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# INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

## Reports of Orders, Decisions and Judgements

2005

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2 The decisions concerning André Rwamakuba rendered prior to the 23 February 2005 can be read in the *Karemera et al.* case / Les décisions concernant André Rwamakuba antérieures au *23 février 2005 peuvent* être consultées dans le dossier *Karemera et consorts*.

3 For these decisions, see the case *Karemera et al.* / Pour ces décisions, voyez le dossier *Karemera et consorts*.

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# *Statute of the International Criminal Tribunal for Rwanda*

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

## Article 1
*Competence of the International Tribunal for Rwanda*

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

## Article 2
*Genocide*

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical;
d) destruction in whole or in part;
e) Imposing measures intended to prevent births within the group;
f) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable :

a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Attempt to commit genocide;
e) Complicity in genocide.

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# *Statut du Tribunal pénal international pour le Rwanda*

Créé par le Conseil de sécurité agissant en vertu du Chapitre VII de la Charte des Nations Unies, le Tribunal criminel international chargé de juger les personnes présumés responsables d'actes de génocide ou d'autre violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (ci-après dénommé «Tribunal international pour le Rwanda») exercera ses fonctions conformément aux dispositions du présent statut.

## Article premier
*Compétence du Tribunal international pour le Rwanda*

Le Tribunal international pour le Rwanda est habilité à juger les personnes présumés responsables de violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994, conformément aux dispositions du présent statut.

## Article 2
*Génocide*

1.. Le Tribunal international pour le Rwanda est compétent pour poursuivre les personnes ayant commis un génocide, tel que ce crime est défini au paragraphe 2 du présent article, ou l'un quelconque des actes énumérés au paragraphe 3 du présent article.

2. Le génocide s'entend de l'un quelconque des actes ci-après, commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel :

a) Meurtre de membres du groupe;

b) Atteinte grave à l'intégrité physique ou mentale de membres du groupe;

c) Soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction;

d) physique totale ou partielle;

e) Mesures visant à entraver les naissances au sein du groupe;

f) Transfert forcé d'enfants du groupe à un autre groupe

3. Seront punis les actes suivants :

a) Le génocide;

b) L'entente en vue de commettre le génocide;

c) L'incitation directe et publique à commettre le génocide;

d) La tentative de génocide;

e) La complicité dans le génocide.

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Article 3
*Crimes against Humanity*

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds :

a) Murder;
b) Extermination;
c) Enslavement;
d) Deportation;
e) Imprisonment;
f) Torture;
g) Rape;
h) Persecutions on political, racial and religious grounds;
i) Other inhumane acts.

Article 4
*Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II*

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to :

a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b) Collective punishments;
c) Taking of hostages;
d) Acts of terrorism;
e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f) Pillage;
g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
h) Threats to commit any of the foregoing acts.

Article 5
*Personal jurisdiction*

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

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Article 3
*Crimes contre l'humanité*

Le Tribunal international pour le Rwanda est habilité à juger les personnes responsables des crimes suivants lorsqu'ils ont été commis dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile quelle qu'elle soit, en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse :

a) Assassinat;
b) Extermination;
c) Réduction en esclavage;
d) Expulsion;
e) Emprisonnement;
f) Torture;
g) Viol;
h) Persécutions pour des raisons politiques, raciales et religieuses;
i) Autres actes inhumains.

Article 4
*Violations de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II*

Le Tribunal international pour le Rwanda est habilité à poursuivre les personnes qui commettent ou donnent l'ordre de commettre des violations graves de l'article 3 commun aux Conventions de Genève du 12 août 1949 pour la protection des victimes en temps de guerre, et du Protocole additionnel II auxdites Conventions du 8 juin 1977. Ces violations comprennent, sans s'y limiter :

a) Les atteintes portées à la vie, à la santé et au bien-être physique ou mental des personnes, en particulier le meurtre, de même que les traitements cruels tels que la torture, les mutilations ou toutes formes de peines corporelles;
b) Les punitions collectives;
c) La prise d'otages;
d) Les actes de terrorisme;
e) Les atteintes à la dignité de la personne, notamment les traitements humiliants et dégradants, le viol, la contrainte à la prostitution et tout attentat à la pudeur;
f) Le pillage;
g) Les condamnations prononcées et les exécutions effectuées sans un jugement préalable rendu par un tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme indispensables par les peuples civilisés;
h) La menace de commettre les actes précités.

Article 5
*Compétence* ratione personae

Le Tribunal international pour le Rwanda a compétence à l'égard des personnes physiques conformément aux dispositions du présent statut.

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Article 6
*Individual Criminal Responsibility*

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7
*Territorial and temporal jurisdiction*

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8
*Concurrent jurisdiction*

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9
Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

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Article 6
*Responsabilité pénale individuelle*

1. Quiconque a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter un crime visé aux articles 2 à 4 du présent statut est individuellement responsable dudit crime.

2. La qualité officielle d'un accusé, soit comme chef d'Etat ou de gouvernement, soit comme haut fonctionnaire, ne l'exonère pas de sa responsabilité pénale et n'est pas un motif de diminution de la peine.

3. Le fait que l'un quelconque des actes visés aux articles 2 à 4 du présent statut a été commis par un subordonné ne dégage pas son supérieur de sa responsabilité pénale s'il savait ou avait des raisons de savoir que le subordonné s'apprêtait à commettre cet acte ou l'avait fait et que le supérieur n'a pas pris les mesures nécessaires et raisonnables pour empêcher que ledit acte ne soit commis ou en punir les auteurs.

4. Le fait qu'un accusé a agi en exécution d'un ordre d'un gouvernement ou d'un supérieur ne l'exonère pas de sa responsabilité pénale mais peut être considéré comme un motif de diminution de la peine si le Tribunal international pour le Rwanda l'estime conforme à la justice.

Article 7
*Compétence* ratione loci *et compétence* ratione temporis

La compétence *ratione loci* du Tribunal international pour le Rwanda s'étend au territoire du Rwanda, y compris son espace terrestre et son espace aérien, et au territoire d'Etats voisins en cas de violations graves du droit international humanitaire commises par des citoyens rwandais. La compétence *ratione temporis* du Tribunal international s'étend à la période commençant le 1er janvier 1994 et se terminant le 31 décembre 1994.

Article 8
*Compétences concurrentes*

1. Le Tribunal international pour le Rwanda et les juridictions nationales sont concurremment compétences pour juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994.

2. Le Tribunal international pour le Rwanda a la primauté sur les juridictions nationales de tous les Etats. A tout stade de la procédure, il peut demander officiellement aux juridictions nationales de se dessaisir en sa faveur conformément au présent statut et à son règlement.

Article 9
Non bis in idem

1. Nul ne peut être traduit devant une juridiction nationale pour les faits constituant de graves violations du droit international humanitaire au sens du présent statut s'il a déjà été jugé pour les mêmes faits par le Tribunal international pour le Rwanda.

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2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if :

a) The act for which he or she was tried was characterised as an ordinary crime; or

b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
*Organisation of the International Tribunal for Rwanda*

The International Tribunal for Rwanda shall consist of the following organs :

a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;

b) The Prosecutor;

c) A registry.

Article 11
*Composition of the Chambers*

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12
*Qualification and election of judges*

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment

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2. Quiconque a été traduit devant une juridiction nationale pour des faits constituant de graves violations du droit international humanitaire ne peut subséquemment être traduit devant le Tribunal international pour le Rwanda que si :

a) Le fait pour lequel il a été jugé était qualifié crime de droit commun; ou

b) La juridiction nationale n'a pas statué de façon impartiale ou indépendante, la procédure engagée devant elle visait à soustraire l'accusé à sa responsabilité pénale internationale, ou la poursuite n'a pas été exercée avec diligence.

3. Pour décider de la peine à infliger à une personne condamnée pour un crime visé par le présent statut, le Tribunal international pour le Rwanda tient compte de la mesure dans laquelle cette personne a déjà purgé toute peine qui pourrait lui avoir été infligée par une juridiction nationale pour le même fait.

### Article 10
*Organisation du Tribunal international pour le Rwanda*

Le Tribunal international comprend les organes suivants :

a) Les Chambres, soit trois Chambres de première instance et une Chambre d'appel;

b) Le Procureur;

c) Un Greffe.

### Article 11
*Composition des Chambres*

1. Les Chambres sont composées de 16 juges permanents indépendants, ressortissants d'États différents et, au maximum au même moment, de neuf juges *ad litem* indépendants, tous ressortissants d'États différents, désignés conformément à l'article 12 *ter*, paragraphe 2 du présent Statut.

2. Trois juges permanents et, au maximum au même moment, six juges *ad litem* sont membres de chacune des Chambres de première instance. Chaque Chambre de première instance à laquelle ont été affectés des juges *ad litem* peut être subdivisée en sections de trois juges chacune, composées à la fois de juges permanents et *ad litem*. Les sections des Chambres de première instance ont les mêmes pouvoirs et responsabilités que ceux conférés à une Chambre de première instance par le présent Statut et rendent leurs jugements suivant les mêmes règles.

3. Sept des juges permanents siègent à la Chambre d'appel, laquelle est, pour chaque appel, composée de cinq de ses membres.

4. Aux fins de la composition des Chambres du Tribunal pénal international pour le Rwanda, quiconque pourrait être considéré comme le ressortissant de plus d'un État est réputé être ressortissant de l'État où il exerce habituellement ses droits civils et politiques.

### Article 12
*Qualifications et élection des juges*

1. Les juges doivent être des personnes de haute moralité, impartialité et intégrité possédant les qualifications requises, dans leurs pays respectifs, pour être nommés aux

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to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. Eleven of the judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner :

a) The Secretary-General shall invite nominations for judges from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge 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 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") in accordance with article 13 bis of the Statute of that Tribunal;

c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers amongst the judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

### Article 12 *quater*
### *Status of* ad litem *judges*

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall :

a) Benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal for Rwanda;

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plus hautes fonctions judiciaires. Il est dûment tenu compte, dans la composition globale des Chambres, de l'expérience des juges en matière de droit pénal et de droit international, notamment de droit international humanitaire et de droits de l'homme.

2. Onze des juges du Tribunal international pour le Rwanda sont élus par l'Assemblée générale sur une liste présentée par le Conseil de sécurité, selon les modalités ci-après :

a) Le Secrétaire général invite les États Membres de l'Organisation des Nations Unies et les États non membres ayant une mission d'observation permanente au Siège de l'Organisation à présenter des candidatures;

b) Dans un délai de soixante jours à compter de la date de l'invitation du Secrétaire général, chaque État peut présenter la candidature d'au maximum deux personnes réunissant les conditions indiquées au paragraphe 1 ci-dessus et n'ayant pas la même nationalité ni celle d'un juge qui est membre de la Chambre d'appel et qui a été élu ou nommé juge permanent du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991 (ci-après dénommé le « Tribunal international pour l'ex-Yougoslavie ») conformément à l'article 13 bis du Statut de ce Tribunal;

c) Le Secrétaire général transmet les candidatures au Conseil de sécurité. Sur la base de ces candidatures, le Conseil dresse une liste de vingt-deux candidats au minimum et trente-trois candidats au maximum en tenant dûment compte de la nécessité d'assurer au Tribunal international pour le Rwanda une représentation adéquate des principaux systèmes juridiques du monde;

d) Le Président du Conseil de sécurité transmet la liste de candidats au Président de l'Assemblée générale. L'Assemblée élit sur cette liste les onze juges du Tribunal international pour le Rwanda. Sont élus les candidats qui ont obtenu la majorité absolue des voix des États Membres de l'Organisation des Nations Unies et des États non membres ayant une mission d'observation permanente au Siège de l'Organisation. Si deux candidats de la même nationalité obtiennent la majorité requise, est élu celui sur lequel s'est porté le plus grand nombre de voix.

3. Si le siège de l'un des juges élus ou désignés conformément au présent article devient vacant à l'une des Chambres, le Secrétaire général, après avoir consulté les Présidents du Conseil de sécurité et de l'Assemblée générale, nomme une personne réunissant les conditions indiquées au paragraphe 1 ci-dessus pour siéger jusqu'à l'expiration du mandat de son prédécesseur.

4. Les juges élus conformément au présent article ont un mandat de quatre ans. Leurs conditions d'emploi sont celles des juges du Tribunal international pour l'ex-Yougoslavie. Ils sont rééligibles.

### Article 12 *quater*
### *Statut des juges* ad litem

1. Pendant la durée où ils sont nommés pour servir auprès du Tribunal pénal international pour le Rwanda, les juges *ad litem* :

a) Bénéficient, *mutatis mutandis*, des mêmes conditions d'emploi que les juges permanents du Tribunal pénal international pour le Rwanda;

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b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;

c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda;

d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not :

a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;

b) Have power :

(i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;

(ii) To review an indictment pursuant to article 18 of the present Statute;

(iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute.

## Article 13
### *Officers and members of the Chambers*

1. The judges of the International Tribunal for Rwanda shall elect a President.

2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.

3. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign two of the judges elected or appointed in accordance with Article 12 of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda. A judge shall serve only in the Chamber to which he or she was assigned.

4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

5. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

## Article 14
### *Rules of procedure and evidence*

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other

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b) Jouissent des mêmes pouvoirs que les juges permanents du Tribunal pénal international pour le Rwanda, sous réserve du paragraphe 2 ci-après;

c) Jouissent des privilèges et immunités, exemptions et facilités d'un juge du Tribunal pénal international pour le Rwanda;

d) Sont habilités à se prononcer pendant la phase préalable au procès dans des affaires autres que celles pour lesquelles ils ont été nommés.

2. Pendant la durée où ils sont nommés pour servir auprès du Tribunal pénal international pour le Rwanda, les juges *ad litem* :

a) Ne peuvent ni être élus Président du Tribunal pénal international pour le Rwanda ou Président d'une Chambre de première instance, ni participer à son élection, conformément à l'article 13 du présent Statut;

b) Ne sont pas habilités :

i) A participer à l'adoption du règlement conformément à l'article 14 du présent Statut. Ils sont toutefois consultés avant l'adoption dudit règlement;

ii) A participer à l'examen d'un acte d'accusation conformément à l'article 18 du présent Statut

iii) A participer aux consultations tenues par le Président du Tribunal pénal international pour le Rwanda au sujet de la nomination de juges, conformément à l'article 13 du Statut, ou de l'octroi d'une grâce ou d'une commutation de peine, conformément à l'article 27 du Statut.

## Article 13
### *Constitution du Bureau et des Chambres*

1. Les juges du Tribunal international pour le Rwanda élisent un président.

2. Le Président du Tribunal international pour le Rwanda doit être membre de l'une de ses Chambres de première instance.

3. Après avoir consulté les juges du Tribunal international pour le Rwanda, le Président nomme deux des juges élus ou nommés conformément à l'article 12 du présent Statut membres de la Chambre d'appel du Tribunal international pour l'ex-Yougoslavie et huit membres des Chambres de première instance du Tribunal international pour le Rwanda. Les juges ne siègent qu'à la Chambre à laquelle ils ont été nommés.

4. Les juges qui siègent à la Chambre d'appel du Tribunal international pour l'ex-Yougoslavie siègent également à la Chambre d'appel du Tribunal international pour le Rwanda.

5. Les juges de chaque Chambre de première instance élisent un président qui conduit toutes les procédures devant cette chambre.

## Article 14
### *Règlement du Tribunal*

Les juges du Tribunal international pour le Rwanda adopteront, aux fins de la procédure du Tribunal international pour le Rwanda, le règlement du Tribunal international pour l'ex-Yougoslavie régissant la mise en accusation, les procès en première instance et les recours, la recevabilité des preuves, la protection des victimes et des

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appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15
*The Prosecutor*

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16
*The Registry*

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17
*Investigation and preparation of indictment*

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks,

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témoins et d'autres questions appropriées, en y apportant les modifications qu'ils jugeront nécessaires.

Article 15
*Le Procureur*

1. Le Procureur est responsable de l'instruction des dossiers et de l'exercice de la poursuite contre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994.

2. Le Procureur, qui est un organe distinct au sein du Tribunal pénal international pour le Rwanda, agit en toute indépendance. Il ne sollicite ni ne reçoit d'instructions d'aucun gouvernement ni d'aucune autre source.

3. Le Bureau du Procureur se compose du Procureur et du personnel qualifié qui peut être nécessaire.

4. Le Procureur est nommé par le Conseil de sécurité sur proposition du Secrétaire général. Il ou elle doit être de haute moralité, d'une compétence notoire et avoir une solide expérience de l'instruction des affaires criminelles et des poursuites. Son mandat est de quatre ans et peut être reconduit. Ses conditions d'emploi sont celles d'un secrétaire général adjoint de l'Organisation des Nations Unies.

5. Le personnel du Bureau du Procureur est nommé par le Secrétaire général sur recommandation du Procureur.

Article 16
*Le Greffe*

1. Le Greffe est chargé d'assurer l'administration et les services du Tribunal international pour le Rwanda.

2. Le Greffe se compose d'un greffier et des autres fonctionnaires nécessaires.

3. Le Greffier est désigné par le Secrétaire général après consultation du Président du Tribunal international pour le Rwanda pour un mandat de quatre ans renouvelable. Les conditions d'emploi du Greffier sont celles d'un sous-secrétaire général de l'Organisation des Nations Unies.

4. Le personnel du Greffe est nommé par le Secrétaire général sur recommandation du Greffier.

Article 17
*Information et établissement de l'acte d'accusation*

1. Le Procureur ouvre une information d'office ou sur la foi des renseignements obtenus de toutes sources, notamment des gouvernements, des organes de l'Organisation des Nations Unies, des Organisations intergouvernementales et non gouvernementales. Il évalue les renseignements reçus ou obtenus et décide s'il y a lieu de poursuivre.

2. Le Procureur est habilité à interroger les suspects, les victimes et les témoins, à réunir des preuves et à procéder sur place à des mesures d'instruction. Dans l'exé-

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the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18
*Review of the Indictment*

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19
*Commencement and conduct of trial proceedings*

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 with due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

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 20
*Rights of the Accused*

1. All persons shall be equal before the International Tribunal for Rwanda.

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cution de ces tâches, le Procureur peut, selon que de besoin, solliciter le concours des autorités de l'Etat concerné.

3. Tout suspect interrogé a le droit d'être assisté d'un conseil de son choix, y compris celui de se voir attribuer d'office un défenseur, sans frais, s'il n'a pas les moyens de le rémunérer et de bénéficier, si nécessaire, de services de traduction dans une langue qu'il parle et comprend et à partir de cette langue.

4. S'il décide qu'au vu des présomptions, il y a lieu d'engager des poursuites, le Procureur établit un acte d'accusation dans lequel il expose succinctement les faits et le crime ou les crimes qui sont reprochés à l'accusé en vertu du statut. L'acte d'accusation est transmis à un juge de la Chambre de première instance.

Article 18
*Examen de l'acte d'accusation*

1. Le juge de la Chambre de première instance saisi de l'acte d'accusation examine celui-ci. S'il estime que le Procureur a établi qu'au vu des présomptions il y a lieu d'engager des poursuites, il confirme l'acte d'accusation. A défaut, il le rejette.

2. S'il confirme l'acte d'accusation, le juge saisi décerne sur réquisition du Procureur, les ordonnances et mandats d'arrêt, de dépôt, d'amener ou de remise et toutes autres ordonnances nécessaires pour la conduite du procès.

Article 19
*Ouverture et conduite du procès*

1. La Chambre de première instance veille à ce qui le procès soit équitable et rapide et à ce que l'instance se déroule conformément au règlement de procédure et de preuve, les droits de l'accusé étant pleinement respectés et la protection des victimes et des témoins dûment assurés.

2. Toute personne contre laquelle un acte d'accusation a été confirmé est, conformément à une ordonnance ou un mandat d'arrêt décerné par le Tribunal international pour le Rwanda, placée en état d'arrestation, immédiatement informée des chefs d'accusation portés contre elle et déférée au Tribunal international pour le Rwanda.

3. La Chambre de première instance donne lecture de l'acte d'accusation, s'assure que les droits de l'accusé sont respectés, confirme que l'accusé a compris le contenu de l'acte d'accusation et l'invite à faire valoir ses moyens de défense. La Chambre de première instance fixe alors la date du procès.

4. Les audiences sont publiques à moins que la Chambre de première instance décide de les tenir à huis clos conformément à son règlement de procédure et de preuve.

Article 20
*Les droits de l'accusé*

1. Tous sont égaux devant le Tribunal international pour le Rwanda.

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2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

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

a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

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

c) To be tried without undue delay;

d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

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

f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

g) Not to be compelled to testify against himself or herself or to confess guilt.

### Article 21
*Protection of victims and witnesses*

The International Tribunal for Rwanda 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 victims identity.

### Article 22
*Judgement*

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

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2. Toute personne contre laquelle des accusations sont portées a droit à ce que sa cause soit entendue équitablement et publiquement, sous réserve des dispositions de l'article 21 du statut.

3. Toute personne accusée est présumée innocente jusqu'à ce que sa culpabilité ait été établie conformément aux dispositions du présent statut.

4. Toute personne contre laquelle une accusation est portée en vertu du présent statut a droit, en pleine égalité, au moins aux garanties suivantes :

a) A être informée, dans le plus court délai, dans une langue qu'elle comprend et de façon détaillée, de la nature et des motifs de l'accusation portée contre elle;
b) A disposer du temps et des facilités nécessaires à la préparation de sa défense et à communiquer avec le conseil de son choix;
c) A être jugée sans retard excessif;
d) A être présente au procès et à se défendre elle-même ou à avoir l'assistance d'un défenseur de son choix; si elle n'a pas de défenseur, à être informée de son droit d'en avoir un, et, chaque fois que l'intérêt de la justice l'exige, à se voir attribuer d'office un défenseur, sans frais, si elle n'a pas les moyens de le rémunérer;
e) A interroger ou faire interroger les témoins à charge et à obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins à charge;
f) A se faire assister gratuitement d'un interprète si elle ne comprend pas ou ne parle pas la langue employée à l'audience;
g) A ne pas être forcée de témoigner contre elle-même ou de s'avouer coupable.

### Article 21
*Protection des victimes et des témoins*

Le Tribunal international pour le Rwanda prévoit dans son règlement de procédure et de preuve des mesures de protection des victimes et des témoins. Les mesures de protection comprennent, sans y être limitées, la tenue d'audiences à huis clos et la protection de l'identité des victimes.

### Article 22
*Sentence*

1. La Chambre de première instance prononce des sentences et impose des peines et sanctions à l'encontre des personnes convaincues de violations graves du droit international humanitaire.

2. La sentence est rendue en audience publique à la majorité des juges de la Chambre de première instance. Elle est établie par écrit et motivée, des opinions individuelles ou dissidentes pouvant y être jointes.

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Article 23
*Penalties*

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24
*Appellate Proceedings*

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds :

a) An error on a question of law invalidating the decision; or

b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25
*Review Proceedings*

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26
*Enforcement of Sentences*

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27
*Pardon or commutation of sentences*

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State

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Article 23
*Peines*

1. La Chambre de première instance n'impose que des peines d'emprisonnement. Pour fixer les conditions de l'emprisonnement, la Chambre de première instance a recours à la grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda.

2. En imposant toute peine, la Chambre de première instance tient compte de facteurs tels que la gravité de l'infraction et la situation personnelle du condamné.

3. Outre l'emprisonnement du condamné, la Chambre de première instance peut ordonner la restitution à leurs propriétaires légitimes de tous biens et ressources acquis par des moyens illicites, y compris par la contrainte.

Article 24
*Appel*

1. La Chambre d'appel connaît des recours introduits soit par les personnes condamnées par les Chambres de première instance soit par le Procureur, pour les motifs suivants :

a) Erreur sur un point de droit qui invalide la décision; ou

b) Erreur de fait qui a entraîné un déni de justice.

2. La Chambre d'appel peut confirmer, annuler ou réviser les décisions de Chambres de première instance.

Article 25
*Révision*

S'il est découvert un fait nouveau qui n'était pas connu au moment du procès en première instance ou en appel et qui aurait pu être un élément décisif de la décision, le condamné ou le Procureur peut saisir le Tribunal international pour le Rwanda d'une demande en révision de la sentence.

Article 26
*Exécution des peines*

Les peines d'emprisonnement sont exécutées au Rwanda ou dans un Etat désigné par le Tribunal international pour le Rwanda sur la liste des Etats qui ont fait savoir au Conseil de sécurité qu'ils étaient disposés à recevoir des condamnés. Elles sont exécutées conformément aux lois en vigueur de l'Etat concerné, sous la supervision du Tribunal.

Article 27
*Grâce et commutation de peine*

Si le condamné peut bénéficier d'une grâce ou d'une commutation de peine en vertu des lois de l'Etat dans lequel il est emprisonné, cet Etat en avise le Tribunal

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concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28
*Cooperation and judicial assistance*

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to :

a) The identification and location of persons;

b) The taking of testimony and the production of evidence;

c) The service of documents;

d) The arrest or detention of persons;

e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29 :
*The status, privileges and immunities of the International Tribunal for Rwanda*

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30
*Expenses of the International Tribunal for Rwanda*

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

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international pour le Rwanda. Une grâce ou une commutation de peine n'est accordée que si le Président du Tribunal international pour le Rwanda, en consultation avec les juges, en décide ainsi dans l'intérêt de la justice et sur la base des principes généraux du droit.

Article 28
*Coopération et entraide judiciaire*

1. Les Etats collaborent avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire.

2. Les Etats répondent sans retard à toute demande d'assistance ou à toute ordonnance émanant d'une Chambre de première instance et concernant, sans s'y limiter :

a) L'identification et la recherche des personnes;

b) La réunion des témoignages et la production des preuves;

c) L'expédition des documents;

d) L'arrestation ou la détention des personnes;

e) Le transfert ou la traduction de l'accusé devant le Tribunal.

Article 29
*Statut, privilèges et immunités du Tribunal international*

1. La Convention sur les privilèges et immunités des Nations Unies en date du 13 février 1946 s'applique au Tribunal international pour le Rwanda, aux juges, au Procureur et à son personnel ainsi qu'au Greffier et à son personnel.

2. Les juges, le Procureur et le Greffier jouissent des privilèges et immunités, des exemptions et des facilités accordés aux agents diplomatiques, conformément au droit international.

3. Le personnel du Procureur et du Greffier jouit des privilèges et immunités accordés aux fonctionnaires des Nations Unies en vertu des articles V et VII de la Convention visée au paragraphe 1 du présent article.

4. Les autres personnes, y compris les accusés, dont la présence est requise au siège du Tribunal international pour le Rwanda bénéficient du traitement nécessaire pour assurer le bon fonctionnement du Tribunal international pour le Rwanda.

Article 30
*Dépenses du Tribunal international pour le Rwanda*

Les dépenses du Tribunal international pour le Rwanda sont imputées sur l'Organisation des Nations Unies conformément à l'article 17 de la Charte des Nations Unies.

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Article 31
*Working languages*

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32
*Annual Report*

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

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Article 31
*Langues de travail*

Les langues de travail du Tribunal international sont l'anglais et le français.

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# *Rules of Procedure and Evidence (Adopted on 29 June 1995, as amended on 7 June 2005)*

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[1] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.
[2] *Ibidem*.

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[1] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.
[2] *Ibidem*.

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[3] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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[3] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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[4] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.
[5] *Ibidem*.

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[4] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.
[5] *Ibidem*.

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[6] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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[6] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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## PART ONE – GENERAL PROVISIONS

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*Entry into Force*

These Rules of Procedure and Evidence, adopted pursuant to Article 14 of the Statute of the Tribunal, shall come into force on 29 June 1995.

### Rule 2
*Definitions*

A) In the Rules, unless the context otherwise requires, the following terms shall mean :

Rules : The Rules referred to in Rule 1;

Statute : The Statute of the Tribunal adopted by Security Council resolution 955 of 8 November 1994;

Tribunal : The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council resolution 955 of 8 November 1994;

Accused : A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47;

*Ad litem* Judge : A Judge appointed pursuant to Article 12 *ter* of the Statute;

Arrest : The act of taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40;

Bureau : A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers;

Investigation : All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after confirmation of an indictment;

Party : The Prosecutor or the accused;

Permanent Judge : A Judge elected or appointed pursuant to Article 12 *bis* of the Statute;

President : The President of the Tribunal;

Prosecutor : The Prosecutor designated pursuant to Article 15 of the Statute;

[7] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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## CHAPITRE PREMIER - DISPOSITIONS GÉNÉRALES

### Article premier
*Entrée en vigueur*

Le présent Règlement de procédure et de preuve, adopté conformément aux dispositions de l'article 14 du Statut du Tribunal, entre en vigueur le 5 juillet 1995.

### Article 2
*Définitions*

A) Dans le règlement, sauf incompatibilité tenant au contexte, les expressions suivantes signifient :

Règlement : Le Règlement visé à l'article premier;

Statut : Le Statut du Tribunal adopté par le Conseil de sécurité dans sa résolution 955 du 8 novembre 1994;

Tribunal : Le Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994, créé par le Conseil de sécurité dans sa résolution 955 du 8 novembre 1994;

Accusé : Toute personne physique mise en cause pour un ou plusieurs chefs d'accusation dans un acte d'accusation confirmé conformément à l'article 47;

Juge *ad litem* : Un juge nommé en application de l'article 12 *ter* du Statut;

Arrestation : L'acte par lequel un suspect ou un accusé est appréhendé et placé en garde à vue en vertu d'un mandat d'arrêt ou conformément aux dispositions de l'article 40;

Bureau : Organe constitué du Président, du Vice-président et des Présidents des Chambres de première instance;

Enquête : Toutes activités entreprises par le Procureur conformément au Statut et au Règlement afin de rassembler des informations et des éléments de preuve tant avant qu'après la confirmation de l'acte d'accusation;

Partie : Le Procureur ou l'accusé;

Juge permanent : Un juge élu ou nommé en application de l'article 12 *bis* du Statut;

Président : Le Président du Tribunal;

Procureur : Le Procureur désigné conformément à l'article 15 du Statut;

[7] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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Regulations : The provisions framed by the Prosecutor pursuant to Rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor;

Suspect : A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction;

Transaction : A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;

Victim : A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.

B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 3
*Languages*

A) The working languages of the Tribunal shall be English and French.

B) The accused or suspect shall have the right to use his own language.

C) Counsel for the accused may apply to a Judge or a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the Defence and the interests of justice.

D) Any other person appearing before the Tribunal, who does not have sufficient knowledge of either of the two working languages, may use his own language.

[E) The Registrar shall make any necessary arrangements for interpretation and translation of the working languages.][8].

Rule 4
*Sittings away from the Seat of the Tribunal*

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.

Rule 5
*Non-compliance with Rules*

A) Where an objection on the ground of non-compliance with the Rule or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant

[8] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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Règlements internes : Toute disposition adoptée par le Procureur en application du paragraphe (A) de l'article 37 dans le but d'organiser les activités du Bureau du Procureur;

Suspect : Toute personne physique au sujet de laquelle le Procureur possède des informations fiables qui tendent à montrer qu'elle aurait commis une infraction relevant de la compétence du Tribunal;

Opération : Un certain nombre d'actes ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs événements, en un seul endroit ou en plusieurs endroits, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun;

Victime : Toute personne physique à l'égard de laquelle aurait été commise une infraction relevant de la compétence du Tribunal.

Entreprise criminelle : Un certain nombre d'actes ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs événements, en un seul endroit ou en plusieurs endroits, et faisant partie d'un plan, d'une stratégie ou d'un dessein communs;

B) Aux fins du présent Règlement, l'emploi du masculin et du singulier comprend le féminin et le pluriel et inversement.

## Article 3
*Langues*

A) Les langues de travail du Tribunal sont l'anglais et le français.

B) L'accusé ou le suspect a le droit d'employer sa propre langue.

C) Le conseil de l'accusé peut demander à un juge ou à une Chambre l'autorisation d'employer une langue autre que les deux langues de travail ou celle de l'accusé. Si une telle autorisation est accordée, les frais d'interprétation et de traduction sont pris en charge par le Tribunal dans les limites éventuellement fixées par le Président compte tenu des droits de la défense et de l'intérêt de la justice.

D) Toute autre personne comparaissant devant le Tribunal peut employer sa propre langue, si elle n'a pas une connaissance suffisante de l'une ou l'autre des deux langues de travail.

[E) Le Greffier prend toute disposition nécessaire pour assurer la traduction et l'interprétation dans les langues de travail][8].

## Article 4
*Sessions hors du siège du Tribunal*

Une Chambre ou un juge peut, avec l'autorisation du Président, exercer ses fonctions hors du siège du Tribunal, si l'intérêt de la justice le commande.

## Article 5
*Violation du Règlement*

A) Toute exception d'une partie à l'égard d'un acte d'une autre partie, fondée sur une violation du Règlement ou des règlements internes, doit être soulevée dès que possible;

[8] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.

B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.

C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

Rule 6
*Amendment of the Rules*

A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted, if agreed to by not less than ten Judges at a Plenary Meeting of the Tribunal convened with notice of the proposal addressed to all Judges.

B) An amendment of the Rules may be adopted otherwise than as stipulated in Sub-Rule (A) above, provided it is approved unanimously by any appropriate means either done in writing or confirmed in writing.

C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

Rule 7
*Authentic Texts*

The English and French texts of the Rules shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail.

Rule 7 *bis*
*Non Compliance with Obligations*

A) Except in cases to which Rules 11, 13, 59 or 61 applies, where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council.

B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 28 of the Statute in respect of a request by the Prosecutor under Rules 8 or 40, the President shall notify the Security Council thereof.

Rule 7 *ter*
*Time limits*

1. Unless otherwise ordered by the Chambers or otherwise provided by the Rules, where the time prescribed by or under the Rules for the doing of any act shall run

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la Chambre de première instance accorde réparation si la preuve de la violation présumée est rapportée et si celle-ci a effectivement fait subir un préjudice substantiel à cette partie.

B) Lorsqu'une exception de ce type n'a pas été soulevée aussitôt qu'il était possible, la Chambre de première instance peut décider d'accorder réparation si elle constate que la preuve de la violation présumée est rapportée et que ladite violation a causé un préjudice substantiel à la partie requérante.

C) La réparation accordée par une Chambre de première instance conformément au présent article est une mesure que cette dernière juge de nature à assurer le respect des principes fondamentaux d'équité.

Article 6
*Modifications du Règlement*

A) Toute proposition de modification du Règlement peut être présentée par un juge, le Procureur ou le Greffier; elle est adoptée si dix juges au moins y sont favorables lors d'une séance plénière du Tribunal réunie après que la proposition de modification a été communiquée à tous les juges.

B) S'il n'est pas procédé comme prévu au paragraphe (A), une modification du Règlement ne peut être adoptée qu'à l'unanimité et par tout moyen approprié constaté ou confirmé par écrit.

C) Une modification entre en vigueur immédiatement, sans préjudice des droits de l'accusé dans les affaires en instance.

Article 7
*Textes authentiques*

Le texte anglais et le texte français du Règlement font également foi. En cas de divergence, le texte qui reflète le plus fidèlement l'esprit du Statut et du Règlement prévaut.

Article 7 *bis*
*Inexécution d'obligations*

A) Sauf dans les cas visés aux articles 11,13, 59 et 61, lorsqu'une Chambre de première instance ou un Juge est convaincu qu'un Etat ne s'est pas acquitté d'une obligation au titre de l'article 28 du Statut en rapport avec une affaire dont ils sont saisis, la Chambre ou le juge peut prier le Président d'en rendre compte au Conseil de sécurité.

B) Si le Procureur convainc le Président qu'un Etat ne s'est pas acquitté d'une obligation au titre de l'article 28 du Statut en réponse à une demande formulée par le Procureur au titre des articles 8 ou 40 du Règlement, le Président en informe le Conseil de sécurité.

Article 7 *ter*
*Délais*

1. A moins qu'il n'en soit disposé autrement par les Chambres ou le Règlement, lorsque le délai de dépôt d'un acte prescrit par le Règlement ou en vertu du Règle-

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as from the occurrence of an event, that time shall run from the date on which notice of the occurrence of the event has been received in the normal course of transmission by counsel for the accused or the Prosecutor as the case may be.

2. Where a time limit is expressed in days, only ordinary calendar days shall be counted. Weekdays, Saturdays, Sundays and public holidays shall be counted as days. However, should the time limit expire on a Saturday, Sunday or public holiday, the time limit shall automatically be extended to the subsequent working day.

## PART TWO - PRIMACY OF THE TRIBUNAL

### Rule 8
*Request for Information*

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 28 of the Statute.

### Rule 9
*Prosecutor's Application for Deferral*

Where it appears to the Prosecutor that crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State

i) Are the subject of an investigation by the Prosecutor;

ii) Should be the subject of an investigation by the Prosecutor considering, *inter alia* :

   a) The seriousness of the offences;

   b) The status of the accused at the time of the alleged offences;

   c) The general importance of the legal questions involved in the case;

iii) Are the subject of an indictment in the Tribunal, the Prosecutor may apply to the Trial Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal.

### Rule 10
*Formal Request for Deferral*

A) If it appears to the Trial Chamber seized of a request by the Prosecutor under Rule 9 that paragraphs (i), (ii) or (iii) of Rule 9 are satisfied, the Trial Chamber shall issue a formal request to the State concerned that the Court defer to the competence of the Tribunal.

B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.

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ment court à compter de la survenance d'un événement particulier, ledit délai est suspendu jusqu'à la date à laquelle le conseil de l'accusé ou le Procureur, selon le cas, a reçu notification de l'événement par les canaux normaux de transmission.

2. Les délais exprimés en jours font référence aux jours ordinaires du calendrier, qu'ils soient ouvrables ou non, et qu'il s'agisse d'un samedi, d'un dimanche ou d'un jour férié ou non. Toutefois, lorsque le délai de dépôt expire un samedi, un dimanche ou un jour férié, il est automatiquement prorogé jusqu'au premier jour ouvrable suivant cette date.

## CHAPITRE DEUXIÈME - PRIMAUTÉ DU TRIBUNAL

### Article 8
*Demande d'informations*

Lorsqu'il apparaît au Procureur qu'une infraction relevant de la compétence du Tribunal fait ou a fait l'objet d'enquêtes ou de poursuites pénales devant une juridiction interne, il peut demander à l'Etat dont relève cette juridiction de lui transmettre toutes les informations pertinentes. L'Etat transmet sans délai au Procureur ces informations, en application de l'article 28 du Statut.

### Article 9
*Requête du Procureur aux fins de dessaisissement*

S'il apparaît au Procureur que les crimes qui font l'objet d'enquêtes ou de poursuites pénales engagées devant une juridiction interne

i) font l'objet d'une enquête du Procureur;

ii) devraient faire l'objet d'une enquête du Procureur tenant compte, entre autres :

   a) de la gravité des infractions;

   b) de la qualité de l'accusé au moment des infractions alléguées;

   c) de l'importance générale des points soulevés par l'affaire;

iii) font l'objet d'un acte d'accusation devant le Tribunal, le Procureur peut prier la Chambre de première instance désignée par le Président de demander officiellement le dessaisissement de cette juridiction en faveur du Tribunal.

### Article 10
*Demande officielle de dessaisissement*

A) S'il apparaît à la Chambre de première instance saisie d'une telle requête du Procureur, en vertu de l'article 9, que celle-ci satisfait aux dispositions des alinéas (i), (ii) ou (iii) de l'article 9, elle demande officiellement à l'Etat dont relève la juridiction que celle-ci se dessaisisse en faveur du Tribunal.

B) La demande de dessaisissement porte également sur la transmission des éléments d'enquêtes, des copies du dossier d'audience et, le cas échéant, d'une expédition du jugement.

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C) The State to which the formal request for deferral is addressed shall comply without undue delay in accordance with Article 28 of the Statute.

Rule 11
*Non-compliance with a Formal Request for Deferral*

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the request, the Trial Chamber may invite the President to report the matter to the Security Council.

[Rule 11 *bis*
*Referral of the Indictment to another Court]*[9]

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State :

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

D) Where an order is issued pursuant to this Rule :

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor cons iders appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his behalf.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.

[9] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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C) L'Etat auquel la demande officielle de dessaisissement est adressée y répond sans retard conformément à l'article 28 du Statut.

Article 11
*Non-respect d'une demande officielle de dessaisissement*

Si, dans un délai de soixante jours à compter de la date à laquelle le Greffier a notifié la demande de dessaisissement à l'Etat dont relève la juridiction ayant connu de l'affaire dont il s'agit, l'Etat ne fournit pas à la Chambre de première instance l'assurance qu'il a pris ou entend prendre les mesures voulues pour se conformer à cette demande, la Chambre peut prier le Président de soumettre la question au Conseil de sécurité.

[Article 11 *bis*][9]
*Renvoi de l'acte d'accusation devant une autre juridiction*

A) Après la confirmation d'un acte d'accusation, que l'accusé soit placé ou non sous la garde du Tribunal, le Président peut désigner une Chambre de première instance qui détermine s'il y a lieu de renvoyer l'affaire aux autorités de l'Etat :

i) sur le territoire duquel le crime a été commis;

ii) dans lequel l'accusé a été arrêté; ou

iii) ayant compétence et étant disposé et tout à fait prêt à accepter une telle affaire, afin qu'elles saisissent sans délai la juridiction appropriée pour en juger.

B) La Chambre de première instance peut ordonner ce renvoi d'office ou sur la demande du Procureur, après avoir donné au Procureur et, lorsqu'il est placé sous la garde du Tribunal, à l'accusé, la possibilité d'être entendu.

C) Lorsqu'elle examine s'il convient de renvoyer l'affaire selon les termes du paragraphe A), la Chambre de première instance doit être convaincue que l'accusé recevra un procès équitable devant les juridictions de l'Etat concerné, et qu'il ne sera pas condamné à la peine capitale ni exécuté.

D) Lorsqu'une ordonnance est rendue en application du présent article :

i) L'accusé, s'il a été placé sous la garde du Tribunal, est remis aux autorités de l'Etat concerné;

ii) La Chambre de première instance peut ordonner que des mesures de protection prises pour certains témoins ou victimes demeurent en vigueur;

iii) Le Procureur doit communiquer aux autorités de l'Etat concerné toutes les informations relatives à l'affaire et qu'il juge appropriées et, notamment, les pièces jointes à l'acte d'accusation;

iv) Le Procureur peut envoyer des observateurs qui suivront, en son nom, l'action devant les juridictions de l'Etat concerné.

E) La Chambre de première instance peut délivrer à l'encontre de l'accusé un mandat d'arrêt, lequel doit spécifier l'Etat vers lequel il sera transféré pour être jugé.

[9] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may, at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

(G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal, and the State shall accede to such a request without delay in keeping with Article 28 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.

(H) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Trial Chamber whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time- limit shall run from the date on which the accused is notified of the decision.

### Rule 12
*Determinations of Courts of any State*

Subject to Article 9 (2) of the Statute, determinations of courts of any State are not binding on the Tribunal.

### Rule 13
*Non Bis in Idem*

When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for acts constituting serious violations of international humanitarian law under the Statute for which that person has already been tried by the Tribunal, a Trial Chamber shall, following mutatis mutandis the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.

## PART THREE - ORGANIZATION OF THE TRIBUNAL

## Section 1 - The Judges

### Rule 14
*Solemn Declaration*

A) Before taking up his duties each Judge shall make the following solemn declaration

> "I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neigh-

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F) A tout moment après qu'une ordonnance soit rendue en application du présent article et avant que l'accusé ne soit déclaré coupable ou acquitté par une juridiction interne, la Chambre de première instance peut, à la demande du Procureur et après avoir donné aux autorités de l'Etat concerné la possibilité d'être entendues, annuler l'ordonnance et demander officiellement le dessaisissement aux termes de l'article 10.

G) Si une ordonnance rendue en vertu du présent article est annulée par la Chambre, celle-ci peut demander officiellement à l'Etat concerné de transférer l'accusé au siège du Tribunal et l'Etat accède à cette demande sans retard, conformément à l'article 28 du Statut. La Chambre de première instance ou un juge peut également émettre un mandat d'arrêt contre l'accusé.

H) L'accusé ou le Procureur peut en droit interjeter appel de la décision de renvoyer ou non une affaire, rendue par la Chambre de première instance. L'acte d'appel doit être déposé dans les quinze jours de la décision à moins que l'accusé n'ait pas été présent ou représenté lors du prononcé de la décision, auquel cas le délai de dépôt court à compter de la notification de ladite décision à l'accusé.

### Article 12
*Décisions des juridictions internes*

Sous réserve du paragraphe (2) de l'article 9 du Statut, les décisions des juridictions internes ne lient pas le Tribunal.

### Article 13
*Non bis in idem*

Si le Président est valablement informé de poursuites pénales engagées contre une personne devant une juridiction interne pour des faits constituant de graves violations du droit international humanitaire au sens du Statut pour lesquels l'intéressé a déjà été jugé par le Tribunal, une Chambre de première instance rend conformément à la procédure visée à l'article 10, *mutatis mutandis*, une ordonnance motivée invitant cette juridiction à mettre fin définitivement aux poursuites. Si cette juridiction s'y refuse, le Président peut soumettre la question au Conseil de sécurité.

## CHAPITRE TROISIÈME - ORGANISATION DU TRIBUNAL

## SECTION 1 - *Les juges*

### Article 14
*Déclaration solennelle*

A) Avant de prendre ses fonctions, chaque juge fait la déclaration solennelle suivante

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le terri-

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bouring States, between 1 January 1994 and 31 December 1994, honourably, faithfully, impartially and conscientiously."

B) The declaration, signed by the Judge and witnessed by the Secretary-General of the United Nations or his representative, shall be kept in the records of the Tribunal.

Rule 14 *bis*

The members of the Tribunal shall continue to discharge their duties until their places have been filled.

Rule 15
*Disqualification of Judges*

A) A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.

B) Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a case upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

C) The Judge who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rule 47 or 61, shall not be disqualified from sitting as a member of a Trial Chamber for the trial of that accused.

D) No member of the Appeals Chamber shall hear any appeal in a case in which another Judge of the same nationality sat as a member of the Trial Chamber.

Rule 15 *bis*
*Absence of a Judge*

A) If

i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.

B) If

i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and

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toire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

B) Le texte de cette déclaration, signé par le juge en présence du Secrétaire général de l'ONU ou de son représentant, est versé aux archives du Tribunal.

Article 14 *bis*

Les membres du Tribunal continuent d'exercer leurs fonctions jusqu'à ce qu'ils soient remplacés.

Article 15
*Récusation et empêchement de juges*

A) Un juge ne peut connaître d'une affaire dans laquelle il a un intérêt personnel ou avec laquelle il a ou il a eu un lien quelconque de nature à porter atteinte à son impartialité. En ce cas, il doit se dessaisir de cette affaire. Lorsque le juge renonce à siéger au sein d'une Chambre de première instance, le Président désigne un autre juge de première instance pour siéger à sa place. Lorsqu'un juge renonce à siéger au sein de la Chambre d'appel, le Président de la Chambre d'appel désigne un autre juge pour siéger à sa place.

B) Toute partie peut solliciter du Président de la Chambre qu'un juge de cette Chambre soit dessaisi d'une affaire pour les raisons ci-dessus énoncées. Après concertation entre le Président de la Chambre et le juge concerné, le Bureau statue si nécessaire. Si le Bureau donne suite à la demande, le Président désigne un autre juge pour remplacer le juge dessaisi.

C) Le juge qui examine un acte d'accusation conformément à l'article 18 du Statut et aux articles 47 ou 61 du Règlement peut siéger à la Chambre appelée à juger ultérieurement l'accusé.

D) Aucun membre de la Chambre d'appel ne peut connaître, en cette qualité, d'une affaire dont un autre juge de la même nationalité a eu à connaître en première instance.

Article 15 *bis*
*Absence d'un juge*

A) Lorsque

i) pour cause de maladie ou d'autres raisons personnelles urgentes, ou d'activités se rapportant au Tribunal et ayant été autorisées, un juge ne peut continuer à siéger dans une affaire en cours pendant une période qui semble devoir être de courte durée et

ii) les autres juges de la Chambre sont convaincus que l'intérêt de la justice le commande, ces derniers peuvent continuer à entendre l'affaire en l'absence du premier juge durant une période n'excédant pas cinq jours de travail.

B) Lorsque

i) pour cause de maladie ou d'autres raisons personnelles urgentes, ou d'activités se rapportant au Tribunal et ayant été autorisées, un juge ne peut continuer à siéger dans une affaire en cours pendant une période qui semble devoir être de courte durée et

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ii) he remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and

b) the Presiding Judge may adjourn the proceedings.

C) If, by reason of death, illness, resignation from the Tribunal, non-reelection, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).

D) If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.

E) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

F) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

### Rule 16
*Resignation*

A Judge who decides to resign shall give notice of his resignation in writing to the President, who shall transmit it to the Secretary-General of the United Nations.

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ii) les autres juges de la Chambre ne sont pas convaincus que l'intérêt de la justice commande de continuer à entendre l'affaire en l'absence de celui-ci,

a) les juges présents peuvent toutefois traiter les questions dont ils sont convaincus que l'intérêt de la justice commande de les trancher même en l'absence de ce juge et

b) le Président de la Chambre peut ajourner la procédure.

C) Si, pour raison de décès, de maladie, de démission, de non-réélection, de non-prolongation du mandat, ou d'autres raisons, un juge ne peut continuer à siéger dans une affaire en cours pendant une période qui semble devoir se prolonger, le Président de la Chambre en informe le Président qui peut désigner un autre juge et ordonner soit que l'affaire soit réentendue soit que la procédure reprenne au point où elle s'est arrêtée. Toutefois, après l'audition des déclarations liminaires visées à l'article 84 ou le début de la présentation des éléments de preuve en application de l'article 85, la continuation de la procédure ne peut être ordonnée qu'avec le consentement de l'accusé, sous réserve des dispositions du paragraphe (D).

D) Si, lorsqu'il se trouve dans les conditions énoncées à la dernière phrase du paragraphe (C), l'accusé refuse de donner son consentement, les juges restants peuvent quand même décider de continuer à entendre l'affaire devant une Chambre de première instance avec un juge suppléant pour autant que, au regard de toutes les circonstances, ils estiment à l'unanimité que leur décision sert mieux l'intérêt de la justice. Les deux parties peuvent interjeter appel de cette décision, directement devant la Chambre d'appel entièrement constituée. Si aucun recours n'est formé, ou si la Chambre d'appel confirme la décision de la Chambre de première instance, le Président désigne un autre juge pour siéger au sein du collège existant, pour autant que ce juge ait d'abord déclaré qu'il s'est familiarisé avec le dossier de l'affaire concernée. Il ne peut être procédé qu'à un seul remplacement de juge en vertu du présent paragraphe.

E) Les appels prévus au paragraphe (D) doivent être interjetés dans les sept jours du dépôt de la décision contestée. Lorsque pareille décision est rendue oralement, ce délai commence à courir à partir de la date du prononcé de cette décision, sauf dans les cas où

i) la partie qui conteste la décision n'était pas présente ou pas représentée lorsque cette décision a été prononcée, circonstance dans laquelle le délai commence à courir à partir de la date où la partie concernée a reçu notification de la décision orale, ou

ii) la Chambre de première instance a précisé qu'une décision écrite suivrait, circonstance dans laquelle le délai commence à courir à partir du dépôt de la décision écrite.

F) En cas de maladie, de poste vacant non pourvu ou de toute autre circonstance similaire, le Président peut, s'il est convaincu que l'intérêt de la justice le commande, autoriser une Chambre à traiter les affaires courantes, telles que le prononcé de décisions, en l'absence d'un ou de plusieurs de ses membres.

### Article 16
### *Démission*

Un juge qui décide de démissionner en informe par écrit le Président qui transmet au Secrétaire général de l'ONU.

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### Rule 17
*Precedence*

A) All Judges are equal in the exercise of their judicial functions, regardless of dates of election, appointment, age or period of service.

B) The Presiding Judges of the Chambers shall take precedence according to age after the President and the Vice-President.

C) Judges elected or appointed on different dates shall take precedence according to the dates of their election or appointment; Judges elected or appointed on the same date shall take precedence according to age.

D) In case of re-election, the total period of service as a Judge of the Tribunal shall be taken into account.

## SECTION 2 - *The Presidency*

### Rule 18
*Election of the President*

A) The President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his term of office as a Judge. The President may be re-elected once.

B) If the President ceases to be a member of the Tribunal or resigns his office before the expiration of his term, the Judges shall elect from among their number a successor for the remainder of the term.

C) The President shall be elected by a majority of the votes of the Judges of the Tribunal. If no Judge obtains such a majority, the second ballot shall be limited to the two Judges who obtained the greatest number of votes on the first ballot. In the case of equality of votes on the second ballot, the Judge who takes precedence in accordance with Rule 17 shall be declared elected.

### Rule 19
*Functions of the President*

A) The President shall preside at all plenary meetings of the Tribunal, co-ordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on him by the Statute and the Rules.

B) The President may, in consultation with the Bureau, the Registrar and the Prosecutor, issue Practice Directions, consistent with the Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Tribunal.

### Rule 20
*The Vice-President*

A) The Vice-President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his term of office as a Judge. The Vice-President may be re-elected once.

B) Rules 18 (B) and (C) shall apply *mutatis mutandis* to the Vice-President.

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Article 17
*Préséance*

A) Tous les juges sont égaux dans l'exercice de leurs fonctions judiciaires, quels que soient la date de leur élection ou de leur nomination, leur âge ou la durée des fonctions déjà exercées.

B) Après le Président et le Vice-président, les Présidents des Chambres prennent rang entre eux selon l'ancienneté d'âge.

C) Les juges élus ou nommés à des dates différentes prennent rang selon la date de leur élection ou de leur nomination; les juges élus ou nommés à la même date prennent rang entre eux selon l'ancienneté d'âge.

D) En cas de réélection, il est tenu compte de la durée totale des fonctions déjà exercées par le juge intéressé.

SECTION 2 - *La présidence du Tribunal*

Article 18
*Election du Président*

A) Le Président est élu pour une période de deux ans, dès lors que cette période ne dépasse pas sa durée de fonctions en tant que juge. Le Président est rééligible une fois.

B) Si le Président cesse d'être membre du Tribunal ou démissionne avant l'expiration normale de son mandat, les juges du Tribunal élisent parmi eux son successeur pour le reste de son mandat.

C) Le Président est élu à la majorité des voix des juges du Tribunal. Si aucun juge ne recueille la majorité, il est procédé à un second tour de scrutin entre les deux juges qui ont obtenu le plus de voix au premier tour. En cas de partage des voix au second tour, est élu le juge qui a préséance conformément à l'article 17.

Article 19
*Fonctions du Président*

A) Le Président préside toutes les sessions plénières du Tribunal, coordonne les travaux des Chambres, contrôle les activités du Greffe et s'acquitte de toutes les autres fonctions qui lui sont confiées par le Statut et par le Règlement.

B) Le Président peut, en consultation avec le Bureau, le Greffier et le Procureur, émettre des Directives pratiques, compatibles avec le Statut et le Règlement et traitant d'aspects particuliers de la conduite des affaires dont le Tribunal est saisi.

Article 20
*Le Vice-Président*

A) Le Vice-président est élu pour une période de deux ans, dès lors que cette période ne dépasse pas sa durée de fonctions en tant que juge. Le Vice-président est rééligible une fois.

B) Les dispositions prévues aux paragraphes (B) et (C) de l'article 18 s'appliquent *mutatis mutandis* au Vice-président.

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Rule 21
*Functions of the Vice-President*

The Vice-President shall exercise the functions of the President in case the latter is absent or is unable to act.

Rule 22
*Replacements*

If neither the President nor the Vice-President can carry out the functions of the Presidency, this shall be assumed by the senior Judge of the Trial Chambers, determined in accordance with Rule 17.

SECTION 3 - *Internal Functioning of the Tribunal*

Rule 23
*The Bureau*

A) The Bureau shall be composed of the President, the Vice-President and the Presiding Judge of the Trial Chambers.

B) The President shall consult the other members of the Bureau on all major questions relating to the functioning of the Tribunal.

C) A Judge may draw the attention of any member of the Bureau to issues that in his opinion ought to be discussed by the Bureau or submitted to a Plenary Meeting of the Tribunal.

Rule 23 *bis*
*The Coordination Council*

A) The Coordination Council shall be composed of the President, the Prosecutor and the Registrar.

B) In order to achieve the mission of the Tribunal, as defined in the Statute, the Coordination Council ensures the coordination of the activities of the three organs of the Tribunal.

C) The Coordination Council shall meet once a month at the initiative of the President. A member may at any time request that additional meetings be held. The President shall chair the meetings.

D) The Vice-President, the Deputy Prosecutor and the Deputy Registrar may ex officio represent respectively, the President, the Prosecutor and the Registrar.

Rule 23 *ter*
*The Management Committee*

A) The Management Committee shall be composed of the President, the Vice-President, a Judge elected by the Judges in plenary session for a one year renewable mandate, the Registrar, the Deputy Registrar and the Chief of Administration.

B) The Management Committee shall assist the President with respect to the functions set forth in Rules 19 and 33, concerning in particular, all Registry activities

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Article 21
*Fonctions du Vice-Président*

Le Vice-président exerce les fonctions du Président si celui-ci est absent ou empêché.

Article 22
*Remplacement du Président et du Vice-président*

A) Si le Président et le Vice-président sont l'un et l'autre empêchés d'exercer la présidence, celle-ci est assurée par le juge doyen des Chambres de première instance conformément à l'article 17.

SECTION 3 - *Le fonctionnement interne du Tribunal*

Article 23
*Le Bureau*

A) Le Bureau est constitué du Président, du Vice-président et des Présidents des Chambres de première instance.

B) Le Président consulte les autres membres du Bureau au sujet de toutes les questions importantes liées au fonctionnement du Tribunal.

C) Tout juge peut appeler l'attention d'un membre du Bureau sur les questions qui méritent à son avis d'être examinées par le Bureau ou d'être soumises à une réunion plénière du Tribunal.

Article 23 *bis*
*Le Conseil de coordination*

A) Le Conseil de coordination est constitué du Président, du Procureur et du Greffier.

B) En vue de réaliser la mission du Tribunal, telle que définie dans le Statut, le Conseil de coordination assure la coordination des activités des trois organes du Tribunal.

C) Le Conseil de coordination se réunit une fois par mois sur convocation du Président. Des réunions additionnelles peuvent être convoquées à tout moment à la demande de l'un des membres. Le Président dirige les réunions.

D) Le Vice-président, le Procureur adjoint et le Greffier adjoint peuvent d'office, représenter respectivement, le Président, le Procureur et le Greffier.

Article 23 *ter*
*Le Comité de gestion*

A) Le Comité de gestion est constitué du Président, du Vice-président, d'un juge élu par les juges réunis en session plénière pour un mandat renouvelable d'un an, du Greffier, du Greffier adjoint et du Chef de l'administration.

B) Le Comité de gestion apporte son concours au Président dans l'exercice de ses fonctions, telles que précisées par les articles 19 et 33 du Règlement, notamment en

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relating to the administrative and judicial support provided to the Chambers and to the Judges. To this end, the Management Committee shall coordinate the preparation and implementation of the budget of the Tribunal with the exception of budgetary lines specific to the activities of the Office of the Prosecutor.

C) The Management Committee shall meet once a month at the initiative of the President. Two members may at any time request that additional meetings be held. The President shall chair the meetings.

D) In the performance of its functions, the Management Committee may call on the services of one or several advisers or experts.

### Rule 24
*Plenary Meetings of the Tribunal*

The Judges shall meet in plenary to

i) Elect the President and Vice-President;

ii) Adopt and amend the Rules;

iii) Adopt the Annual Report provided for in Article 32 of the Statute;

iv) Decide upon matters relating to the internal functioning of the Chambers and the Tribunal;

v) Determine or supervise the conditions of detention;

vi) Exercise any other functions provided for in the Statute or in the Rules.

### Rule 25
*Dates of Plenary Meetings*

A) The dates of the scheduled Plenary Meetings of the Tribunal shall normally be agreed upon in July of each year for the following calendar year.

B) Other Plenary Meetings shall be convened by the President if so requested by at least eight Judges, and may be convened whenever the exercise of his functions under the Statute or the Rules so requires.

### Rule 26
*Quorum and Vote*

A) The quorum for each Plenary Meeting of the Tribunal shall be ten Judges.

B) Subject to Rule 6 (A) and (B) and Rule 18 (C), the decisions of the Plenary Meeting of the Tribunal shall be taken by the majority of the Judges present. In the event of an equality of votes, the President or the Judge who acts in his place shall have a casting vote.

## SECTION 4 - *The Chambers*

### Rule 27
*Rotation of the Judges*

A) Judges shall rotate on a regular basis between the Trial Chambers. Rotation shall take into account the efficient disposal of cases.

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ce qui concerne toutes les activités du Greffe liées au soutien administratif et judiciaire des Chambers et des juges. A cette fin, le Comité de gestion coordonne la préparation et l'exécution du budget du Tribunal à l'exception des postes budgétaires liés spécifiquement aux activités du Bureau du Procureur.

C) Le Comité de gestion se réunit une fois par mois sur convocation du Président. Des réunions additionnelles peuvent être convoquées à tout moment à la demande de deux membres. Le Président dirige les réunions.

D) Dans l'accomplissement de ses fonctions, le Comité de gestion peut s'adjoindre un ou plusieurs conseillers ou experts.

### Article 24
*Sessions plénières du Tribunal*

Les juges se réunissent en plénière pour

i) L'élection du Président et du Vice-président;

ii) L'adoption et la modification du Règlement;

iii) L'adoption du Rapport annuel prévu à l'article 32 du Statut;

iv) L'adoption de décisions sur les questions liées au fonctionnement interne des Chambres et du Tribunal;

v) La détermination ou le contrôle des conditions de détention;

vi) L'accomplissement de toute autre tâche prévue dans le Statut ou le Règlement.

### Article 25
*Réunions plénières*

A) En principe, le Tribunal arrête au mois de juillet les dates et la durée de ses réunions plénières ordinaires pour l'année civile suivante.

B) Si au moins huit juges le demandent, le Président doit convoquer d'autres réunions plénières; il peut aussi en convoquer dans tous les cas où l'exigent les fonctions que lui confèrent le Statut ou le Règlement.

### Article 26
*Quorum et vote*

A) Un quorum de dix juges est requis pour chaque réunion plénière du Tribunal.

B) Sous réserve des dispositions des paragraphes (A) et (B) de l'article 6 et du paragraphe (C) de l'article 18, les décisions adoptées par le Tribunal en plénière sont prises à la majorité des juges présents. En cas de partage des voix, celle du Président ou du juge faisant fonction de Président est prépondérante.

## SECTION 4 - *Les Chambres*

### Article 27
*Roulement des juges*

A) L'affectation des juges aux Chambres de première instance se fait par roulement périodique, compte tenu de la nécessité d'assurer la bonne expédition des affaires.

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B) The Judges shall take their places in their assigned Chamber as soon as the President thinks it convenient, having regard to the disposal of pending cases.

C) The President may at any time temporarily assign a member of one Trial Chamber to another Trial Chamber.

Rule 28
*Duty Judges*

Every six months and after consultation with the Judges, the President shall, designate for each month of the next six months one Judge from each Trial Chamber to whom indictments, warrants, and other submissions not pertaining to a case already assigned to a Chamber, shall be transmitted for review. The duty roster shall be published by the Registrar. However, in exceptional circumstances, a Judge on duty may request another Judge of the same Chamber to replace him, after having informed the President and the Registrar.

Rule 29
*Deliberations*

The deliberations of the Chambers shall take place in private and remain secret.

SECTION 5 - *The Registrar*

Rule 30
*Appointment of the Registrar*

The President shall seek the opinion of the Judges on the candidates for the post of Registrar, before consulting with the Secretary-General of the United Nations pursuant to Article 16 (3) of the Statute.

Rule 31
*Appointment of the Deputy Registrar and Registry Staff*

The Registrar, after consultation with the President, shall make his recommendations to the Secretary-General of the United Nations for the appointment of the Deputy Registrar and other Registry staff.

Rule 32
*Solemn Declaration*

A) Before taking up his duties, the Registrar shall make the following declaration before the President

> "I solemnly declare that I will perform the duties incumbent upon me as Registrar of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in all loyalty,

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B) Les juges prennent leurs fonctions à la Chambre à laquelle ils sont affectés dès que le Président le juge opportun, compte tenu de la nécessité d'expédier les affaires en instance.

C) Le Président peut à tout moment affecter temporairement un membre d'une Chambre de première instance à une autre Chambre de première instance.

Article 28
*Permanence des juges*

Tous les six mois et après avoir consulté les juges, le Président désigne, pour chaque mois du semestre à venir, un juge dans chaque Chambre de première instance auquel les actes d'accusation, mandats et autres requêtes qui ne concernent aucune affaire dont une Chambre est saisie, seront transmis pour examen. Le tableau de permanence est publié par le Greffier. Toutefois, à titre exceptionnel, un juge de permanence peut demander à un autre juge de la même Chambre de le suppléer, à charge pour lui d'en informer le Président du Tribunal et le Greffier.

Article 29
*Délibéré*

Les délibérations des Chambres sont et demeurent secrètes.

SECTION 5 - *Le Greffier*

Article 30
*Nomination du Greffier*

Avant de consulter le Secrétaire général de l'ONU conformément au paragraphe 3 de l'article 16 du Statut, le Président recueille l'opinion des juges au sujet des candidats à la fonction de Greffier.

Article 31
*Nomination du Greffier adjoint et du personnel du Greffe*

Après avoir consulté le Président, le Greffier recommande au Secrétaire général de l'ONU la personne à nommer aux fonctions de Greffier adjoint ainsi que les autres membres du personnel du Greffe.

Article 32
*Déclaration solennelle*

A) Avant son entrée en fonctions, le Greffier fait devant le Président la déclaration suivante

> «Je déclare solennellement que je remplirai en toute loyauté, discrétion et conscience les devoirs qui m'incombent en ma qualité de Greffier du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er jan-

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discretion and good conscience and that I will faithfully observe all the provisions of the Statute and the Rules of Procedure and Evidence of the Tribunal."

B) Before taking up his duties, the Deputy Registrar shall make a similar declaration before the President.

C) Every staff member of the Registry shall make a similar declaration before the Registrar.

Rule 33
*Functions of the Registrar*

A) The Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.

B) The Registrar, in the execution of his functions, may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary.

C) The Registrar may, in consultation with the President of the Tribunal and the Presiding Judge of the Appeals Chamber, as the case may be, issue Practice Directions addressing particular aspects of the practice and procedure in the Registry of the Tribunal and in respect of other matters within the powers of the Registrar.

Rule 34
*Victims and Witnesses Support Unit*

A) There shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to

i) Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;

ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and

iii) Develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.

B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women.

Rule 35
*Minutes*

Except where a full record is made under Rule 81, the Registrar, or Registry staff designated by him, shall take minutes of the Plenary Meetings of the Tribunal and of the sittings of the Chambers, other than private deliberations.

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vier et le 31 décembre 1994 et que j'observerai fidèlement toutes les prescriptions du Statut et du Règlement du Tribunal.»

B) Le Greffier adjoint fait devant le Président une déclaration semblable avant son entrée en fonctions.

C) Tout membre du personnel du Greffe fait une déclaration semblable devant le Greffier.

Article 33
*Fonctions du Greffier*

A) Le Greffier apporte son concours aux Chambres et lors des réunions plénières du Tribunal, ainsi qu'aux juges et au Procureur dans l'exercice de leurs fonctions. Sous l'autorité du Président, il est responsable de l'administration et du service du Tribunal et est chargé de toute communication émanant du Tribunal ou adressée à celui-ci.

B) Le Greffier peut, dans l'exécution de ses fonctions, informer les Chambres oralement ou par écrit de toute question relative à une affaire particulière qui affecte ou risque d'affecter l'exécution de ses fonctions, y compris l'exécution des décisions judiciaires, en informant les parties lorsque cela est nécessaire.

C) Le Greffier peut, le cas échéant, avis pris du Président du Tribunal et du Président de la Chambre d'appel, émettre des Directives pratiques traitant de certains aspects des pratiques et des procédures en vigueur au Greffe du Tribunal ainsi que d'autres affaires relevant de la compétence du Greffier.

Article 34
*Section d'aide aux victimes et aux témoins*

A) Il est créé auprès du Greffier une Section d'aide aux victimes et aux témoins, composée d'un personnel qualifié et chargée de

i) Recommander l'adoption de mesures de protection des victimes et des témoins conformément à l'article 21 du Statut;

ii) Fournir aux victimes et aux témoins l'assistance nécessaire à leur réadaptation physique et psychologique, en particulier par le biais de services de conseils dans les cas de viol et de violences sexuelles; et

iii) Concevoir des plans à court et à long terme pour la protection des témoins qui ont déposé devant le Tribunal et craignent pour leur vie, leur famille ou leurs biens.

B) Aux fins des mesures de protection et d'assistance destinées aux victimes et aux témoins, une politique tenant compte de la dualité homme-femme devrait être adoptée. Il faudra à cet égard dans le cadre du recrutement du personnel de la Section examiner comme il se doit la possibilité d'employer des femmes qualifiées.

Article 35
*Procès-verbaux*

Hormis les cas de compte rendu intégral prévus à l'article 81, le Greffier ou les fonctionnaires du Greffe désignés par lui établissent les procès-verbaux des réunions plénières du Tribunal et des audiences des Chambres, à l'exception des délibérations à huis clos.

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### Rule 36
*Record Book*

The Registrar shall keep a Record Book which shall list, subject to Rule 53, all the particulars of each case brought before the Tribunal. The Record Book shall be open to the public.

## SECTION 6 - *The Prosecutor*

### Rule 37
*Functions of the Prosecutor*

A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by him. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer.

B) The Prosecutor's powers under Parts Four to Eight of the Rules may be exercised by staff members of the Office of the Prosecutor authorized by him, or by any person acting under his direction.

### Rule 38
*Deputy Prosecutor*

A) The Prosecutor shall make his recommendations to the Secretary-General of the United Nations for the appointment of a Deputy Prosecutor.

B) The Deputy Prosecutor shall exercise the functions of the Prosecutor in the event of his absence or inability to act or upon the Prosecutor's express instructions.

# PART FOUR - INVESTIGATIONS AND RIGHTS OF SUSPECTS

## SECTION 1 - *Investigations*

### Rule 39
*Conduct of Investigations*

In the conduct of an investigation, the Prosecutor may

i) Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations;

ii) Take all measures deemed necessary for the purpose of the investigation and to support the prosecution at trial, including the taking of special measures to provide for the safety of potential witnesses and informants;

iii) Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (Interpol); and

iv) Request such orders as may be necessary from a Trial Chamber or a Judge.

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Article 36
*Répertoire général*

Le Greffier tient un répertoire général indiquant, pour chaque affaire portée devant le Tribunal, sous réserve de l'article 53, tous les renseignements pertinents. Le répertoire général est ouvert au public.

SECTION 6 - *Le Procureur*

*Article 37*

*Fonctions du Procureur*

A) Le Procureur remplit toutes les fonctions prévues par le Statut conformément au Règlement et aux règlements internes qu'il adopte, pour autant que ceux-ci soient compatibles avec le Statut et le Règlement. Toute incompatibilité présumée des règlements internes est portée à la connaissance du Bureau, dont l'opinion prévaut.

B) Les pouvoirs du Procureur tels que définis aux chapitres quatre à huit du Règlement peuvent être exercés par les membres du Bureau du Procureur qu'il autorise à cette fin ou par toute personne mandatée par lui à cet effet.

Article 38
*Le Procureur adjoint*

A) Le Procureur recommande au Secrétaire général de l'ONU la personne à nommer aux fonctions de procureur adjoint.

B) Le Procureur adjoint remplit les fonctions du Procureur en cas d'absence ou d'incapacité ou sur instructions formelles du Procureur.

CHAPITRE QUATRIÈME - ENQUÊTES ET DROITS DES SUSPECTS

SECTION 1 - *Les enquêtes*

Article 39
*Déroulement des enquêtes*

Aux fins de ses enquêtes, le Procureur est habilité à :

i) Convoquer et interroger les suspects, entendre les victimes et les témoins, enregistrer leurs déclarations, recueillir tous éléments de preuve et enquêter sur les lieux;

ii) Prendre toutes autres mesures jugées nécessaires aux fins de l'enquête et aux fins de soutenir l'accusation au procès, y compris des mesures spéciales nécessaires à la sécurité d'éventuels témoins et informateurs;

iii) Obtenir à ces fins l'aide de toute autorité nationale compétente, ainsi que de tout organisme international, y compris l'Organisation internationale de police criminelle (Interpol); et

iv) Solliciter d'une Chambre de première instance ou d'un juge le prononcé de toute ordonnance nécessaire.

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## Rule 40
*Provisional Measures*

A) In case of urgency, the Prosecutor may request any State

i) To arrest a suspect and place him in custody;

ii) To seize all physical evidence;

iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The State concerned shall comply forthwith, in accordance with Article 28 of the Statute.

B Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.

C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.

D) The suspect shall be released if (i) the Chamber so rules; or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.

## Rule 40 *bis*
*Transfer and Provisional Detention of Suspects*

A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.

B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met

i) The Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;

ii) After hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and

iii) The Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.

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Article 40
*Mesures conservatoires*

A) En cas d'urgence, le Procureur peut demander à tout Etat :

i) de procéder à l'arrestation et au placement en garde à vue d'un suspect;

ii) de saisir tous éléments de preuve matériels;

iii) de prendre toute mesure nécessaire pour empêcher l'évasion du suspect ou de l'accusé, l'intimidation ou les atteintes à l'intégrité physique des victimes ou des témoins, ou la destruction d'éléments de preuve.

L'Etat concerné s'exécute sans délai, en application de l'article 28 du Statut.

B) Sur démonstration par le Procureur d'un cas d'empêchement majeur pour l'Etat de maintenir le suspect en garde à vue ou de prendre toute mesure nécessaire pour empêcher son évasion, le Procureur peut adresser une requête à un juge désigné par le Président pour obtenir une ordonnance aux fins du transfert du suspect et de sa détention provisoire au siège du Tribunal ou dans tout autre lieu que le Bureau peut fixer. Après consultation du Procureur et du Greffier, le transfert est organisé par les autorités du pays concerné, du pays hôte du Tribunal et le Greffier.

C) Dans les cas visés au paragraphe (B), le suspect, dès son transfert, bénéficie des droits prévus à l'article 42 du Règlement et peut introduire un recours devant une Chambre de première instance du Tribunal. La Chambre statue sur le recours, le Procureur entendu.

D) Le suspect est remis en liberté si (i) la Chambre l'ordonne; ou si (ii) le Procureur ne soumet pas un acte d'accusation dans les vingt jours du transfert.

Article 40 *bis*
*Transfert et détention provisoire de suspects*

A) Dans le cadre d'une enquête, le Procureur peut transmettre au Greffier, pour ordonnance par un juge désigné conformément à l'article 28, une requête aux fins de transfert et de placement en détention provisoire d'un suspect dans les locaux du centre de détention relevant du Tribunal. Cette requête est motivée et, à moins que le Procureur souhaite seulement interroger le suspect, mentionne un chef d'accusation provisoire et est accompagnée d'un sommaire des éléments sur lesquels s'est appuyé le Procureur.

B) Le juge ordonne le transfert et la détention provisoire du suspect, si les conditions suivantes sont remplies :

(i) Le Procureur a demandé à un Etat de procéder à l'arrestation et au placement en garde à vue du suspect, conformément à l'article 40, ou le suspect est autrement détenu par un Etat;

(ii) Après avoir entendu le Procureur, le juge considère qu'il existe des indices graves et concordants tendant à montrer que le suspect aurait commis une infraction relevant de la compétence du Tribunal;

(iii) Le juge considère la détention provisoire comme une mesure nécessaire pour empêcher l'évasion du suspect, l'intimidation ou les atteintes à l'intégrité physique ou mentale des victimes ou des témoins ou la destruction d'éléments de preuve ou comme autrement nécessaire à la conduite de l'enquête.

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C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.

E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.

F) At the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing and before the end of the period of detention, to extend the provisional detention for a period not exceeding 30 days.

G) At the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing and before the end of the period of detention, to extend the detention for a further period not exceeding 30 days.

H The total period of provisional detention shall in no case exceed 90 days after the day of transfer of the suspect to the Tribunal, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.

I) The provisions in Rules 55 (B) to 59 shall apply mutatis mutandis to the execution of the order for the transfer and provisional detention of the suspect.

J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.

K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.

L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply mutatis mutandis to the provisional detention of persons under this Rule.

## Rule 41
### *Preservation of Information*

A) The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.

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C) La détention provisoire du suspect peut être ordonnée pour une durée qui ne saurait être supérieure à 30 jours à compter du lendemain du transfert du suspect au centre de détention du Tribunal.

D) L'ordonnance de transfert et de placement en détention provisoire du suspect doit être signée par le juge et revêtue du sceau du Tribunal. L'ordonnance mentionne les éléments sur lesquels le Procureur se fonde pour présenter la requête visée au paragraphe (A), y compris le chef d'accusation provisoire, ainsi que les motifs pour lesquels le juge rend l'ordonnance, compte tenu du paragraphe (B). L'ordonnance précise également la durée initiale de la détention provisoire et est accompagnée d'un document rappelant les droits du suspect, tels qu'indiqués par le présent article et les articles 42 et 43.

E) Dès que possible, des copies de l'ordonnance et de la requête du Procureur sont notifiées par le Greffier au suspect et à son conseil.

F) A la demande motivée du Procureur et si les nécessités de l'enquête le justifient, le juge ayant rendu l'ordonnance initiale ou un autre juge appartenant à la même Chambre de première instance peut décider, à la suite d'un débat contradictoire et avant le terme de la période de détention, de prolonger la détention provisoire pour une durée qui ne saurait être supérieure à trente jours.

G) A la demande motivée du Procureur et si des circonstances particulières le justifient, le juge ayant rendu l'ordonnance initiale ou un autre juge appartenant à la même Chambre de première instance peut décider, à la suite d'un débat contradictoire et avant le terme de la période de détention, de prolonger à nouveau la détention provisoire pour une durée qui ne saurait être supérieure à 30 jours.

H) La durée totale de la détention provisoire ne peut en aucun cas excéder 90 jours, à compter du lendemain du transfert du suspect au Tribunal, délai à l'issue duquel, pour le cas où un acte d'accusation n'a pas été confirmé et un mandat d'arrêt signé, le suspect est remis en liberté ou, le cas échéant, remis aux autorités nationales de l'Etat initialement requises.

I) Les dispositions des articles 55 (B) à 59 s'appliquent *mutatis mutandis* à l'exécution de l'ordonnance de transfert et de placement en détention provisoire du suspect.

J) Après son transfert au siège du Tribunal, le suspect assisté de son conseil comparaît sans retard devant le juge ayant rendu l'ordonnance initiale ou un autre juge appartenant à la même Chambre de première instance, qui s'assure du respect de ses droits.

K) Au cours de la détention, le Procureur, le suspect ou son conseil peuvent présenter à la Chambre de première instance à laquelle appartient le juge ayant rendu l'ordonnance initiale toutes requêtes relatives à la régularité de la détention provisoire ou à la mise en liberté du suspect.

L) Sans préjudice des paragraphes (C) à (H), les articles relatifs à la détention préventive de personnes mises en accusation s'appliquent *mutatis mutandis* à la détention provisoire de personnes conformément au présent article.

### Article 41
### *Conservation des informations*

A) Le Procureur est responsable de la conservation, de la garde et de la sécurité des informations et des éléments de preuve matériels recueillis au cours des enquêtes.

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B) The Prosecutor shall draw up an inventory of all materials seized from the accused, including documents, books, papers, and other objects, and shall serve a copy thereof on the accused. Materials that are of no evidentiary value shall be returned without delay to the accused.

Rule 42
*Rights of Suspects during Investigation*

A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands

i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;

ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and

iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 43
*Recording Questioning of Suspects*

[Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure :

i) The suspect shall be informed in a language he understands that the questioning is being audio-recorded or video-recorded;][10];

ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;

iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded;

iv) The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and

v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.

[10] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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B) Le Procureur dresse un inventaire des effets saisis de l'accusé, y compris tous documents, livres, papiers et autres objets, et en sert une copie à l'accusé. Les effets non susceptibles de servir d'éléments de preuve sont restitués sans retard à l'accusé.

Article 42
*Droits du suspect pendant l'enquête*

A) Avant d'être interrogé par le Procureur, le suspect est informé de ses droits dans une langue qu'il parle et comprend, à savoir :

i) Le droit à l'assistance d'un conseil de son choix ou, s'il est indigent, à la commission d'office d'un conseil à titre gratuit;

ii) Le droit à l'assistance gratuite d'un interprète s'il ne comprend pas ou ne parle pas la langue utilisée lors de l'interrogatoire;

iii) Le droit de garder le silence et d'être averti que chacune de ses déclarations sera enregistrée et pourra être utilisée comme moyen de preuve.

B) L'interrogatoire d'un suspect ne peut avoir lieu qu'en présence de son conseil, à moins que le suspect n'ait renoncé à son droit à l'assistance d'un conseil. L'interrogatoire doit néanmoins cesser, si un suspect qui a initialement renoncé à son droit à l'assistance d'un conseil, s'en prévaut ultérieurement; l'interrogatoire ne doit reprendre que lorsque le suspect a obtenu de son chef ou d'office l'assistance d'un conseil.

Article 43
*Enregistrement des interrogatoires des suspects*

[Le Procureur ne peut interroger un suspect que si l'interrogatoire est consigné sous forme d'enregistrement sonore ou vidéo selon les modalités suivantes :

i) Le suspect est informé, dans une langue qu'il comprend, de ce que l'interrogatoire est consigné sous forme d'enregistrement sonore ou vidéo;][10]

ii) Si l'interrogatoire est suspendu, la suspension, son heure et celle de la reprise de l'interrogatoire sont respectivement mentionnées dans l'enregistrement sonore ou vidéo;

iii) A la fin de l'interrogatoire, il est donné au suspect la possibilité de préciser ou de compléter toutes ses déclarations; l'heure de la fin de l'interrogatoire est alors mentionnée dans l'enregistrement;

iv) La teneur de l'enregistrement est transcrite dès que possible après la fin de l'interrogatoire et copie du texte de la transcription est remise au suspect; une copie de l'enregistrement ou, s'il a été utilisé un appareil à enregistrements multiples, l'une des bandes originales est également remise au suspect;

v) Après qu'une copie de l'enregistrement a été faite, si nécessaire, aux fins de transcription, la bande originale de l'enregistrement ou l'une d'entre elles est placée, en présence du suspect, sous scellés contresignés par lui-même et par le Procureur.

[10] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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## SECTION 2 - *Of Counsel*

### Rule 44
### *Appointment and Qualifications of Counsel*

A) Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law.

B) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel.

### Rule 44 *bis*
### *Duty Counsel*

A) A list of duty counsel who speak one or both working languages of the Tribunal and have indicated their willingness to be assigned pursuant to this Rule shall be kept by the Registrar.

B) Duty counsel shall fulfil the requirements of Rule 44, and shall be situated within reasonable proximity to the Detention Facility and the Seat of the Tribunal.

C) The Registrar shall at all times ensure that duty counsel will be available to attend the Detention Facility in the event of being summoned.

D) If an accused, or suspect transferred under Rule 40 *bis*, is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused or suspect until counsel is engaged by the accused or suspect, or assigned under Rule 45.

E) In providing initial legal advice and assistance to a suspect transferred under Rule 40 *bis*, duty counsel shall advise the suspect of his or her rights including the rights referred to in Rule 55 (A).

### Rule 45
### *Assignment of Counsel*

A) A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least 10 years relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar.

B) The criteria for determination of indigence shall be established by the Registrar and approved by the Judges.

C) In assigning counsel to an indigent suspect or accused, the following procedure shall be observed

i) A request for assignment of counsel shall be made to the Registrar;

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## SECTION 2 - *Le conseil*

### Article 44
### *Mandat et qualification du conseil*

A) Le conseil choisi par un suspect ou un accusé dépose dès que possible son mandat auprès du Greffier. Sous réserve de vérification par le Greffier, tout conseil est considéré comme qualifié pour représenter un suspect ou un accusé dès lors qu'il est habilité à exercer la profession d'avocat dans un Etat ou est professeur de droit dans une université.

B) Dans l'accomplissement de leur tâche, les conseils sont assujettis au respect des dispositions pertinentes du Statut, du Règlement et du Règlement de détention ainsi qu'à celles de tout autre règlement adopté par le Tribunal, sans préjudice de l'Accord de siège, du Code de conduite et des codes de pratique et de déontologie régissant leur profession et, le cas échéant, de la Directive relative à la commission d'office de conseils de la défense.

### Article 44 *bis*
### *Conseils de permanence*

A) Le Greffier tient une liste des conseils de permanence qui parlent aux moins une des deux langues de travail du Tribunal et ont fait savoir qu'ils accepteraient d'être commis d'office conformément au présent article.

B) Le conseil de permanence doit remplir les conditions visées à l'article 44 et résider dans une zone raisonnablement proche du centre de détention et du siège du Tribunal.

C) Le Greffier veille, en tout temps, à ce que les conseils de permanence soient prêts à se rendre au centre de détention au cas où ils y seraient convoqués.

D) En cas de non-représentation d'un accusé ou d'un suspect à tout moment après son transfert au Tribunal en application de l'article 40 *bis*, le Greffier convoque, le plus tôt possible, un conseil de permanence pour le représenter, et ce, jusqu'au choix d'un conseil par l'accusé ou le suspect, ou jusqu'à la commission d'office d'un conseil.

E) Dans le cadre de l'assistance juridique initiale qu'il fournit au suspect transféré en vertu de l'article 40 *bis*, le conseil de permanence l'informe de ses droits, y compris ceux énoncés au paragraphe (A) de l'article 55.

### Article 45
### *Commission d'office d'un conseil*

A) Le Greffier tient une liste des conseils qui parlent au moins une des deux langues de travail du Tribunal, remplissent les conditions visées à l'article 44, justifient d'au moins de 10 ans d'expérience pertinente, et ont fait savoir qu'ils accepteraient d'être commis d'office par le Tribunal pour représenter un suspect ou un accusé indigent.

B) Les critères d'indigence sont déterminés par le Greffier et approuvés par les juges.

C) Un conseil est commis d'office pour représenter un suspect ou un accusé indigent conformément à la procédure suivante :

i) Une demande de commission d'un conseil doit être présentée au Greffier;

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ii) The Registrar shall enquire into the financial means of the suspect or accused and determine whether the criteria of indigence are met;

iii) If he decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused.

D) If a request is refused, a further reasoned request may be made by the suspect or the accused to the Registrar upon showing a change in circumstances.

E) The Registrar shall, in consultation with the Judges, establish the criteria for the payment of fees to assigned counsel.

F) If a suspect or an accused elects to conduct his own defence, he shall so notify the Registrar in writing at the first opportunity.

G) Where an alleged indigent person is subsequently found not to be indigent, the Chamber may make an order of contribution to recover the cost of providing counsel.

H) Under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

I) It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances.

### Rule 45 *bis*
### *Detained Persons*

Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal.

### Rule 45 *ter*
### *Availability of Counsel*

A) Counsel and Co-Counsel, whether assigned by the Registrar or appointed by the client for the purposes of proceedings before the Tribunal, shall furnish the Registrar, upon date of such assignment or appointment, a written undertaking that he will appear before the Tribunal within a reasonable time as specified by the Registrar.

B) Failure by Counsel or Co-Counsel to appear before the Tribunal, as undertaken, shall be a ground for withdrawal by the Registrar of the assignment of such Counsel or Co-Counsel or the refusal of audience by the Tribunal or the imposition of any other sanctions by the Chamber concerned.

### Rule 46
### *Misconduct of Counsel*

A) A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is oth-

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ii) Le Greffier doit s'enquérir des moyens financiers du suspect ou de l'accusé et apprécier si les critères d'indigence sont réunis;

iii) Dans l'affirmative, il commet un conseil choisi sur la liste; dans le cas contraire, il en informe l'intéressé.

D) En cas de rejet de la demande, le suspect ou l'accusé peut soumettre au Greffier une nouvelle demande motivée par un changement de circonstances.

E) Le Greffier, en consultation avec les juges, détermine le tarif des honoraires à verser au conseil commis d'office.

F) Si un suspect ou un accusé décide d'assurer lui-même sa défense, il en avertit par écrit le Greffier dès que possible.

G) S'il s'avère qu'une personne présumée indigente ne l'est pas, la Chambre peut rendre une ordonnance aux fins de récupérer les frais entraînés par la commission d'un conseil.

H) Dans des circonstances exceptionnelles, à la demande du suspect ou de l'accusé, ou de son conseil, la Chambre peut donner instruction au Greffier de remplacer un conseil commis d'office, pour des raisons jugées fondées et après s'être assurée que la demande ne vise pas à ralentir la procédure.

I) Il est admis que le conseil commis représentera l'accusé et ce jusqu'à la fin de l'affaire. A défaut et en l'absence de justifications approuvées par la Chambre, ses honoraires peuvent ne pas lui être payés en totalité ou en partie. Dans de telles circonstances, la Chambre peut rendre une décision à cet effet. Le conseil n'est autorisé à se retirer de l'affaire qui lui a été assignée que dans les circonstances les plus exceptionnelles.

### Article 45 *bis*
### *Personnes détenues*

Les articles 44 et 45 s'appliquent à toute personne détenue sous l'autorité du Tribunal.

### Article 45 *ter*
### *Disponibilité du conseil*

A) Qu'ils soient désignés par le Greffe ou choisis par leur client afin de le représenter devant le Tribunal, le conseil et le co-conseil doivent fournir au Greffier à la date de cette désignation ou nomination, un engagement écrit selon lequel ils apparaîtront devant le Tribunal dans un délai raisonnable spécifié par le Greffier.

B) Le défaut pour le conseil ou le co-conseil de se présenter devant le Tribunal, tel qu'ils s'y sont engagés, sera un motif de retrait de leur désignation par le Greffier ou une interdiction de se présenter devant le Tribunal ou toute autre sanction décidée par la Chambre concernée.

### Article 46
### *Discipline*

A) Une Chambre peut, après un avertissement, prendre des sanctions contre un conseil, si elle considère que son comportement reste offensant ou injurieux, entrave

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erwise contrary to the interests of justice. This provision is applicable mutatis mutandis to Counsel for the prosecution.

B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission or, if a professor and not otherwise admitted to the profession, to the governing body of his University.

C) If a counsel assigned pursuant to Rule 45 is sanctioned in accordance with Sub-Rule (A) by being refused audience, the Chamber shall instruct the Registrar to replace the counsel.

D) The Registrar may set up a Code of Professional Conduct enunciating the principles of professional ethics to be observed by counsel appearing before the Tribunal, subject to adoption by the Plenary Meeting. Amendments to the Code shall be made in consultation with representatives of the Prosecutor and Defence counsel, and subject to adoption by the Plenary Meeting. Amendments to the Code shall be made in consultation with representatives of the Prosecutor and defence counsel, and subject to adoption by the Plenary Meeting. If the Registrar has strong grounds for believing that Counsel has committed a serious violation of the Code of Professional Conduct so adopted, he may report the matter to the President or the Bureau for appropriate action under this rule.

## PART FIVE - PRE-TRIAL PROCEEDINGS

### SECTION 1 - *Indictments*

#### Rule 47
*Submission of Indictment by the Prosecutor*

A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose.

B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.

C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the scheduled date for review of the indictment.

E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.

F) The reviewing Judge may :

i) Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;

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la procédure ou va autrement à l'encontre des intérêts de la justice. Cette disposition s'applique mutatis mutandis aux membres du Bureau du Procureur.

B) Un juge ou une Chambre de première instance peut, avec l'accord du Président, signaler tout manquement du conseil à l'Ordre des avocats dans le pays où il est admis à l'exercice de sa profession ou, si l'intéressé est professeur et n'est pas avocat, au conseil d'administration de l'Université dont il relève.

C) Si, en application de l'alinéa (A), elle a sanctionné, en refusant de l'entendre, un conseil commis d'office conformément à l'article 45, la Chambre donne instruction au Greffier de remplacer le conseil.

D) Le Greffier peut élaborer un code de conduite énonçant les principes déontologiques à observer par les conseils appelés à comparaître devant le Tribunal, sous réserve de son approbation par la réunion plénière. Les modifications du Code de conduite sont faites en consultation avec les représentants du Procureur et du conseil de la défense, sous réserve de leur adoption par la réunion plénière. S'il a de bonnes raisons de croire qu'un conseil a commis une violation grave du Code de conduite ainsi adopté, le Greffier peut saisir le Président ou le Bureau de la question aux fins de mesures appropriées, conformément aux dispositions du présent article.

## CHAPITRE CINQUIÈME - MISE EN ACCUSATION

### SECTION 1 - *Les actes d'accusation*

#### Article 47
*Présentation de l'acte d'accusation par le Procureur*

A) Un acte d'accusation, soumis conformément à la procédure ci-après, est examiné par un juge désigné à cet effet conformément à l'article 28.

B) Si l'enquête permet au Procureur d'établir qu'il existe des éléments de preuve suffisants pour soutenir raisonnablement qu'un suspect a commis une infraction relevant de la compétence du Tribunal, le Procureur établit et transmet au Greffier, pour confirmation par un juge, un acte d'accusation auquel il joint tous les éléments justificatifs.

C) L'acte d'accusation indique le nom du suspect et les renseignements personnels le concernant, ainsi qu'une relation concise des faits de l'affaire et la qualification qu'ils revêtent.

D) Le Greffier transmet l'acte d'accusation et les pièces jointes au juge désigné, lequel informe le Procureur de la date fixée pour l'examen de l'acte d'accusation.

E) Le juge désigné examine chacun des chefs d'accusation et tout élément que le Procureur présenterait à l'appui de ceux-ci, afin de décider, en application de la norme énoncée à l'article 18 (1) du Statut, si un dossier peut être établi contre le suspect.

F) Le juge désigné peut :

i) demander au Procureur de présenter des éléments supplémentaires à l'appui de l'un ou de la totalité des chefs d'accusation, ou de prendre toute autre mesure appropriée;

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ii) Confirm each count;

iii) Dismiss each count; or

iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.

H) Upon confirmation of any or all counts in the indictment

i) The Judge may issue an arrest warrant, in accordance with Sub-Rule 55 (A), and any orders as provided in Article 19 of the Statute; and

ii) The suspect shall have the status of an accused.

I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.

### Rule 48
### *Joinder of Accused*

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

### Rule 48 *bis*
### *Joinder of Trials*

Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73.

### Rule 49
### *Joinder of Crimes*

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

### Rule 50
### *Amendment of Indictment*

A) (i) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the Pres-

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ii) confirmer chacun des chefs d'accusation;

iii) rejeter chacun des chefs d'accusation;

iv) surseoir à sa décision afin de permettre au Procureur de modifier l'acte d'accusation.

G) L'acte d'accusation tel que confirmé par le juge est conservé par le Greffier qui en fait des copies certifiées conformes portant le sceau du Tribunal. Si l'accusé ne comprend aucune des deux langues officielles du Tribunal et si le Greffier sait quelle langue l'accusé comprend, l'acte d'accusation est traduit dans cette langue et cette traduction est jointe à toute copie certifiée conforme de l'acte d'accusation.

H) Une fois confirmé l'un quelconque ou l'ensemble des chefs de l'acte d'accusation

i) Le juge peut délivrer un mandat d'arrêt, conformément au paragraphe (A) de l'article 55, et toute ordonnance prévue à l'article 18 du Statut;

ii) Le suspect acquiert le statut d'un accusé.

I) Le rejet d'un chef d'accusation n'interdit pas au Procureur d'établir ultérieurement un nouvel acte d'accusation modifié sur la base des faits ayant fondé le chef d'accusation rejeté, pour autant que soient produits à l'appui des éléments de preuve supplémentaires.

### Article 48
*Jonction d'instances*

Des personnes accusées d'une même infraction ou d'infractions différentes commises à l'occasion de la même opération peuvent être mises en accusation et jugées ensemble.

### Article 48 *bis*
*Jonction de procès*

Sur autorisation d'une Chambre de première instance, en application de l'article 73, des personnes qui sont inculpées séparément, accusées de la même infraction ou d'infractions différentes commises à l'occasion de la même entreprise criminelle, peuvent être jugées ensemble.

### Article 49
*Jonction de chefs d'accusation*

Plusieurs infractions peuvent faire l'objet d'un seul et même acte d'accusation si les actes incriminés ont été commis à l'occasion de la même entreprise criminelle et par le même accusé.

### Article 50
*Modifications de l'acte d'accusation*

A) (i) Le Procureur peut, sans autorisation préalable, modifier l'acte d'accusation, et ce, à tout moment avant sa confirmation. Ultérieurement, et jusqu'à la comparution initiale de l'accusé devant une Chambre de première instance conformément à l'article 62, il ne peut le faire qu'avec l'autorisation du juge l'ayant confirmé ou, dans des circonstances

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ident. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(ii) In deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, *mutatis mutandis*, follow the procedures and apply the standards set out in Sub-Rules 47(E) and (F) in addition to considering any other relevant factors.

B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Rule 51
*Withdrawal of Indictment*

A) The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by a Trial Chamber pursuant to Rule 73.

B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused.

Rule 52
*Public Character of Indictment*

Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.

Rule 53
*Non-disclosure*

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

B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of

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exceptionnelles, avec l'autorisation d'un juge désigné par le Président. Lors de cette comparution initiale ou par la suite, l'acte d'accusation ne peut être modifié que sur autorisation d'une Chambre de première instance donnée conformément à l'article 73. Les dispositions de l'article 47 (G) et de l'article 53 *bis* s'appliquent *mutatis mutandis* à l'acte d'accusation modifié, dès lors que l'autorisation de modifier est donnée.

(ii) Pour décider s'il est opportun d'autoriser la modification de l'acte d'accusation, la Chambre de première instance ou, le cas échéant, le juge compétent suit la procédure définie aux paragraphes (E) et (F) de l'article 47 *mutatis mutandis*, applique les normes qui y sont fixées et tient compte de tout autre élément d'appréciation pertinent.

B) Lorsque l'acte d'accusation modifié comporte de nouveaux chefs d'accusation et que l'accusé a déjà comparu devant une Chambre de première instance conformément à l'article 62, une nouvelle comparution se tient dès que possible pour permettre à l'accusé de plaider coupable ou non coupable des nouveaux chefs qui lui sont imputés.

C) Un délai supplémentaire de trente jours est accordé à l'accusé pour lui permettre de soulever les exceptions prévues à l'article 72 relativement aux nouveaux chefs qui lui sont imputés et, s'il y a lieu, la date du procès peut être reportée pour accorder à la défense le temps nécessaire à sa préparation.

### Article 51
*Retrait de l'acte d'accusation*

A) Le Procureur peut, sans autorisation préalable, retirer un acte d'accusation à tout moment avant sa confirmation. Ultérieurement, et jusqu'à la comparution initiale de l'accusé devant une Chambre de première instance conformément à l'article 62, il ne peut le faire qu'avec l'autorisation du juge l'ayant confirmé ou, dans des circonstances exceptionnelles, avec l'autorisation d'un juge désigné par le Président. Lors de cette comparution initiale ou par la suite, l'acte d'accusation ne peut être retiré que sur autorisation d'une Chambre de première instance conformément à l'article 73.

B) Le retrait de l'acte d'accusation est notifié sans délai au suspect ou à l'accusé et à son conseil.

### Article 52
*Caractère public de l'acte d'accusation*

Après la confirmation par le juge de première instance, et sous réserve de l'article 53, l'acte d'accusation est rendu public.

### Article 53
*Non-divulgation au public*

A) Lorsque des circonstances exceptionnelles le requièrent, un juge ou une Chambre de première instance peut ordonner dans l'intérêt de la justice la non-divulgation au public de tous documents ou informations, et ce, jusqu'à décision contraire.

B) Lorsqu'il confirme un acte d'accusation, le juge peut, après avis du Procureur, ordonner sa non-divulgation au public jusqu'à sa signification à l'accusé, ou en cas de jonction d'instances, à tous les accusés.

C) Un juge ou une Chambre de première instance peut également, après avis du Procureur, ordonner la non-divulgation au public de tout ou partie de l'acte d'accu-

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any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

D) Notwithstanding sub-rules (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to secure the possible arrest of an accused.

### Rule 53 *bis*
### *Service of Indictment*

A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Tribunal or as soon as possible thereafter.

B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment certified in accordance with Rule 47 (G).

## SECTION 2 - *Orders and Warrants*

### Rule 54
### *General Provision*

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

### Rule 55
### *Execution of Arrest Warrants*

A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 20 of the Statute, and in Rules 42 and 43 mutatis mutandis, together with the right of the accused to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

B) The Registrar shall transmit to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, three sets of certified copies of :

i) The warrant for arrest of the accused and an order for his surrender to the Tribunal;

ii) The confirmed indictment;

iii) A statement of the rights of the accused; and if necessary a translation thereof in a language understood by the accused.

C) The Registrar shall instruct the said authorities to :

i) Cause the arrest of the accused and his transfer to the Tribunal;

ii) Serve a set of the aforementioned documents upon the accused;

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sation, de toute information et de tout document particuliers, si l'un ou l'autre est convaincu qu'une telle ordonnance est nécessaire pour donner effet à une disposition du Règlement ou pour préserver des informations confidentielles obtenues par le Procureur ou encore que l'intérêt de la justice le commande.

D) Nonobstant les paragraphes (A), (B) et (C) ci-dessus, le Procureur peut divulguer tout ou partie de l'acte d'accusation aux autorités d'un État ou à une autorité compétente ou une institution internationale lorsqu'il l'estime nécessaire pour se ménager une chance d'arrêter un accusé.

### Article 53 *bis*
### *Signification de l'acte d'accusation*

A) L'acte d'accusation est signifié à l'accusé en personne lorsqu'il est placé sous la garde du Tribunal ou le plus tôt possible ultérieurement.

B) L'acte d'accusation est signifié à l'accusé lorsque copie certifiée, conformément aux dispositions de l'article 47 (G), lui en est donnée.

## SECTION 2 - *Les ordonnances et les mandats*

### Article 54
### *Disposition générale*

A la demande d'une des parties ou de sa propre initiative, un juge ou une Chambre de première instance peut délivrer les ordonnances, citations à comparaître, assignations, injonctions, mandats et ordres de transfert nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès.

### Article 55
### *Exécution des mandats d'arrêt*

A) Un mandat d'arrêt doit être signé par un juge et revêtu du sceau du Tribunal. Il est accompagné d'une copie de l'acte d'accusation et d'un document rappelant les droits de l'accusé. Au titre de ces droits figurent ceux qui sont énoncés à l'article 20 du Statut et, mutatis mutandis, aux articles 42 et 43 du Règlement, ainsi que le droit de conserver le silence et la mise en garde selon laquelle toute déclaration faite par l'accusé est enregistrée et peut être retenue contre lui.

B) Le Greffier transmet aux autorités nationales de l'Etat sur le territoire ou sous la juridiction ou le contrôle duquel l'accusé réside ou avait sa dernière résidence connue trois jeux de copies certifiées conformes des documents ci-après :

i) Le mandat d'arrêt et l'ordonnance de transfèrement au Tribunal;

ii) L'acte d'accusation confirmé;

iii) Le document rappelant les droits de l'accusé auquel est jointe, s'il y a lieu une traduction dans une langue que celui-ci comprend.

C) Le Greffier donne instructions auxdites autorités :

i) D'arrêter l'accusé et de le transférer au Tribunal;

ii) De notifier à l'accusé les documents susmentionnés;

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iii) Cause the documents to be read to the accused in a language understood by him and to caution him as to his rights in that language; and

iv) Return one set of the documents together with proof of service, to the Tribunal.

D) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor's Office may be present as from the time of arrest.

Rule 55 *bis*
*Warrant of Arrest to All States*

A) Upon the request of the Prosecutor, and if satisfied that to do so would facilitate the arrest of an accused who may move from State to State, or whose whereabouts are unknown, a Judge may without having recourse to the procedures set out in Rule 61, and subject to sub-rule (B), address a warrant of arrest to all States.

B) The Registrar shall transmit such a warrant to the national authorities of such States as may be indicated by the Prosecutor.

Rule 56
*Cooperation of States*

The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 28 of the Statute.

Rule 57
*Procedure after Arrest*

Upon the arrest of the accused, the State concerned shall detain him, and shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal, or to such other place as the Bureau may decide, after consultation with the Prosecutor and the Registrar, shall be arranged by the State authorities concerned, in liaison with the authorities of the host country and the Registrar.

Rule 58
*National Extradition Provisions*

The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 59
*Failure to Execute a Warrant of Arrest or Transfer Order*

A) Where the State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant of arrest or transfer order, it shall report forthwith its inability to the Registrar, and the reasons therefore.

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iii) De donner lecture à l'accusé des documents dans une langue qu'il comprend et de l'informer de ses droits dans cette langue; et

iv) De renvoyer au Tribunal un jeu desdits documents en y joignant la preuve qu'ils ont été notifiés à l'accusé.

D) Lorsqu'un mandat d'arrêt émis par le Tribunal est exécuté, un membre du Bureau du Procureur peut être présent à compter du moment de l'arrestation.

Article 55 *bis*
*Mandat d'arrêt à tous les Etats*

A) A la demande du Procureur et s'il est convaincu que cela faciliterait l'arrestation d'un accusé susceptible de passer d'un Etat à un autre, ou que l'on ignore où il se trouve, un juge peut, sans recourir à la procédure décrite à l'article 61, et sous réserve du paragraphe (B), adresser un mandat d'arrêt à tous les Etats.

B) Le Greffier transmet un tel mandat aux autorités nationales des Etats pour lesquels le Procureur le requiert.

Article 56
*Coopération des Etats*

L'Etat auquel est transmis un mandat d'arrêt ou un ordre de transfert d'un témoin, agit sans tarder et avec toute la diligence voulue pour assurer sa bonne exécution, conformément à l'article 28 du Statut.

Article 57
*Procédure après l'arrestation*

Après l'arrestation de l'accusé, l'Etat concerné détient l'intéressé et en informe sans délai le Greffier. Le transfert de l'accusé au siège du Tribunal ou vers tout autre lieu que le Bureau peut fixer, après consultation du Procureur et du Greffier, est organisé par les autorités nationales intéressées en liaison avec les autorités du pays hôte et le Greffier.

Article 58
*Dispositions de droit interne relatives à l'extradition*

Les obligations énoncées à l'article 28 du Statut prévalent sur tous obstacles juridiques que la législation nationale ou les traités d'extradition auxquels l'Etat intéressé est partie pourraient opposer à la remise ou au transfert de l'accusé ou d'un témoin au Tribunal.

Article 59
*Défaut d'exécution d'un mandat d'arrêt ou d'un ordre de transfert*

A) Lorsque l'Etat auquel un mandat d'arrêt ou un ordre de transfert a été transmis n'a pu l'exécuter, il en informe sans délai le Greffier et en indique les raisons.

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B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly.

Rule 60
*Publication of Indictment*

At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio, transmission via Internet or television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

Rule 61
*Procedure in Case of Failure to Execute a Warrant of Arrest*

A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that :

i) The Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the accused to be served resides or was last known to be; and

ii) If the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisement pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment and any other evidence submitted to him after confirmation of the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.

C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-Rule (A) above.

D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.

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B) Si, dans un délai raisonnable après que le mandat d'arrêt ou l'ordre de transfert a été transmis à l'Etat, il n'est pas rendu compte des mesures prises, l'Etat est réputé ne pas avoir exécuté le mandat d'arrêt ou l'ordre de transfert et le Tribunal, par l'intermédiaire du Président, peut en informer le Conseil de sécurité.

Article 60
*Publication de l'acte d'accusation*

A la demande du Procureur, le Greffier transmet aux autorités nationales de l'Etat ou des Etats, aux fins de publication dans des journaux, ou de diffusion par la radio, l'internet ou la télévision, le texte d'une annonce portant publiquement à la connaissance de l'accusé l'existence d'un acte d'accusation établi contre lui, le sommant de se livrer au Tribunal et invitant toute personne qui saurait où l'accusé se trouve à communiquer cette information au Tribunal.

Article 61
*Procédure en cas d'inexécution d'un mandat d'arrêt*

A) Si, au terme d'un délai raisonnable, le mandat d'arrêt n'a pas été exécuté et que l'acte d'accusation n'a pas été signifié à personne, le juge qui a confirmé l'acte d'accusation invite le Procureur à rendre compte des mesures qu'il a prises. Dès lors que le juge est convaincu que :

i) Le Greffier et le Procureur ont pris toutes les mesures raisonnables pour faire arrêter l'accusé, notamment en s'adressant aux autorités compétentes de l'Etat sur le territoire ou sous la juridiction ou le contrôle duquel l'accusé visé par la signification réside ou avait sa dernière résidence connue; et

ii) Le Procureur et le Greffier ont pris toutes les mesures raisonnables pour établir le lieu de résidence inconnu de l'accusé, y compris par l'insertion d'annonces dans les journaux, conformément à l'article 60, le juge ordonne que le Procureur [présente l'acte d'accusation à] la Chambre de première instance à laquelle il est affecté ….

B) Dès le prononcé d'une telle ordonnance, le Procureur soumet l'acte d'accusation à la Chambre de première instance en audience publique, en y joignant tous les éléments de preuve présentés au Juge qui a initialement confirmé l'acte d'accusation et tout autre élément de preuve présenté au juge après la confirmation de l'acte d'accusation. Le Procureur peut également citer à comparaître et interroger, devant la Chambre de première instance, tout témoin dont la déclaration a été soumise au Juge ayant confirmé l'acte d'accusation.

C) Si la Chambre de première instance considère, sur la base de ces éléments de preuve ainsi que de tous autres que le Procureur peut produire, qu'il existe des raisons suffisantes de croire que l'accusé a commis une ou toutes les infractions mises à sa charge dans l'acte d'accusation, elle statue en conséquence. La Chambre fait lire par le Procureur les passages pertinents de l'acte d'accusation et lui demande de rendre compte des efforts déployés pour signifier l'acte d'accusation conformément au paragraphe (A).

D) En outre, la Chambre de première instance délivre contre l'accusé un mandat d'arrêt international qui est transmis à tous les Etats. A la demande du Procureur ou de sa propre initiative, le Procureur entendu, la Chambre de première instance peut ordonner à un ou plusieurs Etats d'adopter des mesures conservatoires à l'effet de geler les avoirs de l'accusé, sans préjudice des droits des tiers.

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E) If, during the hearing, the Prosecutor satisfies the Trial Chamber that the failure to effect personal service of the indictment was due in whole or in part to a failure or refusal of a State to co-operate with the Tribunal in accordance with Article 28 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as he thinks fit.

[Rule 62
*Initial Appearance of Accused and Plea*][11]

A) Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall :

i) Satisfy itself or himself that the right of the accused to counsel is respected;

ii) Read or have the indictment read to the accused in a language he understands, and satisfy itself or himself that the accused understands the indictment;

iii) Call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

iv) In case of a plea of not guilty, instruct the Registrar to set a date for trial;

v) In case of a plea of guilty :

a) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 (B); or

b) if before a Trial Chamber, act in accordance with Rule 62 (B);

B) If an accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea :

i) is made freely and voluntarily;

ii) is an informed plea;

iii) is unequivocal; and

iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case. Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

Rule 62 *bis*
*Plea Agreement Procedure*

A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber :

[11] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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E) Si le Procureur établit à l'audience devant la Chambre de première instance que le défaut de signification à personne de l'acte d'accusation est imputable en tout ou en partie à l'absence ou au refus de coopération d'un Etat avec le Tribunal contrairement à l'article 28 du Statut, la Chambre de première instance en dresse le constat. Le Président en informe le Conseil de sécurité selon les modalités les plus opportunes, après consultation des deux Présidents de Chambre.

[Article 62
*Comparution initiale de l'accusé*][11]

A) Après son transfert au Tribunal, l'accusé comparaît sans délai devant une Chambre de première instance ou devant un juge désigné parmi ses membres et est officiellement mis en accusation. La Chambre de première instance ou le juge désigné :

i) s'assure que le droit de l'accusé à l'assistance d'un conseil est respecté,

ii) donne lecture ou fait donner lecture de l'acte d'accusation à l'accusé, dans une langue qu'il comprend, et s'assure qu'il comprend cet acte d'accusation;

iii) invite l'accusé à plaider coupable ou non coupable sur chaque chef d'accusation et, à défaut pour l'accusé de plaider, inscrit en son nom au dossier qu'il a plaidé non coupable,

iv) donne instruction au Greffier de fixer la date du procès au cas où l'accusé plaide non coupable,

v) lorsque l'accusé plaide coupable,

a) devant un juge, communique cet aveu de culpabilité à la Chambre de première instance,

b) une Chambre de première instance agit conformément au paragraphe (B),

B) Si un accusé plaide coupable conformément au paragraphe (A) (v) ou demande à revenir sur son plaidoyer de non culpabilité, la Chambre doit s'assurer que l'aveu de culpabilité :

i) est fait librement et volontairement,

ii) est fait en connaissance de cause,

iii) est sans équivoque, et

iv) repose sur des faits suffisants pour établir le crime et la participation de l'accusé à sa commission, compte tenu soit d'indices objectifs, soit de l'absence de tout sérieux désaccord entre le Procureur et l'accusé sur les faits de la cause, la Chambre peut déclarer l'accusé coupable et donner instruction au Greffier de fixer la date de l'audience pour le prononcé de la peine.

Article 62 *bis*
*Procédure en cas d'accord sur le plaidoyer*

A) Le Procureur et la défense peuvent convenir que, après que l'accusé aura plaidé coupable de l'ensemble des chefs d'accusation, de l'un ou de plusieurs de ces chefs, le Procureur prendra tout ou partie des dispositions suivantes devant la Chambre de première instance :

[11] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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i) apply to amend the indictment accordingly;

ii) submit that a specific sentence or sentencing range is appropriate;

iii) not oppose a request by the accused for a particular sentence or sentencing range.

B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty.

## Rule 63
*Questioning of the Accused*

A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A) (iii).

## Rule 64
*Detention on Remand*

Upon his transfer to the Tribunal, the accused shall be detained in facilities provided by the host country or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused.

## Rule 65
*Provisional Release*

A) Once detained, an accused may not be provisionally released except upon an order of a Trial Chamber.

B) Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard, and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

C) The Trial Chamber may impose such conditions upon the provisional release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.

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i) demandera l'autorisation de modifier l'acte d'accusation en conséquence,

ii) proposera une peine déterminée ou une fourchette de peines qu'il estime appropriées,

ii) ne s'opposera pas à la demande par l'accusé d'une peine déterminée ou d'une fourchette de peines.

B) La Chambre de première instance n'est pas tenue par l'accord visé au paragraphe (A).

C) Si les parties ont conclu un accord sur le plaidoyer, la Chambre de première instance demande la divulgation de l'accord en question, soit en audience publique soit, si des motifs convaincants ont été présentés, à huis clos, au moment où l'accusé plaide coupable conformément à l'article 62 (A) (v), ou demande à revenir sur son plaidoyer de non-culpabilité.

Article 63
*Interrogatoire de l'accusé*

A) L'interrogatoire d'un accusé par le Procureur, y compris après la comparution initiale, ne peut avoir lieu qu'en présence de son conseil, à moins que l'accusé n'ait volontairement et expressément renoncé à la présence de celui-ci. Si l'accusé exprime ultérieurement le désir de bénéficier de l'assistance d'un conseil, l'interrogatoire est immédiatement suspendu et ne reprendra qu'en présence du conseil.

B) L'interrogatoire ainsi que la renonciation à l'assistance d'un conseil sont enregistrés sur bande magnétique ou sur cassette vidéo conformément à la procédure prévue à l'article 43. Préalablement à l'interrogatoire, le Procureur informe l'accusé de ses droits conformément à l'article 42 (A) (iii).

Article 64
*Détention provisoire*

Après son transfert au Tribunal, l'accusé est détenu dans les locaux mis à disposition par le pays hôte ou par un autre pays. Le Président peut, à la requête d'une des parties, demander de revoir les conditions de détention de l'accusé.

Article 65
*Mise en liberté provisoire*

A) Une fois détenu, l'accusé ne peut être mis en liberté que sur ordonnance d'une Chambre.

B) La mise en liberté provisoire ne peut être ordonnée par la Chambre de première instance qu'après avoir donné au pays hôte, et au pays où l'accusé demande à être libéré la possibilité d'être entendus, et pour autant qu'elle ait la certitude que l'accusé comparaîtra et, s'il est libéré, ne mettra pas en danger une victime, un témoin ou toute autre personne.

C) La Chambre de première instance peut subordonner la mise en liberté provisoire aux conditions qu'elle juge appropriées, y compris le versement d'une caution et, le cas échéant, l'observation des conditions nécessaires pour garantir la présence de l'accusé au procès et la protection d'autrui.

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D) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown. Subject to paragraph (F) below, applications for leave to appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the application shall be filed within seven days of the oral decision unless :

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.

F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.

G) Where the Trial Chamber orders a stay of its decision to release the accused pending an appeal by the Prosecutor, the accused shall not be released until either :

i) the time-limit for the filing of an application for leave to appeal by the Prosecutor has expired, and no such application is filed;

ii) a bench of three Judges of the Appeals Chamber rejects the application for leave to appeal;

iii) the Appeals Chamber dismisses the appeal; or

iv) a bench of three Judges of the Appeals Chamber or the Appeals Chamber otherwise orders.

H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been provisionally released or is for any other reason at large. The provisions of Section 2 of Part Five shall apply *mutatis mutandis.*

I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that :

i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;

ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and

iii) special circumstances exist warranting such release.

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

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D) Toute décision rendue en vertu de cet article sera susceptible d'appel lorsque l'autorisation de faire appel aura été accordée par une formation de trois juges de la Chambre d'appel et lorsque des motifs valables pour ce faire auront été invoqués. Sous réserve du paragraphe (F) ci-après, les demandes aux fins d'une autorisation d'interjeter appel doivent être déposées dans les sept jours du dépôt de la décision contestée. Lorsque cette décision est rendue oralement, la requête doit être déposée dans les sept jours de ladite décision, à moins que :

i) La partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer; ou

ii) La Chambre de première instance ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

E) Le Procureur peut demander à ce que la Chambre de première instance sursoie à l'exécution de sa décision de libérer un accusé au motif qu'il a l'intention d'interjeter appel de la décision; il présente cette demande en même temps qu'il dépose sa réponse à la requête initiale de l'accusé aux fins de mise en liberté provisoire.

F) Lorsque la Chambre de première instance fait droit au sursis à l'exécution de sa décision de mettre en liberté un accusé, le Procureur dépose son acte d'appel au plus tard le lendemain du prononcé de la décision.

G) Lorsque la Chambre de première instance ordonne le sursis à l'exécution de sa décision de mise en liberté de l'accusé en attendant l'arrêt relatif à l'appel interjeté par le Procureur, l'accusé n'est pas remis en liberté sauf dans les cas suivants :

i) Le délai de dépôt de la demande d'autorisation du Procureur aux fins d'interjeter appel est écoulé et aucune demande n'a été déposée;

ii) Une formation de trois juges de la Chambre d'appel rejette la demande d'autorisation d'interjeter appel;

iii) La Chambre d'appel rejette le recours, ou

iv) Une formation de trois juges de la Chambre d'appel ou la Chambre d'appel en décide autrement.

H) Si elle l'estime nécessaire, la Chambre de première instance peut délivrer un mandat d'arrêt aux fins de garantir la comparution d'un accusé mis en liberté provisoire ou laissé en liberté pour toute autre raison. Les dispositions de la section 2 du chapitre V s'appliquent dans ce cas *mutatis mutandis*.

I) Sans préjudice des dispositions de l'article 107 du Règlement, la Chambre d'appel peut accorder la mise en liberté provisoire de condamnés dans l'attente de leur jugement en appel ou pendant une période donnée pour autant qu'elle ait la certitude que :

i) s'il est libéré, l'appelant comparaîtra à l'audience en appel ou, le cas échéant, il se présentera aux fins de détention à l'expiration de la période donnée;

ii) s'il est libéré, l'appelant ne mettra pas en danger une victime, un témoin ou toute autre personne;

iii) des circonstances particulières justifient cette mise en liberté.

Les dispositions des paragraphes (C) et (H) s'appliquent *mutatis mutandis*

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### Rule 65 *bis*
### *Status Conferences*

A) A status conference may be convened by a Trial Chamber or a Judge thereof. Its purpose is to organize exchanges between the parties so as to ensure expeditious trial proceedings.

B) The Appeals Chamber or an Appeals Chamber Judge may convene a status conference.

C) A status conference held pursuant to paragraph (B) of this Rule may be conducted with the participation of counsel via tele-conference or video-conference.

## SECTION 3 - *Production of Evidence*

### Rule 66
### *Disclosure of materials by the Prosecutor*

Subject to the provisions of Rules 53 and 69;

A) The Prosecutor shall disclose to the Defence

i) Within 30 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, and

[ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown, a Trial Chamber may order that copies of the statements of additional Prosecution witnesses be made available to the Defence within a prescribed time.][12]

B) At the request of the defence, the Prosecutor shall, subject to Sub-Rule C, permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

C) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-Rule A and B. 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.

### Rule 67
### *Reciprocal Disclosure of Evidence*

Subject to the provisions of Rules 53 and 69

[12] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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Article 65 *bis*
*Conférence de mise en état*

A) Une conférence de mise en état peut être convoquée par une Chambre de première instance ou par un juge à l'effet d'organiser, entre les parties, des échanges de vues propres à assurer un déroulement rapide de l'instance.

B) La Chambre d'appel ou un juge de la Chambre d'appel peut convoquer une conférence de mise en état.

C) Lorsqu'une conférence de mise en état se tient en application du paragraphe (B) du présent article, les représentants du Bureau du Procureur et les conseils de la défense peuvent y participer par voie d'audioconférence ou de vidéoconférence.

SECTION 3 - *La production des moyens de preuve*

Article 66
*Communication des pièces par le Procureur*

Sous réserve des dispositions des articles 53 et 69

A) Le Procureur communique à la défense

i) Dans les trente jours suivant la comparution initiale de l'accusé, copie de toutes les pièces justificatives jointes à l'acte d'accusation lors de la demande de confirmation ainsi que de toutes les déclarations antérieures de l'accusé recueillies par le Procureur;

[ii) Au plus tard soixante jours avant la date fixée pour le début du procès, copie des déclarations de tous les témoins que le Procureur entend appeler à la barre. Une Chambre de première instance peut, à condition que le bien-fondé d'une telle mesure lui soit démontré, ordonner que des copies de déclarations de témoins à charge supplémentaires soient remises à la défense dans un délai fixé par la Chambre][12].

B) A la demande de la défense, le Procureur doit, sous réserve du paragraphe (C), permettre à celle-ci d'examiner tous livres, documents, photographies et autres objets se trouvant en sa possession ou sous son contrôle qui sont nécessaires à la défense de l'accusé, ou seront utilisés par le Procureur comme moyens de preuve au procès, ou ont été obtenus de l'accusé ou lui appartiennent.

C) Dans le cas où la communication d'informations ou de pièces se trouvant en la possession du Procureur pourrait nuire à de nouvelles enquêtes ou à des enquêtes en cours, ou pour toute autre raison pourrait être contraire à l'intérêt public ou porter atteinte à la sécurité d'un Etat, le Procureur peut demander à la Chambre de première instance siégeant à huis clos d'être dispensé de l'obligation de communication visée aux paragraphes (A) et (B). En formulant sa demande le Procureur fournit à la Chambre de première instance, et à elle seule, les informations ou les pièces dont la confidentialité est recherchée.

Article 67
*Echange des moyens de preuve*

Sous réserve des dispositions des articles 53 et 69

[12] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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

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

ii) The defence shall notify the Prosecutor of its intent to enter :

a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

C) If the defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

## Rule 68
### *Disclosure of Exculpatory and Other Relevant Material*

(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

(B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.

(C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.

(D) The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and

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A) Dès que possible, et en toute hypothèse avant le début du procès :

i) Le Procureur informe la défense du nom des témoins à charge qu'il a l'intention d'appeler pour établir la culpabilité de l'accusé et réfuter tout moyen de défense dont le Procureur a été informé conformément au paragraphe (ii) ci-dessous;

ii) La défense informe le Procureur de son intention d'invoquer :

a) un alibi, avec indication du lieu ou des lieux où l'accusé prétend s'être trouvé au moment des faits incriminés, des nom et adresse des témoins ainsi que de tous autres éléments de preuve sur lesquels l'accusé a l'intention de se fonder pour établir son alibi;

b) un moyen de défense spécial, notamment la déficience mentale ou la diminution des capacités mentales avec indication des nom et adresse des témoins ainsi que de tous autres éléments de preuve sur lesquels l'accusé a l'intention de se fonder pour établir ce moyen de défense.

B) Le défaut d'une telle notification par la défense ne limite pas le droit de l'accusé d'invoquer les moyens de défense susvisés.

C) Si la défense introduit la requête prévue au paragraphe (B) de l'article 66, le Procureur est autorisé à examiner tous livres, documents, photographies et autres objets se trouvant en la possession ou sous le contrôle de la défense et qu'elle entend produire au procès.

D) Si l'une ou l'autre des parties découvre des éléments de preuve ou informations ou pièces supplémentaires qui auraient dû être produits conformément au Règlement, elle en informe sans tarder l'autre partie et la Chambre de première instance.

## Article 68
### *Communication des éléments de preuve à décharge et autres éléments pertinents*

A) Le Procureur communique aussitôt que possible à la défense tous les éléments dont il sait effectivement qu'ils sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité des éléments de preuve du Procureur.

B) Dans la mesure du possible et avec l'accord de la défense, sous réserve du paragraphe (A), le Procureur met à la disposition de la défense, sous forme électronique, les collections de documents pertinents qu'il détient et les logiciels qui permettent à la défense de les passer au crible électroniquement.

C) Si le Procureur obtient des informations confidentielles d'une personne ou entité donnée dans les conditions prévues à l'article 70 et si ces informations contiennent des éléments entrant dans le cadre du paragraphe (A) ci-dessus, il prend les mesures raisonnables pour obtenir le consentement de cette personne ou entité avant de les communiquer à l'accusé ou de l'informer de leur existence.

D) Si le Procureur détient des informations dont la communication pourrait hypothéquer des enquêtes en cours ou ultérieures, ou pourrait, pour toute autre raison, être contraire à l'intérêt public ou porter atteinte à la sécurité d'un État, il peut demander à la Chambre de première instance, siégeant à huis clos, de le dispenser de les com-

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when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

Rule 69
*Protection of Victims and Witnesses*

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

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

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

Rule 70
*Matters not Subject to Disclosure*

A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.

D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).

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muniquer. Ce faisant, le Procureur fournira à la Chambre de première instance (mais uniquement à elle) les informations dont la confidentialité est demandée.

E) À l'issue du procès et de tout appel ultérieur, le Procureur communique à la partie adverse tous les éléments visés au paragraphe (A) ci-dessus.

Article 69
*Protection des victimes et des témoins*

A) Dans des cas exceptionnels, chacune des deux parties peut demander à la Chambre de première instance d'ordonner la non-divulgation de l'identité d'une victime ou d'un témoin pour empêcher qu'ils ne courent un danger ou des risques, et ce, jusqu'au moment où la Chambre en décidera autrement.

B) Lorsqu'elle arrête des mesures de protection des victimes ou des témoins, la Chambre de première instance peut consulter la Section d'aide aux victimes et aux témoins.

C) Sous réserve des dispositions de l'article 75, l'identité des victimes ou des témoins visés au paragraphe (A) doit être divulguée avant le commencement du procès et dans des délais permettant à la défense et au Procureur de se préparer.

Article 70
*Exception à l'obligation de communication*

A) Nonobstant les dispositions des articles 66 et 67, les rapports, mémoires ou autres documents internes établis par une partie, ses assistants ou ses représentants dans le cadre de l'enquête ou de la préparation du dossier n'ont pas à être communiqués ou échangés en vertu des dispositions susmentionnées.

B) Si le Procureur possède des informations qui lui ont été communiquées à titre confidentiel et dans la mesure où ces informations n'ont été utilisées que dans le seul but de recueillir des éléments de preuve nouveaux, le Procureur ne peut divulguer ces informations initiales et leur source qu'avec le consentement de la personne ou de l'entité les ayant fournies. Ces informations et leur source ne seront en aucun cas utilisées comme moyens de preuve avant d'avoir été communiquées à l'accusé.

C) Si, après avoir obtenu le consentement de la personne ou de l'organe fournissant des informations au titre du présent article, le Procureur décide de présenter comme éléments de preuve tout témoignage, document ou autres pièces ainsi fournis, la Chambre de première instance ne peut pas, nonobstant les dispositions de l'article 98, ordonner aux parties de produire des éléments de preuve additionnels reçus de la personne ou de l'organe fournissant les informations originelles. Elle ne peut pas non plus, aux fins d'obtenir ces éléments de preuve additionnels, citer cette personne ou un représentant de cet organe comme témoin ou ordonner sa comparution.

D) Si le Procureur cite comme témoin la personne ou un représentant de l'organe fournissant les informations au titre du présent article, la Chambre de première instance ne peut contraindre ledit témoin à répondre aux questions auxquelles il refuse de répondre en raison du caractère confidentiel de ces informations.

E) Le droit de l'accusé de contester les éléments de preuve présentés par le ministère public reste inchangé, sous réserve uniquement des limites figurant aux paragraphes C et D.

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F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

## SECTION 4 - *Depositions*

### Rule 71
### *Depositions*

A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the witness whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.

C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the witness.

D) The deposition may also be given by means of a video-conference.

E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. He shall transmit the record to the Trial Chamber.

## SECTION 5 - *Preliminary Motions*

### Rule 72
### *Preliminary Motions*

A) Preliminary motions, being motions which :

i) challenge jurisdiction;

ii) allege defects in the form of the indictment;

iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or

iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 66 (A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. The Trial

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F) Les paragraphes (C) et (D) n'empiètent en rien sur le pouvoir qu'a la Chambre de première instance en vertu de l'article 89 (C) d'exclure un élément de preuve dont la valeur probante est nettement inférieure à l'exigence d'un procès équitable.

## SECTION 4 - *Les dépositions*

### Article 71
### *Dépositions*

A) En raison de circonstances exceptionnelles et dans l'intérêt de la justice, la Chambre de première instance peut ordonner à la demande de l'une des parties qu'une déposition soit recueillie en vue du procès, sous la direction de la personne qu'elle mandate à cet effet.

B) La requête visant à faire recueillir une déposition est présentée par écrit. Elle mentionne le nom et l'adresse du témoin, la date, le lieu et l'objet de la déposition ainsi que les circonstances exceptionnelles qui la justifient.

C) S'il est fait droit à la requête, la partie ayant demandé la déposition en avise en temps utile l'autre partie, qui a le droit d'assister à la déposition et de contre-interroger le témoin.

D) La déposition peut aussi être recueillie par voie de vidéoconférence.

E) La personne mandatée à cet effet s'assure que la déposition et, le cas échéant, le contre-interrogatoire sont recueillis et enregistrés selon les formes prévues au Règlement; il reçoit et réserve à la décision de la Chambre les objections soulevées par l'une ou l'autre des parties. Il transmet tout le dossier à la Chambre de première instance.

## SECTION 5 - *Les exceptions préjudicielles*

### Article 72
### *Exceptions préjudicielles*

A) Les exceptions préjudicielles, à savoir :

i) l'exception d'incompétence;

ii) l'exception fondée sur un vice de forme de l'acte d'accusation;

iii) l'exception aux fins de disjonction de chefs d'accusation joints conformément à l'article 49 ci-dessus ou aux fins de disjonction d'instances conformément au paragraphe (B) de l'article 82 ci-après; ou

iv) l'exception fondée sur le rejet d'une demande de commission d'office d'un conseil formulée aux termes de l'article 45 (C);

doivent être enregistrées par écrit et au plus tard trente jours après que le Procureur a communiqué à la défense toutes les pièces jointes et déclarations visées à l'article 66 (A) (i). La Chambre se prononce sur ces exceptions préjudicielles dans les soixante jours suivant leur dépôt et avant le début des déclarations liminaires visées à l'article 84. La Chambre de première instance peut statuer sur ces requêtes sur la

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Chamber may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

B) Decisions on preliminary motions are without interlocutory appeal, save :

i) in the case of motions challenging jurisdiction, where an appeal by either party lies as of right;

ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

C) Appeals under paragraph (B) (i) shall be filed within fifteen days and requests for certification under paragraph (B) (ii) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.

D) For purposes of paragraphs (A) (i) and (B) (i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to :

i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;

ii) the territories indicated in Articles 1, 7 and 8 of the Statute;

iii) the period indicated in Articles 1, 7, and 8 of the Statute; or

iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute.

E) An appeal brought under paragraph (B) (i) may not be proceeded with if a bench of three Judges of the Appeals Chamber, assigned by the presiding Judge of the Appeals Chamber, decides that the appeal is not capable of satisfying the requirements of paragraph (D), in which case the appeal shall be dismissed.

F) Objections to the form of the indictment, including an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by a Trial Chamber.

G) Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.

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seule base des mémoires des parties, à moins qu'il ne soit décidé d'entendre la requête en audience publique.

B) Les décisions ainsi rendues ne sont pas susceptibles d'appel en cours de procès à l'exclusion :

i) des exceptions d'incompétence, auquel cas l'appel est de droit;

ii) des cas où la Chambre de première instance a certifié l'appel, après avoir vérifié que la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

C) Les appels visés au paragraphe (B) (i) et les demandes de certification visées au paragraphe (B) (ii) sont déposées respectivement dans les quinze jours et les sept jours de la décision contestée. Lorsque cette décision est rendue oralement, ce délai court à compter du jour du prononcé de ladite décision, à moins que :

i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer; ou que

ii) la Chambre de première instance ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

Dès lors qu'il est fait droit à la demande de certification, la partie concernée dispose de sept jours pour former un recours auprès de la Chambre d'appel.

D) Aux fins des paragraphes (A) (i) et (B) (i) *supra*, l'exception d'incompétence s'entend exclusivement d'une objection selon laquelle l'acte d'accusation ne se rapporte pas :

i) à l'une des personnes mentionnées aux articles 1, 5, 6, et 8 du Statut;

ii) aux territoires mentionnés aux articles 1, 7 et 8 du Statut;

iii) à la période mentionnée aux articles 1, 7 et 8 du Statut;

iv) à l'une des violations définies aux articles 2, 3, 4 et 6 du Statut.

E) L'appel interjeté en application du paragraphe (B) (i) est rejeté si une formation de trois juges de la Chambre d'appel, nommée par le Président du Tribunal, décide que le recours n'est pas susceptible de remplir l'une des conditions mentionnées au paragraphe (D).

F) Les exceptions fondées sur les vices de forme de l'acte d'accusation, y compris d'un acte d'accusation modifié, font l'objet d'une seule requête par partie, à moins qu'une Chambre de première instance n'en décide autrement.

G) Le défaut par l'accusé de soulever les exceptions préjudicielles dans les délais prescrits par le présent article vaut renonciation de sa part. La Chambre de première instance peut néanmoins déroger à ces délais pour des raisons jugées valables.

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## PART SIX - PROCEEDINGS BEFORE TRIAL CHAMBERS

### SECTION 1 - *General Provisions*

#### Rule 73
*Motions*

A) Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless :

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

If certification is granted, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.

D) Where a date has been set for the hearing of a motion, including a preliminary motion, any additional motions to be heard on that date and any supporting material to the motions must be filed at least ten days before the hearing of the motion. Failure to observe this Rule will mean that the later motion will not be considered on the hearing date, nor will any adjournment of the original motion be granted on the basis of subsequent motions filed, save in exceptional circumstances.

E) A responding party shall, thereafter, file any reply within five days from the date on which Counsel received the motion.

F) In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.

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## CHAPITRE SIXIÈME - LE PROCÈS EN PREMIÈRE INSTANCE

### SECTION 1 - *Dispositions générales*

#### Article 73
*Requêtes*

A) Sous réserve de l'article 72, l'une ou l'autre des parties peut présenter à une Chambre de première instance une ou plusieurs requêtes après la comparution initiale de l'accusé. La Chambre de première instance, ou un juge désigné en son sein par cette dernière, peut rendre une décision sur de telles requêtes sur la seule base des mémoires déposés par les parties, à moins qu'il n'ait été décidé d'entendre la requête en audience publique.

B) Les décisions concernant de telles requêtes ne sont pas susceptibles d'appel interlocutoire, à l'exclusion des cas où la Chambre de première instance a certifié l'appel après avoir vérifié que la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

C) Les requêtes aux fins d'autorisation d'interjeter appel doivent être enregistrées dans les sept jours suivant le dépôt de la décision contestée. Lorsque cette décision est rendue oralement, la requête doit être déposée dans les sept jours suivant ladite décision, à moins que :

i) la partie attaquante n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer; ou

ii) la Chambre de première instance ait indiqué qu'une décision écrite suivrait, auquel cas, le délai court à compter du dépôt de la décision écrite.

Dès lors qu'il est fait droit à la demande de certification, la partie concernée dispose de sept jours pour former un recours auprès de la Chambre d'appel.

D) Lorsque la date d'audition d'une requête a été fixée, y compris pour une requête soulevant une exception préjudicielle, toute requête supplémentaire et tout document soumis à l'appui desdites requêtes doit être déposé au plus tard dix jours avant la date prévue pour l'audition pour être également entendu à cette date. Toute requête supplémentaire qui n'est pas déposée dans les délais prescrits ne sera pas entendue à la date prévue pour l'audition et il ne sera pas fait droit à une demande de report de l'audition de la requête originale sur la base du dépôt de requêtes ultérieures, sauf dans des circonstances exceptionnelles.

E) La partie défenderesse dépose sa réponse au plus tard cinq jours après la date à laquelle elle a reçu la requête.

F) Outre les sanctions envisagées à l'article 46, une Chambre peut sanctionner un conseil si ce dernier dépose une requête, y compris une exception préjudicielle, qui, de l'avis de la Chambre, est fantaisiste, ou constitue un abus de procédure. La Chambre peut demander qu'il soit sursis au paiement d'une partie ou de la totalité des honoraires qui sont dus au titre de la requête déposée, et/ou des frais y relatifs.

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G) Notwithstanding the time limits in Rule 72 (A), the time limit in the present Rule applies.

Rule 73 *bis*
*Pre-Trial Conference*

A) The Trial Chamber shall hold a Pre-Trial Conference prior to the commencement of the trial.

B) At the Pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following :

i) A pre-trial brief addressing the factual and legal issues;

ii) Admissions by the parties and a statement of other matters not in dispute;

iii) A statement of contested matters of fact and law;

iv) A list of witnesses the Prosecutor intends to call with

a) The name or pseudonym of each witness;

b) A summary of the facts on which each witness will testify;

c) The points in the indictment on which each witness will testify; and

d) The estimated length of time required for each witness;

v) A list of exhibits the Prosecutor intends to offer stating, where possible, whether or not the defence has any objection as to authenticity.

The Trial Chamber or the Judge may order the Prosecutor to provide the Trial Chamber with copies of written statements of each witness whom the Prosecutor intends to call to testify.

C) The Trial Chamber or the designated Judge may order the Prosecutor to shorten the examination-in-chief of some witnesses.

D) The Trial Chamber or the designated Judge may order the Prosecutor to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

E) After commencement of Trial, the Prosecutor may, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

F) At the Pre-Trial Conference, the Trial Chamber or the designated Judge may order the defence to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set for trial.

Rule 73 *ter*
*Pre-Defence Conference*

A) The Trial Chamber may hold a Conference prior to the commencement by the defence of its case.

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G) Nonobstant les délais prescrits à l'article 72 (A), ceux prescrits au présent article s'appliquent.

Article 73 *bis*
*Conférence préalable au procès*

A) La Chambre de première instance tient une conférence préalable au procès avant l'ouverture des débats.

B) Durant cette conférence la Chambre, ou un juge désigné en son sein, peut inviter le Procureur à déposer, dans un délai fixé par elle ou par ledit juge et avant la date prévue pour l'ouverture des débats :

i) Un mémoire préalable au procès traitant des questions de fait et de droit;

ii) Des accords entre les parties sur des points de fait ou de droit et un exposé sur d'autres points non litigieux;

iii) Un exposé des points de fait et de droit litigieux;

iv) Une liste des témoins que le Procureur entend citer comportant

a) le nom ou le pseudonyme de chacun des témoins;

b) un résumé des faits au sujet desquels chaque témoin déposera;

c) les points de l'acte d'accusation sur lesquels chaque témoin sera entendu; et

d) la durée probable de chaque déposition;

v) Une liste des pièces à conviction que le Procureur entend présenter, en précisant chaque fois que possible si la défense conteste ou non leur authenticité.

La Chambre, ou un juge peut inviter le Procureur à communiquer à la Chambre les copies des déclarations de chacun des témoins que le Procureur entend appeler à la barre.

C) La Chambre de première instance, ou le juge désigné, peut inviter le Procureur à écourter l'interrogatoire principal de certains témoins.

D) Si la Chambre de première instance, ou le juge désigné, considère qu'un nombre excessif de témoins sont appelés à la barre pour établir les mêmes faits, elle peut inviter le Procureur à réduire ce nombre.

E) Après l'ouverture du procès, le Procureur peut, s'il estime que l'intérêt de la justice le commande, saisir la Chambre de première instance d'une requête aux fins d'être autorisé à revenir à sa liste de témoins initiale ou à revoir la composition de sa liste.

F) Durant la conférence préalable au procès, la Chambre de première instance, ou le juge désigné, peut ordonner à la défense de déposer, sept jours au moins avant la date d'ouverture du procès, une liste des points de fait et de droit reconnus ainsi qu'un mémoire préalable au procès traitant des questions de fait et de droit.

Article 73 *ter*
*Conférence préalable à la présentation des moyens à décharge*

A) Avant que la défense ne présente ses moyens, la Chambre de première instance peut tenir une conférence.

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B) At that Conference, the Trial Chamber or a Judge, designated from among its members, may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following :

i) Admissions by the parties and a statement of other matters which are not in dispute;

ii) A statement of contested matters of fact and law;

iii) A list of witnesses the defence intends to call with :

a) The name or pseudonym of each witness;

b) A summary of the facts on which each witness will testify;

c) The points in the indictment as to which each witness will testify; and

d) The estimated length of time required for each witness;

iv) A list of exhibits the defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity.

The Trial Chamber or the Judge may order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements of each witness whom the Defence intends to call to testify.

C) The Trial Chamber or the designated Judge may order the defence to shorten the estimated length of the examination-in-chief for some witnesses.

D) The Trial Chamber or the designated Judge may order the defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.

E) After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

## Rule 74
### *Amicus Curiae*

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

## Rule 74 *bis*
### *Medical examination of the accused*

A Trial Chamber may, *proprio motu* or at the request of a party, order a medical, including psychiatric examination or a psychological examination of the accused. In such case, the Registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.

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B) Durant cette conférence, la Chambre, ou un juge désigné en son sein, peut inviter la défense à déposer, avant de présenter ses moyens, mais après que l'accusation a fini de présenter les siens :

i) Des accords entre les parties sur des points de fait ou de droit et un exposé sur d'autres points non litigieux;

ii) Un exposé des points de fait et de droit litigieux

iii) Une liste des témoins que la défense entend citer, où sont consignés :

a) le nom ou le pseudonyme de chaque témoin;

b) un résumé des faits au sujet desquels chaque témoin déposera;

c) les points de l'acte d'accusation sur lesquels chaque témoin sera entendu; et

d) la durée probable de chaque déposition;

iv) Une liste des pièces à conviction que la défense entend présenter à l'appui des moyens qu'elle invoque, en précisant chaque fois que possible si l'accusation conteste ou non leur authenticité.

La Chambre, ou un juge peut inviter la défense à communiquer à la Chambre et au Procureur les copies des déclarations de chacun des témoins que la défense entend appeler à la barre.

C) La Chambre de première instance, ou le juge désigné, peut inviter la défense à écourter la durée prévue de l'interrogatoire principal de certains témoins.

D) La Chambre de première instance, ou le juge désigné, peut inviter la défense à réduire le nombre de témoins, si elle considère qu'un nombre excessif de témoins sont appelés à la barre pour établir les mêmes faits.

E) Après le début de la présentation des moyens à décharge, la défense peut, si elle estime que l'intérêt de la justice le commande, saisir la Chambre de première instance d'une requête aux fins d'être autorisée à revenir à sa liste de témoins initiale ou à revoir la composition de sa liste.

## Article 74
### *Amicus curiae*

Une Chambre peut, si elle le juge souhaitable dans l'intérêt d'une bonne administration de la justice, inviter ou autoriser tout Etat, toute organisation ou toute personne à comparaître devant elle et lui présenter toute question spécifiée par la Chambre.

## Article 74 *bis*
### *Examen médical de l'accusé*

Une Chambre de première instance peut, d'office ou à la demande d'une partie, ordonner un examen médical, y compris psychiatrique, ou un examen psychologique de l'accusé. Dans ce cas, le Greffier confie cette tâche à un ou plusieurs des experts dont le nom figure sur une liste préalablement établie par le Greffe et approuvée par le Bureau.

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Rule 75
*Measures for the Protection of Victims and Witnesses*

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

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

i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as

a) Expunging names and identifying information from the Tribunal's public records;

b) Non-disclosure to the public of any records identifying the victim;

c) Giving of testimony through image - or voice- altering devices or closed circuit television; and

d) Assignment of a pseudonym;

ii) Closed sessions, in accordance with Rule 79;

iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence by the party calling that witness that his testimony and his identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).

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

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

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

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

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

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

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Article 75
*Mesures destinées à assurer la protection des victimes et des témoins*

A) Un juge ou une Chambre peut, d'office ou à la demande d'une des parties, de la victime, du témoin intéressé, ou de la Section d'aide aux victimes et aux témoins, ordonner des mesures appropriées pour protéger la vie privée et la sécurité des victimes ou des témoins, à condition toutefois que lesdites mesures ne portent pas atteinte aux droits de l'accusé.

B) Une Chambre peut tenir une audience à huis clos pour déterminer s'il y a lieu d'ordonner :

i) Des mesures de nature à empêcher la divulgation au public ou aux médias de l'identité d'une victime ou d'un témoin, d'une personne qui leur est apparentée ou associée, ou du lieu où ils se trouvent, telles que :

a) la suppression, dans les dossiers du Tribunal, du nom de l'intéressé et des indications permettant de l'identifier;

b) l'interdiction de l'accès au public à toute pièce du dossier identifiant la victime;

c) lors des témoignages, l'utilisation de moyens techniques permettant l'altération de l'image ou de la voix, ou l'usage d'un circuit de télévision fermé, et;

d) l'emploi d'un pseudonyme;

ii) La tenue d'audiences à huis clos conformément à l'article 79;

iii) Des mesures appropriées visant à faciliter le témoignage d'une victime ou d'un témoin vulnérable, par exemple au moyen d'un circuit de télévision fermé unidirectionnel.

C) La Section d'aide aux victimes et aux témoins s'assure qu'avant de comparaître, le témoin a bien été informé que son témoignage et son identité pourront, en application de l'article 75 (F), être divulgués ultérieurement dans une autre affaire. La Chambre supervise le déroulement des interrogatoires afin d'éviter toute forme de harcèlement ou d'intimidation.

D) La Chambre assure le cas échéant le contrôle du déroulement des interrogatoires aux fins d'éviter toute forme de harcèlement ou d'intimidation.

E) Lorsqu'un juge ou une Chambre prend une ordonnance en application du paragraphe (A) ci-dessus, il ou elle y précise, le cas échéant, si le compte rendu de la déposition du témoin bénéficiant des mesures de protection peut être communiqué et utilisé dans le cadre d'autres affaires portées devant le Tribunal.

F) Une fois que des mesures de protection ont été ordonnées en faveur d'une victime ou d'un témoin dans le cadre d'une affaire portée devant le Tribunal (la « première affaire »), ces mesures :

i) continuent de s'appliquer *mutatis mutandis* dans toute autre affaire portée devant le Tribunal (la « deuxième affaire ») et ce, jusqu'à ce qu'elles soient annulées, modifiées ou renforcées selon la procédure exposée dans le présent article, mais;

ii) n'empêchent pas le Procureur de s'acquitter des obligations de communication que lui impose le Règlement dans la deuxième affaire, sous réserve qu'il informe de la nature des mesures de protection ordonnées dans la première affaire les conseils de la défense auxquels il communique les éléments en question.

G) Une partie à la deuxième affaire, qui souhaite obtenir l'annulation, la modification ou le renforcement de mesures ordonnées dans la première affaire, doit soumettre sa demande

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

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

H) Before determining an application under paragraph (G) (ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

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

## Rule 76
*Solemn Declaration by Interpreters and Translators*

Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.

## Rule 77
*Contempt of the Tribunal*

A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who :

i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.

C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may :

i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;

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i) à toute Chambre encore saisie de la première affaire, quelle que soit sa composition, ou

ii) à la Chambre saisie de la deuxième affaire, si aucune Chambre n'est plus saisie de la première affaire.

H) Avant de trancher toute demande présentée en vertu du paragraphe (G) (ii) ci-dessus, la Chambre saisie de la deuxième affaire doit obtenir toutes les informations nécessaires concernant la première affaire, et consulter le juge qui a ordonné les mesures de protection dans cette dernière, si celui-ci est toujours en fonction au Tribunal.

I) Toute demande d'annulation, de modification ou de renforcement de mesures de protection ordonnées au bénéfice d'une victime ou d'un témoin doit être tranchée, soit par la Chambre qui en est saisie, soit par un des juges de celle-ci, le terme «Chambre» employé dans le présent article s'entendant également d'«un juge de cette Chambre».

## Article 76
### *Déclaration solennelle des interprètes et des traducteurs*

Avant de prendre ses fonctions, tout interprète ou traducteur prononce une déclaration solennelle aux termes de laquelle il s'engage à accomplir sa tâche en toute loyauté, indépendance et impartialité et dans le plein respect de son devoir de confidentialité.

## Article 77
### *Outrage au Tribunal*

A) Dans l'exercice de son pouvoir inhérent, le Tribunal peut déclarer coupable d'outrage les personnes qui entravent délibérément et sciemment le cours de la justice, et notamment toute personne qui :

i) étant témoin devant une Chambre refuse de répondre à une question malgré la demande qui lui en est faite par la Chambre;

ii) divulgue des informations relatives à ces procédures en violant en connaissance de cause une ordonnance d'une Chambre;

iii) méconnaît, sans excuse valable, une ordonnance aux fins de comparaître devant une Chambre ou aux fins de produire des documents devant une Chambre;

iv) menace, intimide, lèse, essaie de corrompre un témoin, ou un témoin potentiel, qui dépose, a déposé ou est sur le point de déposer devant une Chambre ou de toute autre manière fait pression sur lui; ou

v) menace, intimide, essaie de corrompre ou de toute autre manière cherche à contraindre toute autre personne, dans le but de l'empêcher de s'acquitter d'une obligation découlant d'une ordonnance rendue par un Juge ou une Chambre.

B) Toute incitation à ou tentative de commettre l'un des actes sanctionnés au paragraphe (A) est assimilée à un outrage au Tribunal et est passible de la même peine.

C) Si une Chambre a des motifs de croire qu'une personne s'est rendue coupable d'outrage au Tribunal, elle peut :

i) demander au Procureur d'instruire l'affaire en vue de préparer et de soumettre un acte d'accusation pour outrage;

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ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

iii) initiate proceedings itself.

D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may :

i) in circumstances described in paragraph (C) (i), direct the Prosecutor to prosecute the matter; or

ii) in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an indictment and either direct amicus curiae to prosecute the matter or prosecute the matter itself.

E) The rules of procedure and evidence in Parts Four to Eight shall apply mutatis mutandis to proceedings under this Rule.

F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.

G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding five years, or a fine not exceeding USD 10,000, or both.

H) Payment of a fine shall be made to the Registrar to be held in a separate account.

I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.

J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless :

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

K) In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President. Where the impugned decision is rendered orally, the appeal shall be filed within fifteen days of the oral decision, unless :

i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

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ii) si elle estime que le Procureur a un conflit d'intérêts pour ce qui est du comportement en cause, enjoindre au Greffier de désigner un *amicus curiae* qui instruira l'affaire et indiquera à la Chambre s'il existe des motifs suffisants pour engager une procédure pour outrage; ou

iii) engager une procédure elle-même.

D) Si la Chambre considère qu'il existe des motifs suffisants pour poursuivre une personne pour outrage, elle peut :

i) dans les circonstances décrites au paragraphe (C) (i), demander au Procureur d'engager une procédure, ou;

ii) dans les circonstances décrites au paragraphe (C) (ii) ou (iii), rendre une ordonnance au lieu de délivrer un acte d'accusation et soit demander à *l'amicus curiae* d'engager une procédure, soit engager une procédure elle-même.

E) Les règles de procédure et de preuve énoncées aux chapitres quatre à huit du Règlement s'appliquent, *mutatis mutandis*, aux procédures visées au présent article.

F) Toute personne accusée ou inculpée d'outrage se verra commettre d'office un conseil, en application de l'article 45 si elle satisfait aux critères fixés par le Greffier pour être déclarée indigente.

G) La peine maximum qu'encourt une personne convaincue d'outrage au Tribunal est de cinq ans d'emprisonnement ou une amende de 10 000 dollars E.-U., ou les deux.

H) L'amende est payée au Greffier qui la verse sur un compte distinct.

I) Si le Tribunal reconnaît un conseil coupable d'outrage en application du présent article, la Chambre ayant rendu cette conclusion peut également décider que le conseil n'est plus habilité à représenter le suspect ou l'accusé devant le Tribunal et conclure que son comportement constitue une atteinte à la discipline en application de l'article 46, ou des deux.

J) Toute décision rendue par une Chambre de première instance en vertu du présent article est susceptible d'appel. L'acte d'appel doit être déposé dans les quinze jours du dépôt de la décision contestée. Lorsque cette décision est rendue oralement, l'acte d'appel doit être déposé dans les quinze jours de la décision contestée, à moins que :

i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer; ou

ii) la Chambre de première instance n'ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

K) Lorsque, statuant en premier ressort, la Chambre d'appel rend une décision en application du présent article, cette décision peut être attaquée dans les quinze jours de son dépôt, au moyen d'un acte d'appel présenté au Président. Cinq juges désignés par le Président statuent sur cet appel. Lorsque la décision contestée est rendue oralement, l'acte d'appel doit être déposé dans les quinze jours qui suivent, à moins que :

i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer; ou

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ii) the Appeals Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Rule 78
*Open Sessions*

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

Rule 79
*Closed Sessions*

A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of :

i) Public order or morality;

ii) Safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

iii) The protection of the interests of justice.

B) The Trial Chamber shall make public the reasons for its order.

Rule 80
*Control of Proceedings*

A) The Trial Chamber may exclude a person from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

B) The Trial Chamber may order the removal of an accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed.

Rule 81
*Records of Proceedings and Preservation of Evidence*

A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.

B) The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist.

C) The Registrar shall retain and preserve all physical evidence offered during the proceedings.

D) Photography, video-recording or audio-recording of the trial, otherwise than by the Registry, may be authorised at the discretion of the Trial Chamber.

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ii) la Chambre d'appel n'ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

Article 78
*Audiences publiques*

Sauf disposition contraire, la procédure devant une Chambre de première instance est publique, à l'exception du délibéré.

Article 79
*Audiences à huis clos*

A) La Chambre de première instance peut ordonner que la presse et le public soient exclus pendant tout ou partie de l'audience :

i) Pour des raisons tenant à l'ordre public ou aux bonnes mœurs;

ii) Pour assurer la sécurité et la protection d'une victime ou d'un témoin ou pour éviter la divulgation de son identité conformément à l'article 75; ou

iii) En considération de l'intérêt de la justice.

B) La Chambre de première instance rend publiques les motifs de sa décision.

Article 80
*Police de l'audience*

A) La Chambre de première instance peut faire expulser une personne de la salle afin de sauvegarder le droit de l'accusé à un procès équitable et public ou afin de conserver la dignité qui sied aux débats.

B) La Chambre de première instance peut ordonner l'expulsion de l'accusé et poursuivre les débats en son absence si l'accusé, après avoir été averti que son comportement risque de justifier son expulsion de la salle d'audience, persiste dans ce comportement.

Article 81
*Enregistrement des débats et conservation des preuves*

A) Le Greffier établit et conserve un compte rendu fidèle de tous les débats, y compris un enregistrement sonore, sa transcription et, lorsque la Chambre de première instance le juge nécessaire, un enregistrement vidéo.

B) La Chambre de première instance peut ordonner la divulgation de tout ou partie du compte rendu des débats tenus à huis clos, lorsque les raisons qui ont motivé le huis clos ont disparu.

C) Le Greffier assure la conservation et la garde de tous les éléments de preuve matériels produits au cours de l'instance.

D) La Chambre de première instance décide si des photographies, ou des enregistrements vidéo ou sonores peuvent être pris lors de l'audience autrement que par les soins du Greffe.

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## SECTION 2 - *Case Presentation*

### Rule 82
### *Joint and Separate Trials*

A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

### Rule 82 *bis*
### *Trial in the Absence of Accused*

If an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that :

i) the accused has made his initial appearance under Rule 62;

ii) the Registrar has duly notified the accused that he is required to be present for trial;

iii) the interests of the accused are represented by counsel.

### Rule 83
### *Instruments of Restraint*

Instruments of restraint, such as handcuffs, shall not be used except as a precaution against escape during transfer or for security reasons, and shall be removed when the accused appears before a Chamber.

### Rule 84
### *Opening Statements*

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may however elect to make its statement after the Prosecutor has concluded presentation of evidence and before the presentation of evidence for the defence.

### Rule 85
### *Presentation of Evidence*

A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence :

i) Evidence for the prosecution;

ii) Evidence for the defence;

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## SECTION 2 - *Déroulement du procès*

### Article 82
### *Jonction et disjonction d'instances*

A) En cas d'instances jointes, chaque accusé a les mêmes droits que s'il était jugé séparément.

B) La Chambre de première instance peut ordonner un procès séparé pour des accusés dont les instances avaient été jointes en application de l'article 48, pour éviter tout conflit d'intérêts de nature à causer un préjudice grave à un accusé, ou pour sauvegarder l'intérêt de la justice.

### Article 82 *bis*
### *Procès en l'absence de l'Accusé*

Lorsqu'un accusé refuse de se présenter devant la Chambre de première instance pour son procès, la Chambre peut ordonner la continuation du procès en l'absence de l'accusé pour aussi longtemps qu'il persiste dans son refus, si la Chambre est convaincue que :

i) la comparution initiale de l'accusé s'est tenue conformément aux dispositions de l'article 62;

ii) le Greffier a dûment notifié à l'accusé que sa présence est requise pour le procès;

iii) les intérêts de l'accusé sont représentés par un conseil.

### Article 83
### *Instruments de contrainte*

Les instruments de contrainte, tels que les menottes, ne sont utilisés que pour éviter un risque d'évasion au cours du transfert ou pour des raisons de sécurité; elles sont retirées lorsque l'accusé comparaît devant la Chambre.

### Article 84
### *Déclarations liminaires*

Avant la présentation par le Procureur de ses moyens de preuve, chacune des parties peut faire une déclaration liminaire. Toutefois, la défense peut décider de faire sa déclaration après que le Procureur a présenté ses moyens de preuve et avant de présenter elle-même ses propres moyens de preuve.

### Article 85
### *Présentation des moyens de preuve*

A) Chacune des parties peut appeler des témoins à la barre et présenter des moyens de preuve. A moins que la Chambre n'en décide autrement dans l'intérêt de la justice, les moyens de preuve sont présentés dans l'ordre suivant :

i) Preuves du Procureur;

ii) Preuves de la défense;

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iii) Prosecution evidence in rebuttal;

iv) Defence evidence in rejoinder;

v) Evidence ordered by the Trial Chamber pursuant to Rule 98.

vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

C) The accused may, if he so desires, appear as a witness in his own defence.

Rule 86
*Closing Arguments*

A) After the presentation of all the evidence, the Prosecutor may present a closing argument. Whether or not the Prosecutor does so, the defence may make a closing argument. The Prosecutor may present a rebuttal argument to which the defence may present a rejoinder.

B) A party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument.

C) The parties shall also address matters of sentencing in closing arguments.

Rule 87
*Deliberations*

A) After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

B) The Trial Chamber shall vote separately on each count contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

C) If the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall also determine the penalty to be imposed in respect of each of the counts.

Rule 88
*Judgement*

A) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it,

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iii) Réplique du Procureur;

iv) Duplique de la défense;

v) Moyens de preuve ordonnés par la Chambre de première instance conformément à l'article 98;

vi) Toute information pertinente permettant à la Chambre de première instance de décider de la sentence appropriée, si l'accusé est reconnu coupable d'un ou de plusieurs des chefs figurant dans l'acte d'accusation.

B) Chaque témoin peut, après son interrogatoire principal, faire l'objet d'un contre-interrogatoire et d'un interrogatoire supplémentaire. Le témoin est d'abord interrogé par la partie qui le présente, mais un juge peut également poser toute question au témoin à quelque stade que se soit.

C) L'accusé peut, s'il le souhaite, comparaître en qualité de témoin pour sa propre défense.

Article 86
*Réquisitions et plaidoiries*

A) Après présentation de tous les moyens de preuve, le Procureur peut prendre ses réquisitions et, qu'il le fasse ou non, la défense peut plaider. S'il le souhaite, le Procureur peut répliquer et la défense présenter une duplique.

B) Les dernières conclusions des parties sont déposées auprès de la Chambre de première instance au plus tard cinq jours avant l'audience consacrée aux réquisitions et aux plaidoiries.

C) Dans leurs réquisitions et plaidoiries, les parties abordent également les questions relatives à la sentence.

Article 87
*Délibéré*

A) Après les réquisitions et les plaidoiries, le Président de la Chambre de première instance déclare clos les débats et la Chambre se retire pour délibérer à huis clos. L'accusé n'est déclaré coupable que lorsque la majorité de la Chambre considère que la culpabilité a été prouvée au-delà de tout doute raisonnable.

B) La Chambre de première instance vote séparément sur chaque chef visé dans l'acte d'accusation. Si deux ou plusieurs accusés sont jugés ensemble, en application de l'article 48, la Chambre statue séparément sur le cas de chacun d'eux.

C) Si la Chambre de première instance déclare l'accusé coupable d'un ou de plusieurs des chefs visés dans l'acte d'accusation, elle fixe la peine à infliger pour chaque déclaration de culpabilité.

Article 88
*Jugement*

A) Le jugement est prononcé en audience publique à une date qui a été notifiée aux parties et aux conseils, qui ont le droit d'être présents.

B) Si elle juge l'accusé coupable d'un crime et si à l'examen des preuves il est établi que l'infraction a donné lieu à l'acquisition illicite d'un bien, la Chambre de

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it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.

C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing. Separate or dissenting opinions may be appended.

## SECTION 3 - *Rules of Evidence*

### Rule 89
### *General Provisions*

A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

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

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

D) A Chamber may request verification of the authenticity of evidence obtained out of court.

### Rule 90
### *Testimony of Witnesses*

A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.

B) Every witness shall, before giving evidence, make the following solemn declaration :

> "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

C) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.

D) A witness, other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

E) A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.

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première instance le constate spécifiquement dans son jugement et peut ordonner la restitution de ce bien conformément à l'article 105.

C) Le Jugement est adopté à la majorité des juges. Une motivation écrite y est jointe ou bien le suit dans les meilleurs délais. Des opinions individuelles ou dissidentes peuvent être jointes.

## SECTION 3 - *De la preuve*

### Article 89
*Dispositions générales*

A) En matière de preuve, les règles énoncées dans la présente section s'appliquent à toute procédure devant les Chambres. Celles-ci ne sont pas liées par les règles de droit interne régissant l'administration de la preuve.

B) Dans les cas où le Règlement est muet, la Chambre saisie applique les règles d'administration de la preuve propres à permettre, dans l'esprit du Statut et des principes généraux du droit, un règlement équitable de la cause.

C) La Chambre peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante.

D) La Chambre peut demander à vérifier l'authenticité de tout élément de preuve obtenu hors audience.

### Article 90
*Témoignages*

A) En principe, les Chambres entendent les témoins en personne, à moins qu'une Chambre n'ordonne qu'un témoin dépose selon les modalités prévues à l'article 71.

B) Avant de déposer, tout témoin fait la déclaration suivante :

> «Je déclare solennellement que je dirai la vérité, toute la vérité et rien que la vérité ».

C) Un enfant qui, de l'avis de la Chambre ne comprend pas la nature d'une déclaration solennelle, peut être autorisé à témoigner sans cette formalité, si la Chambre estime qu'il est suffisamment mûr pour être en mesure de relater les faits dont il a eu connaissance et qu'il comprend ce que signifie le devoir de dire la vérité. Un jugement ne peut cependant être fondé sur un seul témoignage de ce type.

D) Un témoin, autre qu'un expert, qui n'a pas encore témoigné ne peut être présent lors de la déposition d'un autre témoin. Toutefois s'il a entendu cet autre témoignage, le sien n'est pas pour autant irrecevable.

E) Un témoin peut refuser de faire toute déclaration qui risquerait de l'incriminer. La Chambre peut toutefois obliger le témoin à répondre. Aucun témoignage obtenu de la sorte ne peut être utilisé par la suite comme élément de preuve dans une poursuite contre le témoin, hormis le cas de poursuite pour faux témoignage.

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F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to :

i) Make the interrogation and presentation effective for the ascertainment of the truth; and

ii) Avoid needless consumption of time.

[(G) (i) Cross-examination shall be limited to the subject- matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.][13]

iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

Rule 90 *bis*
*Transfer of a Detained Witness*

A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.

B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met :

i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State;

C) The Registry shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar.

D) The Registry shall ensure the proper conduct of the transfer, including the supervision of the witness in the Detention Unit of the Tribunal; it shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the Detention Unit and, as promptly as possible, shall inform the relevant Judge or Chamber.

E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless

[13] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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F) La Chambre exerce un contrôle sur les modalités de l'interrogatoire des témoins et de la présentation des éléments de preuve, ainsi que sur l'ordre dans lequel ils interviennent, de manière à :

i) Faire servir l'interrogatoire et la présentation à la manifestation de la vérité; et

ii) Éviter toute perte de temps injustifiée.

[G) i) Le contre-interrogatoire se limite aux points évoqués dans l'interrogatoire principal, aux points ayant trait à la crédibilité du témoin et à ceux ayant trait à la cause de la partie procédant au contre- interrogatoire sur lesquels le témoin est en mesure de déposer.

ii) Lorsqu'une partie procède au contre- interrogatoire d'un témoin qui est en mesure de déposer sur un point portant sur la cause qu'elle défend, elle doit le confronter aux éléments dont elle dispose qui contredisent les dépositions dudit témoin.][13]

iii) La Chambre de première instance peut, si elle le juge bon, autoriser des questions sur d'autres sujets.

Article 90 *bis*
*Transfert d'un témoin détenu*

A) Toute personne détenue dont la comparution personnelle en qualité de témoin est ordonnée par le Tribunal sera transférée temporairement au centre de détention relevant du Tribunal, sous condition de son retour au terme du délai fixé par le Tribunal.

B) L'ordre de transfert ne peut être délivré par un juge ou une Chambre qu'après vérification préalable de la réunion des conditions suivantes :

i) La présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'Etat requis pour la période durant laquelle elle est sollicitée par le Tribunal;

ii) Son transfert n'est pas susceptible de prolonger la durée de sa détention telle que prévue par l'Etat requis;

C) Le Greffe transmet l'ordre de transfert aux autorités nationales de l'Etat sur le territoire ou sous la juridiction ou le contrôle duquel le témoin est détenu. Le transfert est organisé par les autorités nationales intéressées en liaison avec les autorités du pays hôte et le Greffier.

D) Il incombe au Greffe de s'assurer du bon déroulement dudit transfert, y compris le suivi de la détention du témoin au centre de détention relevant du Tribunal, de s'informer de toutes modifications pouvant intervenir dans les modalités de la détention telles que prévues par l'Etat requis et pouvant affecter la durée de détention du témoin audit centre de détention, et d'en faire part, dans les plus brefs délais, au juge ou à la Chambre concerné.

E) A l'expiration du délai fixé par le Tribunal pour le transfert temporaire, le témoin détenu sera remis aux autorités de l'Etat requis, à moins que l'Etat n'ait trans-

[13] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

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the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.

F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a Judge or a Chamber may extend the period, on the same conditions stated in the Sub-Rule B.

Rule 91
*False Testimony under Solemn Declaration*

A) A Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may :

i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or

ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.

C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may :

i) in circumstances described in paragraph (B) (i), direct the Prosecutor to prosecute the matter; or

ii) in circumstances described in paragraph (B) (ii), issue an order in lieu of an indictment and direct amicus curiae to prosecute the matter.

D) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.

F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.

G) The maximum penalty for false testimony under solemn declaration shall be a fine of USD 10,000 or a term of imprisonment of five years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H).

H) Paragraphs (B) to (G) apply mutatis mutandis to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 *bis* which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.

I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

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mis, pendant cette même période, un ordre de mise en liberté du témoin auquel il devra être immédiatement fait suite.

F) Si, au cours du délai fixé par le Tribunal, la présence du témoin détenu demeure nécessaire, un juge ou une Chambre peut proroger le délai, dans le respect des conditions fixées au paragraphe (B).

Article 91
*Faux témoignage sous déclaration solennelle*

A) D'office ou à la demande d'une partie, la Chambre avertit le témoin de son obligation de dire la vérité et des conséquences pouvant résulter d'un faux témoignage.

B) Si la Chambre a de bonnes raisons de croire qu'un témoin a sciemment et volontairement fait un faux témoignage, elle peut :

i) demander au Procureur d'examiner l'affaire en vue de préparer et de soumettre un acte d'accusation pour faux témoignage; ou

ii) si elle estime que le Procureur a un conflit d'intérêts pour ce qui est du comportement en cause, enjoindre au Greffier de désigner un *amicus curiae* qui instruira l'affaire et indiquera à la Chambre s'il existe des motifs suffisants pour engager une procédure pour faux témoignage.

C) Si la Chambre considère qu'il existe des motifs suffisants pour poursuivre une personne pour faux témoignage, elle peut :

i) dans les circonstances décrites au paragraphe (B) (i), demander au Procureur d'engager une procédure, ou;

ii) dans les circonstances décrites au paragraphe (B) (ii), rendre une ordonnance au lieu de délivrer un acte d'accusation et demander à *l'amicus curiae* d'engager une procédure.

D) Les dispositions de procédure et de preuve prévues aux chapitres quatre à huit du Règlement s'appliquent, *mutatis mutandis*, aux procédures visées au présent article.

E) Toute personne accusée ou inculpée de faux témoignage se verra commettre d'office un conseil, en application de l'article 45 si elle satisfait aux critères fixés par le Greffier pour être déclarée indigente.

F) Un juge ayant siégé à la Chambre de première instance devant laquelle le témoin a comparu, ne peut connaître des procédures pour faux témoignage dont le témoin est l'objet.

G) Le faux témoignage sous déclaration solennelle est passible d'une amende ne pouvant excéder 10 000 dollars E.-U. ou d'une peine d'emprisonnement de cinq ans maximum, ou des deux. L'amende est payée au Greffier qui la verse sur le compte distinct visé au paragraphe (H) de l'article 77 ci-dessus.

H) Les paragraphes (B) à (G) s'appliquent mutatis mutandis à une personne qui fait sciemment et volontairement un faux témoignage dans une déclaration écrite recueillie en conformité avec l'article 92 bis et dont cette personne sait ou a des raisons de savoir qu'elle peut servir de preuve lors des poursuites devant le Tribunal.

I) Toute décision rendue par une Chambre de première instance en vertu du présent article est susceptible d'appel. L'acte d'appel doit être déposé dans les quinze jours du dépôt de la décision contestée. Lorsque cette décision est rendue oralement, l'acte d'appel doit être déposé dans les quinze jours de la décision contestée, à moins que

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i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Rule 92
*Confessions*

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

Rule 93
*Evidence of Consistent Pattern of Conduct*

A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.

B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66.

Rule 94
*Judicial Notice*

A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

Rule 94 *bis*
*Testimony of Expert Witnesses*

A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 *bis* (B) (iv) (b) and Rule 73 *ter* (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether :

i) It accepts or does not accept the witness's qualification as an expert;

ii) It accepts the expert witness statement; or

iii) It wishes to cross-examine the expert witness.

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i) la partie attaquant la décision n'ait pas été présente ou représentée lors du prononcé de la décision, auquel cas le délai court à compter du jour où la partie reçoit notification de la décision orale qu'elle entend attaquer; ou

ii) la Chambre de première instance n'ait indiqué qu'une décision écrite suivrait, auquel cas le délai court à compter du dépôt de la décision écrite.

Article 92
*Aveu*

Sous réserve du respect rigoureux des conditions visées à l'article 63, l'aveu fait par l'accusé lors d'un interrogatoire par le Procureur est présumé libre et volontaire jusqu'à preuve du contraire.

Article 93
*Existence d'une ligne de conduite délibérée*

A) Les éléments de preuve permettant d'établir l'existence d'une ligne de conduite délibérée, dans laquelle s'inscrivent des violations graves du droit international humanitaire aux termes du Statut, sont recevables dans l'intérêt de la justice.

B) Les actes qui tendent à démontrer l'existence d'une telle ligne de conduite font l'objet d'une communication à la défense par le Procureur, conformément à l'article 66.

Article 94
*Constat judiciaire*

A) La Chambre de première instance n'exige pas la preuve de ce qui est de notoriété publique, mais en dresse le constat judiciaire.

B) Une Chambre de première instance peut, d'office ou à la demande d'une partie, et après audition des parties, décider de dresser le constat judiciaire de faits ou de moyens de preuve documentaires admis lors d'autres affaires portées devant le Tribunal et en rapport avec l'instance.

Article 94 *bis*
*Déposition de témoins experts*

A) Nonobstant les dispositions des articles 66 (A) (ii), 73 *bis* (B) (iv) (b) et 73 *ter* (B) (iii) (b) du présent Règlement, la déclaration de tout témoin expert cité par une partie est communiquée dans son intégralité à la partie adverse dès que possible et est, en tout état de cause, déposée auprès de la Chambre de première instance au plus tard vingt et un jours avant la date prévue pour le témoignage de cet expert.

B) Dans les quatorze jours suivant le dépôt de la déclaration du témoin expert, la partie adverse fait savoir à la Chambre de première instance si :

i) elle accepte ou non la qualification du témoin en tant qu'expert;

ii) elle accepte la déclaration du témoin expert;

iii) elle souhaite procéder à un contre-interrogatoire du témoin expert.

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C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

Rule 95
*Exclusion of Evidence on the Grounds of the Means by which it was Obtained*

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96
*Rules of Evidence in Cases of Sexual Assault*

In cases of sexual assault :

i) Notwithstanding Rule 90 (C), no corroboration of the victim's testimony shall be required;

ii) Consent shall not be allowed as a defence if the victim

a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or

b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence.

Rule 97
*Lawyer-Client Privilege*

1. All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless :

i) The client consents to such disclosure; or

ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

2. Nothing in this rule shall be interpreted as permitting the use of confidentiality between Counsel and Client to conceal the participation of Counsel in illegal practices such as fee-splitting with client.

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C) Si la partie adverse fait savoir qu'elle accepte la déclaration du témoin expert, celle-ci peut être admise comme élément de preuve par la Chambre de première instance sans que le témoin soit appelé à déposer en personne.

Article 95
*Irrecevabilité des éléments de preuve en raison des procédés par lesquels ils ont été obtenus*

N'est recevable aucun moyen de preuve obtenu par des procédés qui entament fortement sa fiabilité ou dont l'admission irait à l'encontre de l'intégrité de la procédure et lui porterait gravement atteinte.

Article 96
*Administration de la preuve en matière de violences sexuelles*

En cas de violences sexuelles :

i) Nonobstant les dispositions prévues au paragraphe (C) de l'article 90, la corroboration du témoignage de la victime par des témoins n'est pas requise;

ii) Le consentement ne pourra être utilisé comme moyen de défense, si la victime
   a) a subi, a été menacée de subir ou a eu des raisons de craindre de subir des violences, la contrainte, la détention ou des pressions psychologiques; ou
   b) a estimé raisonnablement que, si elle ne se soumettait pas, une autre personne pourrait subir, être menacée de subir ou avoir des raisons de craindre de subir un tel traitement;

iii) Avant d'être admis à établir le consentement de la victime, l'accusé doit démontrer à la Chambre de première instance siégeant à huis clos que les moyens de preuve qu'il entend produire sont pertinents et crédibles;

iv) Le comportement sexuel antérieur de la victime ne peut être invoqué comme moyen de preuve ou de défense.

Article 97
*Secret des communications entre avocat et client*

1. Toutes les communications échangées entre un avocat et son client sont considérées comme couvertes par le secret professionnel, et, conséquemment, leur divulgation ne peut pas être ordonnée à moins que :

i) Le client ne consente à leur divulgation;

ii) Le client n'en ait volontairement divulgué le contenu à un tiers et que ce tiers n'en fasse état au procès.

2. Aucune disposition du présent Article ne peut être interprétée comme permettant au conseil de se prévaloir du principe de la confidentialité qui préside à ses communications avec son client pour dissimuler sa participation à des pratiques illicites telles que le partage de ses honoraires avec son client.

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Rule 98
*Power of Chambers to Order Production of Additional Evidence*

A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.

Rule 98 *bis*
*Motion for Judgement of Acquittal*

If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

SECTION 4 - *Sentencing Procedure*

Rule 99
*Status of the Acquitted Person*

A) In case of acquittal, the accused shall be released immediately.

B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest and further detention of the accused to take effect immediately.

Rule 100
*Sentencing Procedure on a Guilty Plea*

A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Sub-Rule 102 (B).

Rule 101
*Penalties*

A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.

B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23 (2) of the Statute, as well as such factors as :

i) Any aggravating circumstances;

ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

iii) The general practice regarding prison sentences in the courts of Rwanda;

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Article 98
*Pouvoir des Chambres d'ordonner la production de moyens de preuve supplémentaires*

La Chambre de première instance peut, de sa propre initiative, ordonner la production de moyens de preuve supplémentaires par l'une ou l'autre des parties. Elle peut de sa propre initiative citer des témoins à comparaître.

Article 98 *bis*
*Demande d'acquittement*

Si, à l'issue de la présentation par le Procureur de ses moyens de preuve, la Chambre de première instance conclut que ceux-ci ne suffisent pas à justifier une condamnation pour un ou plusieurs des chefs visés dans l'acte d'accusation, elle prononce, à la demande de l'accusé ou d'office, l'acquittement en ce qui concerne lesdits chefs.

SECTION 4 - *Sentence*

Article 99
*Statut de la personne acquittée*

A) En cas d'acquittement, l'accusé est immédiatement mis en liberté.

B) Si, lors du prononcé du jugement, le Procureur informe la Chambre de première instance, en audience publique, de son intention d'interjeter appel conformément à l'article 108, la Chambre peut, sur la demande du Procureur, émettre contre l'accusé un mandat d'arrêt et de maintien en détention avec effet immédiat.

Article 100
*Prononcé de la sentence lorsque l'accusé a plaidé coupable*

A) Si le plaidoyer de culpabilité d'un accusé est retenu par la Chambre de première instance, le Procureur et la défense peuvent présenter toutes informations pertinentes permettant à la Chambre de première instance de décider de la sentence appropriée.

B) La sentence est prononcée en audience publique et en présence de la personne reconnue coupable, sous réserve du paragraphe (B) de l'article 102.

Article 101
*Peines*

A) Toute personne reconnue coupable par le Tribunal est passible d'une peine d'emprisonnement d'une durée déterminée pouvant aller jusqu'à l'emprisonnement à vie.

B) Lorsqu'elle prononce une peine, la Chambre de première instance tient compte des facteurs visés au paragraphe (2) de l'article 23 du Statut, ainsi que d'autres facteurs comme :

i) L'existence de circonstances aggravantes;

ii) L'existence de circonstances atténuantes, y compris l'importance de la coopération que l'accusé a fournie au Procureur avant ou après la déclaration de culpabilité;

iii) La grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda;

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iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.

C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

Rule 102
*Status of the Convicted Person*

A) Subject to the Trial Chamber's directions in terms of Rule 101, the sentence shall begin to run from the day it is pronounced under Rule 100 (B). However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64.

B) If, by a previous decision of the Trial Chamber, the convicted person has been provisionally released, or is for any other reason at liberty, and he is not present when the judgement is pronounced, the Trial Chamber shall issue a warrant for his arrest. On arrest, he shall be notified of the conviction and sentence, and the procedure provided in Rule 103 shall be followed.

Rule 103
*Place of Imprisonment*

A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.

B) Transfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed.

Rule 104
*Supervision of Imprisonment*

All sentences of imprisonment shall be served under the supervision of the Tribunal or a body designated by it.

Rule 105
*Restitution of Property*

A) After a judgement of conviction containing a specific finding as provided in Rule 88 (B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional

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iv) La mesure dans laquelle la personne reconnue coupable a déjà purgé toute peine qui pourrait lui avoir été infligée par une juridiction nationale pour le même fait, conformément au paragraphe (3) de l'article 9 du Statut.

C) En cas de multiplicité des peines, la Chambre de première instance décide si celles-ci doivent être purgées de façon consécutive ou si elles doivent être confondues.

D) La durée de la période pendant laquelle la personne reconnue coupable a été placée en détention provisoire à vue en attendant d'être remise au Tribunal ou en attendant d'être jugée par une Chambre de première instance ou par la Chambre d'appel est, le cas échéant, déduite de la durée totale de sa peine.

Article 102
*Statut du condamné*

A) Sous réserve des décisions arrêtées par la Chambre de première instance conformément à l'article 101, la sentence est exécutoire dès son prononcé conformément au paragraphe B de l'article 100. Toutefois, dès le dépôt d'un acte d'appel, il est sursis à l'exécution de la sentence jusqu'au prononcé de la décision rendue sur l'appel, le condamné restant néanmoins détenu comme prévu à l'article 64.

B) Si, conformément à une décision antérieure de la Chambre de première instance, le condamné a été mis en liberté provisoire ou est laissé en liberté pour toute autre raison, et s'il n'est pas présent lors du prononcé du jugement, la Chambre émet un mandat d'arrêt à son encontre. Lors de son arrestation, notification lui est donnée de la déclaration de culpabilité et de la sentence, après quoi il est procédé conformément à l'article 103.

Article 103
*Lieu d'emprisonnement*

A) La peine de prison est exécutée au Rwanda ou dans un Etat désigné par le Tribunal sur une liste d'Etats ayant indiqué leur volonté d'accueillir des personnes condamnées pour l'exécution de leur peine. Avant qu'une décision ne soit prise concernant le lieu de l'emprisonnement, la Chambre informe officiellement le Gouvernement rwandais.

B) Le transfert du condamné vers cet Etat est effectué aussitôt que possible après expiration du délai d'appel.

Article 104
*Contrôle de l'emprisonnement*

L'exécution de toute peine d'emprisonnement est soumise au contrôle du Tribunal ou d'un organe désigné par lui.

Article 105
*Restitution de biens*

A) Après jugement de culpabilité contenant le constat spécifique prévu au paragraphe (B) de l'article 88, la Chambre de première instance doit, sur requête du Procureur, ou peut, de sa propre initiative, tenir une audience spéciale pour déterminer les conditions spécifiques dans lesquelles devra être restitué le bien en question ou

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measures for the preservation and protection of the property or proceeds as it considers appropriate.

B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.

D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to Sub-Rules (C), (D), (E) and (F).

### Rule 106
*Compensation to Victims*

A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

C) For the purposes of a claim made under Sub-Rule B the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

## Part Seven - Appellate Proceedings

### Rule 107
*General Provision*

The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.

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le produit de son aliénation. La Chambre peut ordonner dans l'intervalle les mesures conservatoires qu'elle juge appropriées pour la préservation et la protection du bien ou du produit de son aliénation.

B) La décision de restitution s'étend au bien ou au produit de l'aliénation du bien lors même qu'il se trouve entre les mains de tiers n'ayant aucun rapport avec le crime dont l'accusé a été reconnu coupable.

C) Les tiers sont cités à comparaître devant la Chambre de première instance et ont la possibilité de justifier leur possession du bien ou du produit de son aliénation.

D) Si la Chambre de première instance peut, à l'examen des preuves et de leur force probante, déterminer qui est le propriétaire légitime, elle ordonne la restitution à ce dernier du bien ou du produit de son aliénation, ou prend toute autre mesure qu'elle juge appropriée.

E) Si la Chambre de première instance ne peut pas déterminer qui est le propriétaire légitime du bien, elle en informe les autorités nationales compétentes et leur demande de le déterminer.

F) Après notification par les autorités nationales qu'elles ont procédé à cette détermination, la Chambre de première instance ordonne la restitution du bien ou du produit de son aliénation, selon le cas, ou prend toute autre mesure qu'elle juge appropriée.

G) Le Greffier transmet aux autorités nationales compétentes les citations, ordonnances et demandes émanant d'une Chambre de première instance conformément aux paragraphes (C), (D), (E) et (F) du présent article.

### Article 106
*Indemnisation des victimes*

A) Le Greffier transmet aux autorités compétentes des Etats concernés le jugement par lequel l'accusé a été reconnu coupable d'un crime qui a causé un préjudice à une victime.

B) La victime ou ses ayants droit peuvent, conformément à la législation nationale applicable, intenter une action devant une juridiction nationale ou toute autre institution compétente pour obtenir réparation du préjudice.

C) Aux fins d'obtenir réparation du préjudice conformément au paragraphe (B), le jugement du Tribunal est définitif et déterminant quant à la responsabilité pénale de la personne condamnée, du fait de ce préjudice.

## CHAPITRE SEPTIÈME - PROCÉDURES D'APPEL

### Article 107
*Disposition générale*

Les dispositions du Règlement en matière de procédure et de preuve devant les Chambres de première instance s'appliquent, *mutatis mutandis*, à la procédure devant la Chambre d'appel.

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Rule 107 *bis*
*Practice Directions for the Appeals Chamber*

The Presiding Judge of the Appeals Chamber may issue Practice Directions, in consultation with the President of the Tribunal, addressing detailed aspects of the conduct of proceedings before the Appeals Chamber.

Rule 108
*Notice of Appeal*

A) Subject to Sub-Rule (B), a party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the full judgement and sentence are delivered in both English and French, shall file with the Registrar and serve upon the other parties a written notice of appeal, setting forth the grounds.

B) In an appeal from a decision dismissing an objection based on lack of jurisdiction or a decision rendered under Rule 77 or Rule 91, such delay shall be fixed at seven days from the date on which the full decision is delivered in either French or English, whichever comes first. The party wishing to file a notice of appeal may apply to the Appeals Chamber under Rule 116 to enlarge the time so prescribed. Where the ability of the accused to make full answer and defence depends on the availability of the decision in an official language other than that in which it was originally issued, that circumstance shall be taken into account as a good cause under Rule 116.

Rule 108 *bis*
*Pre-Hearing Judge*

A) The Presiding Judge of the Appeals Chamber may designate from among its members a Judge responsible for the pre-hearing proceedings (the "Pre-Hearing Judge").

B) The Pre-Hearing Judge shall ensure that the proceedings are not unduly delayed and shall take any measures related to procedural matters, including the issuing of decisions, orders and directions with a view to preparing the case for a fair and expeditious hearing.

C) The Pre-Hearing Judge shall record the points of agreement and disagreement between the parties on matters of law and fact. In this connection, he or she may order the parties to file further written submissions with the Pre-Hearing Judge or the Appeals Chamber.

D) The Appeals Chamber may *proprio motu* exercise any of the functions of the Pre-Hearing Judge.

Rule 109
*Record on Appeal*

A) The record on appeal shall consist of the trial record, as certified by the Registrar.

B) A certified true copy of the record on appeal shall be promptly transmitted to the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague.

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Article 107 *bis*
*Directives pratiques pour la Chambre d'appel*

Le Président de la Chambre d'appel, en consultation avec le Président du Tribunal, émet des directives pratiques traitant d'aspects particuliers de la conduite des affaires dont la Chambre d'appel est saisie.

Article 108
*Acte d'appel*

A) Sous réserve des dispositions du paragraphe (B), toute partie qui souhaite interjeter appel d'un jugement ou d'une sentence doit, dans les trente jours suivant la réception du jugement complet et du prononcé de la peine, dans ses deux versions française et anglaise, déposer auprès du Greffier et signifier aux autres parties l'acte d'appel, écrit et motivé.

B) Ce délai est ramené à sept jours à compter de la réception de la décision en français ou en anglais, quelque soit la version arrivée la première, pour les appels de décisions ayant rejeté une exception d'incompétence ou de décisions prises en application des articles 77 ou 91. Une partie qui souhaite déposer un acte d'appel peut demander à la Chambre d'appel une prorogation du délai au titre de l'article 116. Le fait que pour pouvoir répondre et se défendre correctement, l'accusé doive avoir accès à la décision dans une langue officielle autre que celle d'origine constitue une justification au titre de l'article 116.

Article 108 *bis*
*Le juge de la mise en état en appel*

A) Le Président de la Chambre d'appel peut désigner au sein de ladite Chambre un juge chargé de la mise en état (le «juge de la mise en état en appel»).

B) Le juge de la mise en état en appel s'assure que la procédure ne prend aucun retard injustifié et prend toutes les mesures relatives aux questions de procédure, y compris des décisions, ordonnances et directives, afin que l'affaire soit en état pour une procédure équitable et rapide.

C) Le juge de la mise en état en appel prend acte des points de droit et de fait litigieux et non litigieux entre les parties. A cet égard, il peut enjoindre les parties d'adresser, soit à lui-même soit à la Chambre d'appel, des conclusions écrites supplémentaires.

D) La Chambre d'appel peut, de sa propre initiative, exercer les fonctions du juge de la mise en état.

Article 109
*Dossier d'appel*

A) Le dossier d'appel est constitué du dossier de première instance, tel que certifié par le Greffier.

B) Une copie certifiée conforme du dossier d'appel est transmise sans tarder à l'unité de soutien à la Chambre d'appel du Tribunal pénal international pour le Rwanda, établie à La Haye.

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Rule 110
*List of Certified Documents to the Parties*

The Registrar shall make available to the parties the list of documents constituting the record on appeal as certified by him and shall provide them with any of these documents on demand.

Rule 111
*Appellant's Brief*

An Appellant's brief shall contain all the argument and authorities. It shall be filed with the Registrar and served on the other party within ninety days of the notice of appeal pursuant to Rule 108.

Rule 112
*Respondent's Brief*

A Respondent's brief shall contain all the arguments and authorities. It shall be served on the other party and filed with the Registrar within thirty days of the filing of the Appellant's brief.

Rule 113
*Brief in Reply*

An Appellant may file a brief in reply within fifteen days after the filing of the Respondent's brief.

Rule 114
*Date of Hearing*

After the expiration of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber may rule on such appeals based solely on the briefs of the parties, unless it decides to hear the appeal in open court. The Registrar shall notify the parties accordingly.

Rule 115
*Additional Evidence*

A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.

B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.

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Article 110
*Communication de la liste des documents certifiés aux parties*

Le Greffier communique aux parties la liste des documents constitutifs du dossier d'appel tels qu'il les a certifiés et, sur leur demande, tout document figurant dans ce dossier.

Article 111
*Mémoire de l'appelant*

Le mémoire de l'appelant comporte tous les éléments de droit et de fait. Il est déposé auprès du Greffier et est signifié à l'autre partie dans un délai de quatre-vingt-dix jours à compter du dépôt de l'acte d'appel conformément à l'article 108.

Article 112
*Mémoire de l'intimé*

Le mémoire de l'intimé comporte tous les éléments de droit et de fait. Il est déposé auprès du Greffier et est signifié à l'autre partie dans un délai de trente jours à compter du dépôt du mémoire de l'appelant.

Article 113
*Mémoire en réplique*

L'appelant peut déposer un mémoire en réplique dans un délai de quinze jours à compter du dépôt du mémoire de l'intimé.

Article 114
*Date de l'audience*

A l'expiration des délais prévus aux articles 111, 112 et 113 pour le dépôt des mémoires, la Chambre d'appel peut rendre une décision d'appel sur la seule base des mémoires déposés par les parties, à moins qu'il ne soit décidé de tenir une audience publique. Le Greffier en informe les parties.

Article 115
*Moyens de preuve supplémentaires*

A) Une partie peut demander à pouvoir présenter devant la Chambre d'appel des moyens de preuve supplémentaires. Une telle requête, qui doit indiquer clairement et précisément la conclusion de fait spécifique de la Chambre de première instance à laquelle le moyen de preuve supplémentaire se rapporte, doit être déposée auprès du Greffier et signifiée à l'autre partie au plus tard soixante-quinze jours à compter de la date du jugement, à moins qu'il existe des motifs valables d'accorder un délai supplémentaire. Toute partie concernée par la requête peut présenter des moyens de preuve contraires.

B) Si la Chambre d'appel conclut à la pertinence, à la fiabilité et à l'indisponibilité au procès des moyens de preuve supplémentaires, elle détermine si leur présentation au procès en aurait peut-être changé l'issue. Le cas échéant, elle en tient compte, ainsi que de toutes les autres pièces du dossier et de tout moyen de preuve contraire présenté, en réplique pour rendre son arrêt définitif en conformité avec l'article 118.

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C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.

D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

Rule 116
*Extension of Time Limits*

The Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause.

Rule 117
*Expedited Appeals Procedure*

A) An appeal under Rule 72 (D), 77 or 91 shall be heard expeditiously and may be determined entirely on the basis of written submissions. The record on appeal shall be the record of the Trial Chamber in the particular phase of proceeding that resulted in the impugned decision.

B) All delays and other procedural requirements shall be fixed by an order of the Presiding Judge.

C) Rules 109 to 114 and 118 (D) shall not apply to such appeals.

Rul 117 *bis*
*Parties' Books*

A) In every appeal before the Appeals Chamber, the Appellant and the Respondent shall each prepare and file an Appeal Book respectively to be entitled "Appellant's Appeal Book" and "Respondent's Appeal Book", in consecutively numbered pages or tabs arranged in the following order :

i) a table of contents describing each document, including each exhibit, by its nature, date, and where applicable, number, with an indication of the page or tab where the document will be found in the Appeal Book, and

ii) a legible copy of the pages of or excerpts from every document in the case to which the party actually refers in the party's briefs or intends to refer in the party's oral arguments.

B) In every appeal before the Appeals Chamber, the Appellant and the Respondent shall each prepare and file a Book of Authorities respectively to be entitled "Appellants Book of Authorities" and "Respondent's Book of Authorities", in consecutively numbered pages or tabs arranged in the following order :

i) a table of contents describing each document, including each exhibit, by its nature, date, and where applicable, number, with an indication of the page or tab where the document will be found in the Appeal Book, and

ii) a legible copy of the pages of or excerpts from every reference material, including case law, statutory and regulatory provisions, from international and national sources, to which the party actually refers in the party's briefs or intends to refer in the party's oral arguments.

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C) La Chambre d'appel peut statuer sur la requête avant ou pendant les débats en appel, et avec ou sans audition des parties.

D) Dans les procès à plusieurs appelants, tout moyen de preuve supplémentaire admis au nom de l'un d'entre eux sera, pour peu qu'il soit pertinent, pris en compte dans l'examen du cas de chacun des autres appelants.

Article 116
*Report des délais*

La Chambre d'appel peut faire droit à une demande de report de délais si elle le considère justifié.

Article 117
*Procédure d'appel simplifiée*

A) Tout appel interjeté en vertu de l'article 72 alinéa (D), 77 ou 91 fait l'objet d'une procédure simplifiée et peut être définitivement tranché sur la base des conclusions écrites des parties. Le dossier d'appel est composé du dossier de la Chambre d'appel à cette étape particulière de la procédure qui a entraîné la décision contestée.

B) Les retards et autres formalités nécessaires sont fixés dans une ordonnance rendue par le Président de Chambre d'appel.

C) Les articles 109 à 114 et 118 (D) ne trouvent pas application dans le cas de cette procédure.

Article 117 *bis*
*Les Livres des parties*

A) Pour tout appel auprès de la Chambre d'appel, l'appelant et l'intimé doivent établir et déposer un livre d'appel intitulé respectivement «Livre d'appel de l'appelant» et «Livre d'appel de l'intimé», dont les pages ou les intercalaires sont numérotés consécutivement dans l'ordre suivant :

i) Une table des matières indiquant pour chaque document, y compris les pièces à conviction, sa nature et sa date ou, le cas échéant son numéro, ainsi que la page ou l'intercalaire correspondant, et

ii) Une copie lisible des pages ou des extraits de chaque document de l'affaire auquel la partie se réfère effectivement dans ses mémoires ou entend se référer dans ses exposés.

B) Pour tout appel auprès de la Chambre d'appel, l'appelant et l'intimé doivent établir et déposer un Livre de sources juridiques intitulé respectivement « Livre de sources juridiques de l'appelant » et « Livre de sources juridiques de l'intimé », dont les pages ou les intercalaires sont numérotés consécutivement dans l'ordre suivant :

i) Une table des matières décrivant chaque document et indiquant la page ou l'intercalaire correspondant, et

ii) Une copie lisible des pages ou extraits de chaque document de référence, y compris la jurisprudence et les dispositions légales et réglementaires, internes et internationales, auquel la partie se réfère effectivement ou entend se référer dans ses exposés.

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C) Unless otherwise ordered in any particular case by the Appeals Chamber *proprio motu* or upon a motion by a party, each party shall file sufficient copies of his Appeal Book and of his Book of Authorities at the Registry of the place where the Appeals Chamber is to hold its hearing, four weeks before the date set for the said hearing. The Registry shall advise the parties of the number of copies required.

D) Failure to file the books prescribed above shall not bar the Appeals Chamber from rendering a judgement, a decision or an order as it sees fit in the appeal.

### Rule 117 *ter*
### *Filing of the Trial Records*

The notice of Appeal under Rule 108 and, where necessary, the briefs earmarked under Rules 111, 112, 113, 115 and 117 shall be filed, by the parties, either with the Registry or with an officer of the Registry specifically designated by the Registrar at the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague. Two similar records shall be kept : one at the Registry of the Tribunal and the other in The Hague. Depending on the place of filing, each record shall consist of the original trial records or certified true copies thereof.

### Rule 118
### *Judgement on Appeal*

A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal and on any additional evidence as has been presented to it.

B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

C) In appropriate circumstances the Appeals Chamber may order that the accused be re-tried before the Trial Chamber.

D) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

E) The written judgement shall be filed and registered with the Registry or with an officer of the Registry specifically designated by the Registrar at the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague.

### Rule 119
### *Status of the Accused Following Judgement on Appeal*

A) A sentence pronounced by the Appeals Chamber shall be enforced immediately.

B) Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or as a result of an order issued pursuant to Rule 65, or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces his acquittal, order his arrest or surrender to the Tribunal.

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C) À moins que la Chambre d'appel, de sa propre initiative ou sur demande d'une partie, n'en décide autrement, chaque partie dépose auprès du Greffe du lieu de la tenue de l'audience de la Chambre d'appel un nombre suffisant de copies de son Livre d'appel et de son Livre de sources juridiques, quatre semaines avant la tenue de l'audience. Le Greffe indique aux parties le nombre de copies requis.

D) Nonobstant l'absence de dépôt des Livres prévu ci-dessus, la Chambre d'appel peut rendre un arrêt, une décision ou une ordonnance si elle le juge approprié.

### Article 117 *ter*
### *Dépôt du dossier de première instance*

L'acte d'appel prévu à l'article 108 et, si nécessaire, les mémoires visés aux articles 111, 112, 113, 115 et 117 sont déposés, par les Parties, soit auprès du Greffe, soit auprès d'une personne mandatée à cet effet par le Greffe à l'Unité d'appel de la Chambre d'appel du TPIR établie à La Haye. Deux dossiers semblables sont conservés : l'un, au Greffe du Tribunal et l'autre, dans les locaux de l'Unité d'appel de la Chambre d'appel du Tribunal Pénal International pour le Rwanda, établie à La Haye. Selon le lieu de dépôt, chaque dossier est constitué du dossier de première instance original ou de copies certifiées conformes de ce dernier.

### Article 118
### *Arrêt d'appel*

A) La Chambre d'appel rend son arrêt en se fondant sur le dossier d'appel et, le cas échéant, sur les nouveaux éléments de preuve qui lui ont été présentés.

B) L'arrêt est adopté à la majorité des juges et est motivé par écrit dans les meilleurs délais possibles. Des opinions individuelles ou dissidentes peuvent y être jointes.

C) Lorsque les circonstances le requièrent, la Chambre d'appel peut renvoyer l'affaire devant la Chambre de première instance pour un nouveau procès.

D) L'arrêt est prononcé en audience publique à une date qui a été notifiée aux parties et aux conseils. Ces derniers sont en droit d'être présents.

E) L'arrêt écrit est déposé et enregistré soit auprès du Greffe, soit auprès d'une personne mandatée à cet effet par le Greffe à l'Unité d'appel de la Chambre d'appel du TPIR établie à La Haye.

### Article 119
### *Statut de l'accusé après l'arrêt d'appel*

A) En cas de condamnation, l'arrêt est exécutoire immédiatement.

B) Si l'accusé n'est pas présent au jour du prononcé de l'arrêt, soit en raison de son acquittement en première instance, soit en raison d'une ordonnance prise conformément à l'article 65 ou pour toute autre cause, la Chambre d'appel rend son arrêt en son absence et ordonne son arrestation et sa mise à disposition du Tribunal, hormis le cas de l'acquittement.

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## PART EIGHT - REVIEW PROCEEDINGS

### Rule 120
*Request for Review*

A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber and could not have been discovered through the exercise of due diligence, the Defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

B) Any brief in response to a request for review shall be filed within forty days of the filing of the request.

C) Any brief in reply shall be filed within fifteen days after the filing of the response.

### Rule 121
*Preliminary Examination*

If the Chamber constituted pursuant to Rule 120 agrees that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

### Rule 122
*Appeals*

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.

### Rule 123
*Return of the Case to the Trial Chamber*

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

## PART NINE - PARDON AND COMMUTATION OF SENTENCE

### Rule 124
*Notification by States*

If, according to the law of a State in which a convicted person is imprisoned, he is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 27 of the Statute, notify the Tribunal of such eligibility.

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## CHAPITRE HUITIÈME - RÉVISION

### Article 120
*Demande en révision*

A) S'il est découvert un fait nouveau qui n'était pas connu de la partie intéressée lors de la procédure devant une Chambre de première instance ou la Chambre d'appel ou dont la découverte n'avait pu intervenir malgré toutes les diligences effectuées, la défense ou, dans l'année suivant le prononcé du jugement définitif, le Procureur peut soumettre à la même Chambre, une demande en révision du jugement. Si, à la date de la demande en révision, un ou plusieurs juges de la Chambre initiale n'est plus en fonction au Tribunal, le Président nomme un ou plusieurs juges en remplacement.

B) Tout mémoire en réponse à une demande en révision est déposé dans les quarante jours du dépôt de la demande.

C) Tout mémoire en réplique est déposé dans les quinze jours du dépôt de la réponse.

### Article 121
*Examen préliminaire*

Si la Chambre, constituée en application de l'article 120 du Règlement, convient que le fait nouveau, s'il avait été établi, aurait pu être un élément décisif de la décision, la Chambre révise le jugement et prononce un nouveau jugement après audition des parties.

### Article 122
*Appel*

Après révision, le jugement prononcé par la Chambre de première instance peut faire l'objet d'un appel conformément au chapitre VII.

### Article 123
*Renvoi de l'affaire devant la Chambre de première instance*

Si le jugement à réviser est frappé d'appel lors du dépôt de la demande en révision, la Chambre d'appel peut renvoyer l'affaire à la Chambre de première instance pour qu'elle statue sur la demande.

## CHAPITRE NEUVIÈME - GRÂCE ET COMMUTATION DE PEINE

### Article 124
*Notification par les Etats*

Si, selon la législation de l'Etat sur le territoire duquel est incarcéré le condamné, ce dernier peut faire l'objet d'une grâce ou d'une commutation de peine, l'Etat en informe le Tribunal conformément à l'article 27 du Statut.

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[Rule 125
*Determination by the President*][14]

The President shall, upon such notice, determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal, and after notification to the Government of Rwanda, whether pardon or commutation is appropriate.

Rule 126
*General Standards for Granting Pardon or Commutation*

In determining whether pardon or commutation is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

[14] As amended at the 15th ICTR plenary session of the Judges of the 21st May 2005.

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[Article 125
*Appréciation du Président*][14]

Le Président, au vu de cette notification, apprécie en consultation avec les membres du Bureau et les juges permanents de la Chambre ayant prononcé la peine qui siègent encore au Tribunal, et après notification adressée au Gouvernement rwandais, s'il y a lieu d'accorder une grâce ou une commutation de peine.

Article 126
*Critères d'octroi de la grâce ou de la commutation de peine*

Aux fins d'apprécier l'opportunité d'une grâce ou d'une commutation de peine, le Président tient compte, entre autres, de la gravité de l'infraction commise, du traitement réservé aux condamnés se trouvant dans la même situation, de la volonté de réinsertion sociale dont fait preuve le condamné ainsi que du sérieux et de l'étendue de la coopération qu'il a fournie au Procureur.

[14] Tel qu'amendé par la 15e session plénière des juges du TPIR du 21 mai 2005.

# *The Prosecutor v. Emmanuel BAGAMBIKI Samuel IMANISHIMWE and André NTAGERURA*

## Case N° ICTR-99-46

***Case History : Emmanuel Bagambiki***

- Name : BAGAMBIKI
- First Name : Emmanuel
- Date of Birth : 1948
- Sex : male
- Nationality : Rwandan
- Former Official Function : Prefect of Cyangugu
- Date of Indictment's Confirmation : 10 October 1997 [1]
- Counts : genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity, serious violations of Article 3 common of the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date of the decision to joint Trials (Cyangugu Case) : 11 October 1999 – Ntagerura and Imanishimwe (Case N° ICTR-99-46)
- Date and Place of Arrest : 5 June 1998, in Togo
- Date of Transfer : 10 July 1998
- Date of Initial Appearance : 19 April 1999
- Pleading : not guilty
- Date Trial Began : 18 September 2000
- Date and content of the Sentence : 25 February 2004, acquittal (Conditional release)
- Appeal from the Sentence : dismissed (8 February 2006), acquittal

***

***Case History : Samuel Imanishimwe***

- Name : IMANISHIMWE
- First Name : Samuel
- Date of Birth : 25 October 1961
- Sex : male

[1] The text of the indictment is reproduced in the *1995-1997 Report*, p. 64. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 72.

# *Le Procureur c. Emmanuel BAGAMBIKI, Samuel IMANISHIMWE et André NTAGURERA*

## Affaire N° ICTR-99-46

***Fiche technique : Emmanuel Bagambiki***

- Nom : BAGAMBIKI
- Prénom : Emmanuel
- Date de naissance : 1948
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Préfet à Cyangugu
- Date de la confirmation de l'acte d'accusation : 10 octobre 1997 [1]
- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de jonction d'instance (dossier Cyangugu) : 11 octobre 1999 - Ntagerura et Imanishimwe (aff. N° ICTR-99-46)
- Date et lieu de l'arrestation : 5 juin 1998, au Togo
- Date du transfert : 10 juillet 1998
- Date de la comparution initiale : 19 avril 1999
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 18 septembre 2000
- Date et contenu du prononcé de la peine : 25 février 2004, acquittement (libération conditionnelle)
- Appel : rejeté, acquittement (8 février 2006)

***

***Fiche technique : Samuel Imanishimwe***

- Nom : IMANISHIMWE
- Prénom : Samuel
- Date de naissance : 25 octobre 1961
- Sexe : masculin

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 64. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 73.

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- Nationality : Rwandan
- Former Official Function : Lieutenant in the *Forces armées rwandaises* (FAR)

- Date of Indictment's Confirmation : 10 October 1997 [2]
- Counts : genocide, complicity in the genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity, serious violations of Article 3 common of the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of the decision to joint Trials (Cyangugu Case) : 11 October 1999 – Bagambiki and Ntagerura (Case N° ICTR-99-46)
- Date and Place of Arrest : 11 August 1997, in Kenya
- Date of Transfer : 11 August 1997
- Date of Initial Appearance : 27 November 1997
- Pleading : not guilty
- Date Trial Began : 18 September 2000
- Date and content of the Sentence : 25 February 2004, 27 years imprisonment
- Appeal from the Sentence : Appeals Chamber reduced the sentence to 12 years (7 July 2006)

***

***Case History : André Ntagerura***

- Name : NTAGERURA
- First Names : André
- Date of Birth : 2 January 1950
- Sex : male
- Nationality : Rwandan
- Former Official Function : Minister of Transport
- Date of Indictment's Confirmation : 10 August 1996
- Counts : genocide, conspiracy to commit genocide, complicity in genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date of the decision to joint Trials (*Cyangugu* Case) : 11 October 1999 – Imanishimwe and Bagambiki (case n° ICTR-99-46)
- Date of Indicment's Amendments : 29 January 1998

- Date and Place of Arrest : 27 March 1996, in Cameroon

[2] The text of the indictment is reproduced in the *1995-1997 Report*, p. 64. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 72.

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- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Lieutenant des Forces Armées Rwandaises (FAR)
- Date de la confirmation de l'acte d'accusation : 10 octobre 1997 [2]
- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commette le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de jonction d'instance (dossier Cyangugu) : 11 octobre 1999 – Bagambiki et Ntagerura (aff. n° ICTR-99-46)
- Date et lieu de l'arrestation : 11 août 1997, au Kenya
- Date du transfert : 11 août 1997.
- Date de la comparution initiale : 27 novembre 1997
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 18 septembre 2000
- Date et contenu du prononcé de la peine : 25 février 2004, 27 ans d'emprisonnement
- Appel : la Chambre d'appel a réduit la peine à 12 ans (7 juillet 2006)

***

***Fiche technique : André Ntagerura***

- Nom : NTAGERURA
- Prénom : André
- Date de naissance : 2 janvier 1950
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Ministre du Transport
- Date de la confirmation de l'acte d'accusation : 10 août 1996
- Chefs d'accusation : génocide, entente en vue de commettre le génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de jonction d'instance (dossier *Cyangugu*) : 11 octobre 1999 avec Imanishimwe et Bagambiki (aff. n° ICTR-99-46)
- Date des modifications subséquentes portées à l'acte d'accusation : 29 janvier 1998
- Date et lieu de l'arrestation : 27 mars 1996, au Cameroun

[2] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 64. Le texte de la sion de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 73.

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- Date of Transfer : 23 January 1997
- Date of Initial Appearance : 20 February 1997
- Pleading : not guilty
- Date Trial Began : 18 September 2000
- Date and content of the Sentence : 25 February 2004, acquittal (Conditional release)
- Appeal from the Sentence : dismissed, acquittal (8 February 2006)

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- Date du transfert : 23 janvier 1997
- Date de la comparution initiale : 20 février 1997
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 18 septembre 2000
- Date et contenu du prononcé de la peine : 25 février 2004, acquittement (libération conditionnelle)
- Appel : rejeté, acquittement (8 février 2006)

## *Order of the Presiding judge replacing a judge in a case before the Appeals Chamber 25 January 2005 (ICTR-99-46-A)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Emmanuel Bagambiki, Samuel Imanishimwe, André Ntagurera – Power of the President of the Appeals Chamber, Replacement of a judge in an Appeal case*

*International instruments cited :*

*Rules of Procedure and Evidence, rule 108* bis*; Statute, art. 11 (3) and 13 (4)*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rule 108 *bis* of the Rules of Procedure and Evidence of the International Tribunal;

HEREBY ASSIGN, with immediate effect, Judge Wolfgang Schomburg to replace me in the present case; and

ORDER that, in the case of *The Prosecutor v. André Ntagerura et al.,* Case No. ICTR-99-46-A, the Appeals Chamber be composed as follows :

Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

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

Done this 25th day of January 2005, At The Hague, The Netherlands.

[Signed] : Theodor Meron

***

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## *Décision relative à la requête de Samuel Imanishimwe aux fins de suspension du délai de dépôt du mémoire en réplique 13 avril 2005 (ICTR-99-46-A)*

(Original : Français)

Chambre d'Appel

Juge : Mehmet Güney, Juge de la mise en état en appel

*Emmanuel Bagambiki, Samuel Imanishimwe, André Ntagurera – Mémoire en réplique, délai – Droit de l'accusé de préparer sa défense dans la langue qu'il souhaite, Obligation du Procureur de notifier dans la langue officielle choisie par l'accusé, Droit à la demande de suspension du délai de dépôt, Motif valable – Traduction des documents – Requête acceptée*

*Instruments internationaux cités :*

*Règlement de procédure et de preuve, art. 3, 113 et 116; Statut, art. 20 et 31*

NOUS, Mehmet Güney, Juge de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 («Tribunal international») et Juge de la mise en état en appel dans cette affaire[1],

VU le jugement et la sentence prononcés dans la présente affaire par la Chambre de première instance III le 25 février 2004 («Jugement »);

VU l'acte d'appel contre le Jugement et le mémoire d'appel déposés par Samuel Imanishimwe («appelant») les 2 septembre 2004 et 25 février 2005 respectivement;

VU le mémoire de l'intimé déposé par le Procureur en langue anglaise le 5 avril 2005[2];

VU la «Requête aux fins de suspension du délai de dépôt de la duplique [sic] de Samuel Imanishimwe conformément aux articles 20 du Statut, 3, 113 et 116 du Règlement de procédure et de preuve» déposée par l'appelant le 11 avril 2005 («Requête»);

ATTENDU que l'appelant demande à la Chambre d'appel de suspendre le délai de dépôt de son mémoire en réplique jusqu'à réception par sa Défense de la version française du mémoire de l'intimé du Procureur et d'ordonner au Greffe du Tribunal international de lui notifier dans les meilleurs délais, ainsi qu'à sa Défense, la version française dudit mémoire;

ATTENDU qu'au soutien de sa Requête, l'appelant fait valoir (i) que le mémoire de l'intimé du Procureur n'a été notifié que dans sa seule version anglaise; (ii) qu'il ne maî-

[1] Egalement Juge président dans cette affaire depuis le 25 janvier 2005.
[2] *Prosecutor's Respondent's Brief*, 5 April 2005.

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trise pas la langue anglaise et que le français est la langue de travail de sa défense; et (iii) que « l'impossibilité […] de bien comprendre » la version anglaise du mémoire de l'intimé du Procureur constitue un «justificatif suffisant» au titre de l'article 116 du Règlement de procédure et de preuve du Tribunal international («Règlement»);

VU la «*Prosecutor's Response to Appellant Samuel Imanishimwe's* 'Requête aux fins de suspension du délai de dépôt de la duplique de Samuel Imanishimwe conformément aux articles 20 du Statut, 3, 113 et 116 du Règlement de Procédure et de Preuve'» déposée le 12 avril 2005, dans laquelle le Procureur fait savoir qu'il ne s'oppose pas à la demande de l'Appelant;

ATTENDU qu'aux termes de l'article 113 du Règlement,

> «[l]'appelant peut déposer un mémoire en réplique dans un délai de quinze jours à compter du dépôt du mémoire de l'intimé»;

ATTENDU que l'article 116 du Règlement prévoit que :

> A) La Chambre d'appel peut faire droit à une demande de report de délais si elle considère que des motifs valables le justifient.
>
> B) Le fait que pour pouvoir répondre et se défendre correctement, l'accusé doive avoir accès à une décision dans une langue officielle autre que celle de l'original constitue un motif valable au sens de cet article;

ATTENDU qu'aux termes de l'article 31 du Statut du Tribunal international, «[l]es langues de travail du Tribunal international sont l'anglais et le français»;

CONSIDÉRANT qu'il va de l'intérêt de la justice d'accorder à l'appelant un délai raisonnable pour prendre connaissance du mémoire de l'intimé du Procureur dans une langue officielle qu'il comprend et dans laquelle travaille sa Défense avant de déposer son mémoire en réplique;

CONSIDÉRANT qu'il est fait état dans la requête d'un «motif valable» au sens de l'article 116 du Règlement qui justifie que soit fait droit à la demande de suspension du délai de dépôt du mémoire en réplique de l'appelant jusqu'à notification de la version française du mémoire de l'intimé du Procureur;

PAR CES MOTIFS,

FAISONS DROIT à la requête;

ORDONNONS à l'appelant de déposer son mémoire en réplique dans un délai de quinze jours à compter de la notification à sa Défense de la version française du mémoire de l'intimé du Procureur ;

INVITONS le Greffe à procéder à la traduction en langue française du mémoire de l'intimé du Procureur dans les meilleurs délais et à nous informer de la date à laquelle la traduction sera disponible.

Fait en français et en anglais, le texte français faisant foi.

Fait le 13 avril 2005, à La Haye, Pays-Bas.

[Signé] : Mehmet Güney

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## *Order replacing a judge in a case before the Appeals Chamber 15 July 2005 (ICTR-99-46-A)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Emmanuel Bagambiki, Samuel Imanishimwe, André Ntagurera – Judges, Assignment to the Appeals Chamber, Replacement of judges in the Appeal Case – Interests of justice, Reasonable delay*

*International instrument cited :*

*Statute, art. 11 (3), 13 (3), 13 (4) and 14 (4)*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Tribunal"),

NOTING the appeals lodged by The Office of the Prosecutor on 25 March 2004 and by Samuel Imanishimwe on 2 September 2004 against the Judgement rendered by Trial Chamber III on 25 February 2004;

CONSIDERING the composition of the Tribunal as set out in Document IT/222 of the International Tribunal for the former Yugoslavia, issued on 17 November 2003;

NOTING the "President's Assignment of Judge Andrésia Vaz to the Appeals Chamber and Judge Inés Weinberg de Roca to a Trial Chamber" of 24 February 2005 ("Tribunal President's Re-Assignment Order"), made by Judge Erik Møse, President of the Tribunal, which reads as follows :

RECALLING that on 31 January 2003, the General Assembly elected eleven permanent judges to the Tribunal in conformity with Article 12 *bis* of its Statute;

HAWNG CONSIDERED Article 13 (3) of the Statute, which provides that the President, after consultation with the permanent judges of the Tribunal, shall assign two of the permanent judges elected in accordance with Article 12 *bis* of the Statute to be members of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia;

TAKING INTO ACCOUNT Article 13 (4) of the Statute, according to which members of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Criminal Tribunal for Rwanda;

TAKING ALSO INTO ACCOUNT Article 14 (4) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, according to which two of the judges

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## *Ordonnance portant remplacement d'un juge dans une affaire devant la Chambre d'appel 15 juillet 2005 (ICTR-99-46-A)*

(Original : Anglais)

Chambre d'appel

Juge : Theodor Meron, Président de la Chambre

*Emmanuel Bagambiki, Samuel Imanishimwe, André Ntagurera – Juges, Nomination à la Cour d'Appel, Remplacement de juges dans l'affaire en appel – Intérêts de la Justice, Délai raisonnable*

*Instrument international cité :*

*Statut, art. 11 (3), 13 (3), 13 (4) et 14 (4)*

NOUS, THEODOR MERON, Président de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 (le «Tribunal»),

VU les appels interjetés par le Bureau du Procureur le 25 mars 2004 et par Samuel Imanishimwe le 2 septembre 2004 contre le jugement rendu par la Chambre de première instance III le 25 février ;

VU la composition du Tribunal telle qu'elle est exposée dans le document IT/222 du Tribunal international pour l'ex-Yougoslavie, établi le 17 novembre 2003;

VU l'«Ordonnance du Président portant nomination de la juge Andrésia Vaz à la Chambre d'appel et de la juge Inés Weinberg de Roca à une Chambre de première instance» (l'«Ordonnance du Président du Tribunal portant réaffectation de juges»), rendue le 24 février 2005 par le juge Erik Møse, Président du Tribunal, qui est libellée comme suit :

RAPPELANT que, le 31 janvier 2003, l'Assemblée générale a élu onze juges permanents du Tribunal conformément à l'article 12 *bis* du Statut du Tribunal;

VU l'article 13 (3) du Statut, qui dispose que le Président, après avoir consulté les juges permanents du Tribunal, nomme deux des juges permanents élus conformément à l'article 12 *bis* du Statut à la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie;

VU l'article 13 (4) du Statut, selon lequel les juges siégeant à la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie siègent également à la Chambre d'appel du Tribunal pénal international pour le Rwanda;

VU l'article 14 (4) du Statut du Tribunal pénal international pour l'ex-Yougoslavie, selon lequel deux des juges nommés conformément au Statut du Tribunal pénal inter-

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elected in accordance with the Statute of the International Criminal Tribunal for Rwanda shall be assigned by the President of the Tribunal, in consultation with the President of the International Criminal Tribunal for the Former Yugoslavia, to be members of the Appeals Chamber and permanent judges of the International Criminal Tribunal for the Former Yugoslavia;

RECALLING that on 4 June 2003, Judge Mehmet Güney and Judge Inés Weinberg de Roca were assigned to the Appeals Chambers of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia;

HAVING CONSULTED with the permanent judges of the International Criminal Tribunal for Rwanda and the President of the International Criminal Tribunal for the Former Yugoslavia, and bearing in mind the need to ensure the interests of the Tribunal as a whole and, in particular, the need to ensure trial experience from the Tribunal in the work of the Appeals Chamber and appeals experience in the work of the Trial Chambers;

ASSIGNS Judge Andrésia Vaz to the Appeals Chambers of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, and Judge Inés Weinberg de Roca to Trial Chamber III of the International Criminal Tribunal for Rwanda. These assignments shall take effect from 15 August 2005.

CONSIDERING that the case *Prosecutor v. Ntagerura et al.,* Case n° ICTR-99-46-A ("*Ntagerura*") is in its pre-appeal phase and that, thus, no hearing in this case has been held;

CONSIDERING further that it is in the interest of an effective management of the case to ensure that no undue delay will result from the implementation of the Tribunal President's Re-Assignment Order;

PURSUANT TO Articles 11 (3) and 13 (4) of the Statute of the Tribunal;

HEREBY ASSIGN, with effect from 15 August 2005, Judge Andrésia Vaz to replace Judge Inés Weinberg de Roca in the present case;

AND ORDER that in the case of *Ntagerura,* the Appeals Chamber shall be constituted, as of 15 August 2005, as follows :

Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Wolfgang Schomburg

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

Done this 15th day of July 2005, At The Hague, The Netherlands.

[Signed] : Theodor Meron

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national pour le Rwanda seront nommés par le Président dudit Tribunal, en consultation avec le Président du Tribunal pénal international pour l'ex-Yougoslavie, membres de la Chambre d'appel et juges permanents du Tribunal pénal international pour l'ex-Yougoslavie;

RAPPELANT que, le 4 juin 2003, le juge Mehmet Güney et la juge Inés Weinberg de Roca ont été nommés à la Chambre d'appel du Tribunal pénal international pour le Rwanda et du Tribunal pénal international pour l'ex-Yougoslavie;

AYANT CONSULTÉ les juges permanents du Tribunal pénal international pour le Rwanda et le Président du Tribunal pénal international pour l'ex-Yougoslavie, et compte tenu de la nécessité de veiller à l'intérêt du Tribunal dans son ensemble et, en particulier, de faire profiter, dans le cadre de leurs travaux respectifs, la Chambre d'appel de l'expérience des procès en première instance et les Chambres de première instance, de l'expérience de la procédure en appel;

NOMME la juge Andrésia Vaz à la Chambre d'appel du Tribunal pénal international pour le Rwanda et du Tribunal pénal international pour l'ex-Yougoslavie, et la juge Inés Weinberg de Roca a la Chambre de première instance III du Tribunal pénal international pour le Rwanda. Ces nominations prennent effet à compter du 15 août 2005.

ATTENDU que l'affaire *Le Procureur* c. *Ntagerura et consorts,* affaire n° ICTR-99-46-A (l'«affaire *Ntagerura*») est actuellement en la phase de mise en état en appel et que, donc, aucune audience n'a été tenue dans cette affaire;

ATTENDU par ailleurs que l'intérêt d'une bonne administration de l'affaire commande que l'on veille à ce que la mise en œuvre de l'ordonnance du Président du Tribunal portant réaffectation de juges n'entraîne aucun retard indu;

VU les articles 11 (3) et 13 (4) du Statut du Tribunal;

NOMMONS la juge Andrésia Vaz en remplacement de la juge Inés Weinberg de Roca dans la présente affaire et, ce, à compter du 15 août 2005;

ET ORDONNONS qu'à compter du 15 août 2005, la Chambre d'appel, dans l'affaire *Ntagerura,* sera composée des juges suivants :

Florence Mumba

Mehmet Güney

Fausto Pocar

Andrésia Vaz

Wolfgang Schomburg

Fait en anglais et en français, la version anglaise faisant foi.

FAIT à La Haye (Pays-Bas), le 15 juillet 2005.

[Signé] : Theodor Meron

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## *Order replacing a judge in a case before the Appeals Chamber 18 November 2005 (ICTR-99-46-A)*

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

*Emmanuel Bagambiki, Samuel Imanishimwe, André Ntagurera – Judges, Expiration of a mandate at the Appeals Chamber, Replacement of a judge in the Appeal Case*

I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994,

NOTING the appeals lodged by the Office of the Prosecutor on 25 March 2004 and by Samuel Imanishimwe on 2 September 2004 against the Judgement rendered by the Trial Chamber on 25 February 2004 ;

NOTING the expiration of the term of Judge Florence Mumba, a member of the Appeals Chamber, effective 16 November 2005;

CONSIDERING the composition of the Appeals Chamber as set out in document IT/242 of the International Tribunal for the former Yugoslavia, issued on 17 November 2005;

CONSIDERING that this case is in its pre-appeal phase and that, thus, no hearing in this case has been held;

HEREBY ASSIGN, with immediate effect, Judge Theodor Meron to replace Judge Florence Mumba in the present case;

AND ORDER that the Bench in *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case n° ICTR-99-46-A, shall be composed as follows :

Judge Fausto Pocar
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

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

Done this 18th day of November 2005, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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# *The Prosecutor v. Michel BAGARAGAZA*

# Case N° ICTR-2005-86

***Case History***

- Name : BAGARAGAZA
- First Name : Michel
- Date of Birth : 1945
- Sex : male
- Nationality : Rwandan
- Former Official Function : Director General of OCIR-Thé

- Date of Indictment : 28 July 2005 (Amended on the 1st December 2006)

- Counts : Genocide, Conspiracy to commit genocide, Complicity in the genocide
- Date and Place of Arrest : 15 August 2005, Arusha, Tanzania (Surrendered)
- Date of Transfer : 15 August 2005
- Date of Initial Appearance : 16 August 2005
- Pleading : not guilty
- Date Trial Began : on the 18th of August 2005 the Accused was transferred to The Hague for detention; on the 7th of May 2005, the Case was transferred to a Dutch national jurisdiction in the Hague; on the 20th of May 2008, the Accused was transferred back to Arusha.

# *Le Procureur c. Michel BAGARAGAZA*

# Affaire n° ICTR-2005-86

***Fiche technique***

- Nom : Bagaragaza
- Prénom : Michel
- Date de naissance : 1945
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Directeur général de l'OCIR-Thé
- Date de la confirmation de l'acte d'accusation : 28 juillet 2005 (acte amendé le 1er décembre 2006)
- Chefs d'accusation : Génocide, Entente en vue de commettre le génocide, Complicité dans le génocide
- Date et lieu de l'arrestation : 15 août 2005, Arusha, Tanzanie (Reddition)
- Date du transfert : 15 août 2005
- Date de la comparution initiale : 16 août 2005
- Précision sur le plaidoyer :
- Date du début du procès : 18 août 2005,transféré à La Haye (Pays-Bas) le 7 mai 2007 afin d'y être jugé par une juridiction nationale hollandaise. Le 20 mai 2008, l'accusé a été renvoyé à Arusha.

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## *Acte d'accusation*
## *28 juillet 2005 (ICTR-2005-86-I)*

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «statut»), accuse :

Michel BAGARAGAZA

des crimes suivants :

I. Entente en vue de commettre le génocide,

II. Génocide, ou subsidiairement,

III. Complicité dans le génocide.

### II. L'accusé

1. Michel Bagaragaza est né en 1945 en République rwandaise dans la commune de Giciye (préfecture de Gisenyi).

2. Dans toutes les circonstances visées par le présent acte d'accusation, Michel Bagaragaza était :

A) Haut fonctionnaire :

i) Directeur général de l'OCIR-Thé, l'organisme public exerçant la tutelle de l'Etat sur la filière thé du Rwanda, notamment sur les usines de thé; à ce titre, il avait autorité sur les dirigeants et les agents des usines de thé de Rubaya et de Nyabihu, en ce qu'il pouvait leur ordonner de commettre ou de s'abstenir de commettre des actes illicites et les discipliner ou les punir de leurs actes ou omissions contraires à la loi;

ii) Membre du comité préfectoral du parti politique MRND dans la préfecture de Gisenyi, lequel a créé et contrôlait la milice *Interahamwe* dans cette préfecture;

iii) Président d'honneur de la milice *Interahamwe* de Kabuga dans la préfecture de Kigali-Rural; à ce titre, il avait autorité sur les *Interahamwe* de Kabuga.

### III. Accusations et exposé succinct des faits

3. Dans toutes les circonstances visées par le présent acte d'accusation, il existait au Rwanda un groupe racial ou ethnique minoritaire appelée le groupe tutsi et officiellement considéré comme tel par les pouvoirs publics rwandais. La majorité de la population appartenait à un autre groupe racial ou ethnique appelé le groupe hutu qui lui était aussi officiellement considéré comme tel par les pouvoirs publics.

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4. Entre le 1er janvier et le 17 juillet 1994, sur l'ensemble du territoire rwandais, des miliciens *Interahamwe*, des militaires des Forces armées rwandaises (FAR) et des civils armés ont pris pour cible et attaqué des civils en raison de leur appartenance au groupe ethnique ou racial tutsi ou parce qu'ils étaient considérés comme des personnes sympathisant avec les Tutsis. Au cours de ces attaques, certains citoyens rwandais ont tué des personnes soupçonnées d'appartenir au groupe tutsi ou porté gravement atteinte à leur intégrité physique ou mentale. De nombreuses personnes identifiées comme membres du groupe ethnique ou racial tutsi y ont trouvé la mort.

## PREMIER CHEF D'ACCUSATION : ENTENTE EN VUE DE COMMETTRE LE GÉNOCIDE

Le Procureur du Tribunal pénal international pour le Rwanda accuse Michel Bagaragaza d'entente en vue de commettre le génocide, crime prévu à l'article 2 (3) (b) du Statut, en ce que le 1er janvier et le 17 juillet 1994 ou entre ces dates, Michel Bagaragaza s'est entendu avec Léon Mugesera, Protais Zigiranyirazo, Mathias Nyagasaza, Elie Sagatwa, Alcade Sebatware, Charles Nzabagerageza, Bernard Munyagishari, Robert Kajuga, Mathieu Ngirumpatse, le capitaine Simbikangwa, le capitaine Haguma, le docteur Kabera, Séraphin Rwamakuba, Laurent Semanza, Joseph Sebisogo, Aloys Ngirabatware, Pierre Damien Rusagiza, Anastase Ngayabarezi, Joseph Nzirorera, Augustin Ngirabatware, Claver Mvuyekure, Pasteur Musabe et d'autres personnes pour tuer des membres du groupe racial ou ethnique tutsi ou porter gravement atteinte à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, ainsi qu'il est exposé aux paragraphes 5 à 12.

### *Exposé succinct des faits relatifs au premier chef d'accusation*

*Responsabilité pénale individuelle*

5. En application du paragraphe 1er de l'article 6 du Statut, l'accusé Michel Bagaragaza est responsable du crime d'entente en vue de commettre le génocide pour avoir décidé d'un commun accord avec Léon Mugesera, Protais Zigiranyirazo, Mathias Nyagasaza, Elie Sagatwa, Alcade Sebatware, Charles Nzabagerageza, Bernard Munyagishari, Robert Kajuga, Mathieu Ngirumpatse, le capitaine Simbikangwa, le capitaine Haguma, le docteur Kabera, Séraphin Rwamakuba, Laurent Semanza, Joseph Sebisogo, Aloys Ngirabatware, Pierre Damien Rusagiza, Anastase Ngayabarezi, Joseph Nzirorera, Augustin Ngirabatware, Claver Mvuyekure, Pasteur Musabe et d'autres personnes pour tuer des membres de la population tutsie ou de porter gravement atteinte à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie un groupe ethnique tutsi, et exécuté leur accord en commettant les actes décrits aux paragraphes 6 à 12 entre le 22 novembre 1992 et le 17 juillet 1994.

6. Le 22 novembre 1992 ou vers cette date, Léon Mugesera, Vice-président du comité préfectoral du MRND de Gisenyi dont Michel Bagaragaza était membre, a prononcé dans la ville de Rubaya (préfecture de Gisenyi) un discours demandant aux Hutus de renvoyer rapidement les Tutsis en Ethiopie par la rivière Nyaborongo. Michel Bagaragaza a participé à cette réunion en compagnie d'autres personnalités de

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la localité de Bushiru telles que Protais Zigiranyirazo, Mathias Nyagasaza, Elie Sagatwa et Alcade Sebatware. Au cours de ce rassemblement, Nyagasaza et Bagaragaza ont pris la parole pour souscrire au message donné par Mugesera dans son discours. Dans ce message, Mugesera disait que l'ennemi comprenait aussi les Tutsis habitant au Rwanda et prônait la destruction du groupe ethnique tutsi du Rwanda.

7. A des dates inconnues après le discours prononcé par Léon Mugesera le 22 novembre 1992, Michel Bagaragaza a fourni des uniformes en tissu «kitenge» de couleur rouge, verte et jaune aux membres de la milice *Interahamwe* en exécution de l'entente décrite au paragraphe 5.

8. A une date inconnue située en 1993 s'est tenue dans la préfecture de Gisenyi, en exécution de l'entente décrite au paragraphe 5, une réunion au cours de laquelle Michel Bagaragaza, Juvénal Uwilingiyimana, Bernard Munyagishari et Robert Kajuga ont créé un groupe *Interahamwe* pour la préfecture.

9. En janvier 1993, Michel Bagaragaza, Charles Nzabageragaza, le capitaine Simbikangwa, le capitaine Haguma, le docteur Karera et Séraphin Rwamakuba ont décidé d'un commun accord que les *Interahamwe* devraient suivre une formation paramilitaire afin d'être capables d'attaquer et de tuer leurs ennemis politiques, en particulier les membres de la minorité raciale ou ethnique tutsie.

10. En mars 1993 s'est tenue au domicile de Michel Bagaragaza sis à Kabuga (préfecture de Kigali-Rural) une réunion à laquelle ont participé l'intéressé, Laurent Semanza, Joseph Sebisogo, Aloys Ngirabatware, Pierre Damien Rusagiza, Anastase Ngayabarezi et les *Interahamwe* de la localité. Pendant la réunion, Michel Bagaragaza a été désigné comme Président d'honneur des *Interahamwe* de Kabuga. En outre, les autres participants et lui ont convenu de rester fidèles à leur objectif, à savoir l'élimination des Tutsis et des Hutus soutenant les Tutsis.

11. A une date inconnue située vers le milieu de 1993, Michel Bagaragaza a participé à une réunion à l'hôtel Rebero en compagnie de Mathieu Ngirumpatse, Claver Mvuyekure, Pasteur Musabe, Séraphin Rwamakuba et Robert Kajuga. Lors de cette réunion, les participants ont décidé d'un commun accord de collecter des fonds pour aider les *Interahamwe* de la préfecture de Gisenyi afin de mettre sur pied une force capable d'éliminer les Tutsis.

12. Le 27 février 1994 ou vers cette date, Michel Bagaragaza a participé à une réunion des *Interahamwe* à l'hôtel Rebero en compagnie de Joseph Nzirorera, Augustin Ngirabatware, Claver Mvuyekure, Pasteur Musabe, Séraphin Rwamakuba et Robert Kajuga. Lors de cette réunion, les participants ont décidé d'un commun accord de collecter des fonds pour aider les *Interahamwe* afin de mettre sur pied une force capable d'éliminer les Tutsis.

## DEUXIÈME CHEF D'ACCUSATION : GÉNOCIDE

Le Procureur du Tribunal pénal international pour le Rwanda accuse Michel Bagaragaza de génocide, crime prévu à l'article 2 (3) (a) du Statut, en ce que du 1er janvier au 17 juillet 1994, sur l'ensemble du territoire rwandais et en particulier dans la préfecture de Gisenyi, Michel Bagaragaza s'est rendu responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique

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ou mentale, dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, ainsi qu'il est exposé aux paragraphes 13 à 22.

Ou subsidiairement,

TROISIÈME CHEF D'ACCUSATION :
COMPLICITÉ DANS LE GÉNOCIDE

Le Procureur du Tribunal pénal international pour le Rwanda accuse Michel Bagaragaza de génocide, crime prévu à l'article 2 (3) (e) du Statut, en ce que du 1er janvier au 17 juillet 1994, sur l'ensemble du territoire rwandais et en particulier dans la préfecture de Gisenyi, Michel Bagaragaza s'est rendu responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique tutsi comme tel et que son aide contribuerait à la perpétration du crime de génocide, ainsi qu'il est exposé aux paragraphes 13 à 22.

*Exposé succinct des faits relatifs au deuxième et troisième chefs d'accusation*

*Responsabilité pénale individuelle*

13. En application du paragraphe 1er de l'article 6 du Statut, l'accusé Michel Bagaragaza est individuellement responsable du crime de génocide et de complicité dans le génocide pou avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Michel Bagaragaza a non seulement usé de ses fonctions indiquées au paragraphe 2 plus haut pour ordonner aux personnes placées sous son autorité de le commettre, mais encore incité et aidé et encouragé des personnes sur lesquelles il n'avait pas autorité à le faire. En outre, il a participé sciemment et délibérément à une entreprise criminelle commune dont l'objet, le but et la conséquence prévisible étaient de commettre le génocide du groupe racial ou ethnique tutsi et des personnes considérées comme des Tutsis ou présumées soutenir les Tutsis, tant dans la préfecture de Gisenyi que sur le reste du territoire rwandais. Pour atteindre ce but criminel, l'accusé a agi de concert avec Mathieu Ngirumpatse, Joseph Nzirorera, Augustin Ngirabatware, Claver Mvuyekure, Pasteur Musabe, Séraphin Rwamakuba, Robert Kajuga et d'autres personnes, soit directement, soit par l'intermédiaire de subordonnés, pendant au moins la période allant du 1er janvier au 17 juillet 1994. Les faits détaillés qui donnent lieu à sa responsabilité pénale individuelle sont exposés aux paragraphes 14 à 17.

14. Le 27 février 1994 ou vers cette date, Michel Bagaragaza a participé à une réunion des *Interahamwe* à l'hôtel Rebero en compagnie de plusieurs personnes, dont Joseph Nzirorera, Augustin Ngirabatware, Claver Mvuyekure, Pasteur Musabe, Séraphin Rwamakuba et Robert Kajuga. Lors de cette réunion, les participants ont décidé d'un commun accord de collecter des fonds pour aider les *Interahamwe* afin de mettre sur pied une force capable d'éliminer les Tutsis. Michel Bagaragaza a versé sa contribution.

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15. Entre le 7 et le 9 avril 1994 ou vers cette période, des *Interahamwe* et des gardes présidentiels se sont rendus à l'usine de thé de Rubaya. Michel Bagaragaza a ordonné aux salariés de l'usine de thé, sur lesquels il avait autorité en sa qualité de directeur général de l'OCIR-Thé, de leur fournir du carburant pour leurs véhicules. Par la suite, les *Interahamwe* et les gardes présidentiels en question ont attaqué et tué des centaines de Tutsis sur la colline de Kesho. Pour en avoir fourni les moyens, Michel Bagaragaza a aidé et encouragé à tuer les tutsis qui avaient trouvé refuge sur la colline de Kesho.

16. Entre le 7 et le 9 avril 1994 ou vers cette période, Michel Bagaragaza a ordonné à l'un des chauffeurs de l'usine de Nyabihu nommé Emmanuel Mbarshimana de se rendre à la cathédrale de Nyundo, sise dans la préfecture de Gisenyi, avec un camion rempli d'*Interahamwe* en vue de l'extermination des Tutsis qui s'étaient réfugiés à la cathédrale. Pour avoir facilité le transport des *Interahamwe* jusqu'à la cathédrale de Nyundo, Michel Bagaragaza a aidé et encouragé à commettre le massacre des Tutsis qui s'en est suivi.

17. Le 9 avril 1994 ou vers cette date, Michel Bagaragaza a ordonné à un chauffeur sur lequel il avait autorité de conduire un groupe d'*Interahamwe* à bord d'un véhicule blanc de marque Daihatsu à Rubaya, Michel Bagaragaza a aidé et encouragé à tuer des Tutsis dans cette localité.

*Responsabilité pénale individuelle*

18. En application du paragraphe 3 de l'article 6 du Statut, l'accusé Michel Bagaragaza est responsable du crime de génocide ou de complicité dans le génocide en ce que ses subordonnés ont commis certains actes criminels qu'il savait ou avait des raisons de savoir que les intéressés s'apprêtaient à commettre ou avaient commis et il n'a pas pris les mesures nécessaires et raisonnables pour les prévenir ou pour en punir les auteurs. Au nombre de ces subordonnés figuraient les directeurs et les autres membres du personnel des usines placées sous le contrôle de l'OCIR-Thé, notamment Anasthase Djaribu, Directeur de l'usine de thé de Rubaya, les agents Emmanuel Mbarshimana et Arago Sebatashya, le chef de la plantation de théiers de l'usine de thé de Nyabihu et d'autres personnes. Le détail des actes de ces subordonnés sont exposés aux paragraphes 19 à 22.

19. Dans les premiers mois de 1994, l'un des subordonnés de Michel Bagaragaza, à savoir Anasthase Djaribu, Directeur de l'usine de thé de Rubaya sise dans la préfecture de Gisenyi, a recruté des réservistes de l'armée pour travailler dans son usine, donné une formation militaire à d'autres salariés de l'usine dans la forêt voisine de Gishwati et fourni à ces réservistes et autres salariés des armes et des munitions qui avaient été stockées à l'usine. A partir du 7 avril 1994, ces personnes ont utilisé les armes en question pour tuer des Tutsis à l'intérieur comme à l'extérieur de l'usine, dans le cadre d'une campagne d'extermination des Tutsis. Michel Bagaragaza savait ou avait des raisons de savoir que son subordonné recrutait, formait et armait des salariés en préparation d'une campagne visant à tuer les Tutsis et n'a rien fait pour empêcher ou punir ces actes.

20. Le 8 avril 1994 ou vers cette date, l'un des subordonnés de Michel Bagaragaza, en l'occurrence le chef de la plantation de l'usine de thé de Nyabihu sise dans la préfecture de Gisenyi, a donné l'autorisation de remplir les véhicules de carburant à l'usine pour permettre le transport d'*Interahamwe* qui allaient rechercher les Tutsis et les tuer en représailles à la mort du Président. Michel Bagaragaza savait ou avait des

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raisons de savoir que son subordonné fournissait du carburant pour que des véhicules transportant des *Interahamwe* qui allaient tuer les Tutsis et s'est abstenu d'empêcher que l'intéressé fournisse le carburant nécessaire ou de punir cet acte, aidant et encourageant ainsi à tuer les Tutsis.

21. Entre le 7 et le 9 avril 1994 ou vers cette période, l'un des subordonnés de Michel Bagaragaza, à savoir Anasthase Djaribu, Directeur de l'usine de thé de Rubaya située dans la préfecture de Gisenyi, a aidé et encouragé les *Interahamwe* en autorisant l'alimentation de leurs véhicules en carburant, leur approvisionnement en armes provenant du stock entreposé à l'usine et le renforcement de leur effectif par d'autres membres du personnel de l'usine pour les aider à attaquer des centaines de Tutsis qui s'étaient réfugiés sur la colline de Kesho sise non loin de là. Dirigés par Arago Sebatashya, le chef des *Interahamwe* de la commune de Karago qui était aussi un des salariés de l'usine de thé et un des subordonnés de Michel Bagaragaza, ils ont attaqué et tué des centaines de Tutsis sur la colline de Kesho. Michel Bagaragaza était informé ou avait des raisons d'être informé des actes de ses subordonnés et s'est abstenu de les prévenir ou de les punir.

22. Entre le 7 et le 9 avril 1994 ou vers cette période, l'un des subordonnés de Michel Bagaragaza, à savoir Emmanuel Mbarshimana, chauffeur de l'usine de thé de Nyabihu, a conduit un camion rempli d'*Interahamwe* à Nyundo, dans la rpéfecture de Gisenyi, en vue de l'extermination des Tutsis qui avaient trouvé refuge à la cathédrale de Nyundo. Michel Bagaragaza était informé ou avait des raisons d'être informé des actes de son subordonné et s'est abstenu de les prévenir ou de les punir.

Les actes et les omissions de Michel Bagaragaza exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut.

Kigali (Rwanda), le 28 juillet 2005.

[Signé] : Hassan Bubacar Jallow

# *The Prosecutor v. Théoneste BAGOSORA, Gratien KABILIGI, Anatole NSENGIYUMVA and Aloys NTABAKUZE*

## Case N° ICTR-98-41

***Case History : Théoneste Bagosora***

- Name : BAGOSORA
- First Name : Théoneste
- Date of Birth : 16 August 1941
- Sex : male
- Nationality : Rwandan
- Former Official Function : Director of Cabinet at the Ministry of Defence

- Date of Indictment's Confirmation : 10 August 1996 [1]
- Counts : genocide, complicity in the genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date of Indictment's Amendments : 12 August 1999

- Date of the decision to joint Trials : 29 June 2000 – Kabiligi, Ntabakuze et Nsengiyumva
- Date and Place of Arrest : 9 March 1996, in Cameroon
- Date of Transfer : 23 January 1997
- Date of Initial Appearance : 20 February 1997
- Pleading : not guilty
- Date Trial Began : 2 April 2002
- Third Party Intervention : *Amicus curiae*, Belgium

***

***Case History : Gratien Kabiligi***

- Name : KABILIGI
- First Name : Gratien

[1] The text of the indictment is reproduced in the *1995-1997 Report*, p. 76. The text of the Decision on the confirmation of the indictment is reproduced in the *1995-1997 Report*, p. 110.

# *Le Procureur c. Théoneste BAGOSORA, Gratien KABILIGI, Anatole NSENGIYUMVA et Aloys NTABAKUZE*

## Affaire N° ICTR-98-41

***Fiche technique : Théoneste Bagosora***

- Nom : BAGOSORA
- Prénom : Théoneste
- Date de naissance : 16 août 1941
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : directeur de cabinet au ministère de la défense
- Date de la confirmation de l'acte d'accusation : 10 août 1996 [1]
- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commette le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de modifications subséquentes portées à l'acte d'accusation : 12 août 1999
- Date de jonction d'instance : 29 juin 2000 – Kabiligi, Ntabakuze et Nsengiyumva
- Date et lieu de l'arrestation : 9 mars 1996, au Cameroun
- Date du transfert : 23 janvier 1997
- Date de la comparution initiale : 20 février 1997
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 2 avril 2002
- Intervention de tiers : *Amicus curiae,* Belgique

***

***Fiche technique : Gratien Kabiligi***

- Nom : KABILIGI
- Prénom : Gratien

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 76. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 111.

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- Date of Birth : 18 December 1951
- Sex : male
- Nationality : Rwandan
- Former Official Function : *Brigadier-General* in the *Forces armées rwandaises* (FAR)
- Date of Indictment's Confirmation : 15 October 1997 [2]
- Counts : genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity, violations of article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II

- Date of Indictment's Amendments : 8 October 1999
- Date of the decision to joint Trials : 29 June 2000 – Bagosora, Nsengiyumva and Ntabakuze
- Date and Place of Arrest : 18 July 1997, in Kenya
- Date of Transfer : 18 July 1997
- Date of Initial Appearance : 17 February 1998
- Pleading : not guilty
- Date Trial Began : 2 April 2002

***

***Case History : Anatole Nsengiyumva***

- Name : NSENGIYUMVA
- First name : Anatole
- Date of Birth : 4 September 1950
- Sex : male
- Nationality : Rwandan
- Former Official Function : *Lieutenant-Colonel*
- Date of Indictment's Confirmation : 12 July 1996 [3]
- Counts : direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date of the decision to joint Trials : 29 June 2000 – Bagosora, Kabiligi and Ntabakuze
- Date of Indictment's Amendments : 12 August 1999

[2] The text of indictment is reproduced in the *1995-1997 Report*, p. 176. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 188.

[3] The text of the indictment is reproduced in the *1995-1997 Report*, p. 558. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 574.

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- Date de naissance : 18 décembre 1951
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : brigadier général dans les Forces armées rwandaises (FAR)
- Date de la confirmation de l'acte d'accusation : 15 octobre 1997 [2]
- Chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de modifications subséquentes portées à l'acte d'accusation : 8 octobre 1999
- Date de jonction d'instance : 29 juin 2000 – Bagosora, Nsengiyumva et Ntabakuze
- Date et lieu de l'arrestation : 18 juillet 1997, au Kenya
- Date du transfert : 18 juillet 1997
- Date de la comparution initiale : 17 février 1998
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 2 avril 2002

***

***Fiche technique : Anatole Nsengiyumva***

- Nom : NSENGIYUMVA
- Prénom : Anatole
- Date de naissance : 4 septembre 1950
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : lieutenant-colonel
- Date de la confirmation de l'acte d'accusation : 12 juillet 1996 [3]
- Chefs d'accusation : incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de jonction d'instance : 29 juin 2000 – Bagosora, Kabiligi et Ntabakuze
- Date des modifications subséquentes portées à l'acte d'accusation : 12 août 1999

[2] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 177. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 189.

[3] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 558. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 575.

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- Date and Place of Arrest : 27 March 1996, in Cameroon
- Date of Transfer : 23 January 1997
- Date of Initial Appearance : 19 February 1997
- Pleading : not guilty
- Date Trial Began : 2 April 2002

***

***Case History : Aloys Ntabakuze***

- Name : NTABAKUZE
- First Name : Aloys
- Date of Birth : 1954
- Sex : male
- Nationality : Rwandan
- Former Official Function : Commander of Battalion in FAR

- Date of Indictment's Confirmation : 15 October 1997 [4]
- Counts : genocide, complicity in the genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II
- Date of the decision to joint Trials : 29 June 2000 – Bagosora, Kabiligi and Nsengiyumva
- Date and Place of Arrest : 18 July 1997, in Kenya
- Date of Transfer : 18 July 1997
- Date of Initial Appearance : 24 October 1997
- Pleading : not guilty
- Date Trial Began : 2 April 2002

[4] The text of indictment is reproduced in the *1995-1997 Report*, p. 176. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 188.

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- Date et lieu de l'arrestation : 27 mars 1996, au Cameroun
- Date du transfert : 23 janvier 1997
- Date de la comparution initiale : 19 février 1997
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 2 avril 2002

***

***Fiche technique : Aloys Ntabakuze***

- Nom : NTABAKUZE
- Prénom : Aloys
- Date de naissance : 1954
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : commandant de bataillon des FAR
- Date de la confirmation de l'acte d'accusation : 15 octobre 1997 [4]
- Chefs d'accusation : génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de jonction d'instance : 29 juin 2000 – Bagosora, Kabiligi et Nsengiyumva

- Date et lieu de l'arrestation : 18 juillet 1997, au Kenya
- Date du transfert : 18 juillet 1997
- Date de la comparution initiale : 24 octobre 1997
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 2 avril 2002

[4] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 177. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 189

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## *Decision on Motion to Compel Accused to Testify Prior to Other Defence Witnesses 11 January 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Testimony, List of witnesses, Order of the evidences, Testimony of an accused, Qualification as expert witness, Appréciation power of the Chamber, Discretionary power of the Chamber – Interpretation, ICTY Case-law, Nationals Case-laws, Judicial Order of the United States – Motion denied*

*International and National Instruments cited :*

*Rules of Procedure and Evidence, rules 85, 90 (D) and 90 (F); Statute, art. 19 and 20*

*Police and Criminal Evidence Act 1984 (United Kingdom); Criminal Procedure Act 1995 (Scotland); Code de procédure pénale (France); Act of 22 May 1981 relating to Legal Procedure in Criminal Cases (Norway)*

*International and National Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Elie Ndayambaje et al., *Decision on Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List, 27 February 2004 (ICTR-96-8)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dario Kordic et Mario Cerkez, *Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999 (IT-95-14/2)*

*Canada : Alberta Court of Appeal,* R. v. Smuk, *[1971] W. W. R. 613, 1971; Ontario Court of Appeal,* R. v. Angelantoni, *(1975) 28 C.C.C. (2d) 179, 30 September 1975; Ontario County Court,* R. v. Sparre, *(1977) 37 C.C.C. (2d) 495, 1977; Supreme Court of Canada,* R. v. Smith (Joan), *[1992] 2 S.C.R. 915, 27 August 1992*

*United State of America : Supreme Court of United States,* Brooks v. Tennessee, *406 U.S. 605 (1972), 406 U.S. 605 (1972), 7 June 1972*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

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## *Décision relative à la requête intitulée «Motion to Compel compel accused to testify prior to other defence witnesses» 11 janvier 2005 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Témoignage, Liste de témoins, Ordre de présentation des preuves, Témoignage d'un accusé, Qualification de témoin expert, Pouvoir d'appréciation de la Chambre, Pouvoir discrétionnaire de la Chambre – Interprétation, Jurisprudence du TPIY, Jurisprudences nationales, Ordre juridique des Etats-Unis – Requête rejetée*

*Instruments internationaux et nationaux cités :*

*Règlement de Procédure et de preuve, art. 85, 90 (D) et 90 (F); Statut, art. 19 et 20*

*Police and Criminal Evidence Act 1984 (Angleterre); Criminal Procedure Act 1995 (Écosse); Code de procédure pénale (France); Loi n° 25 du 22 mai 1981 relative à la procédure en matière pénale (code de procédure pénale) (Norvège)*

*Jurisprudence internationale et nationale citée :*

*T.P.I.R. : Chambre de premiere instance,* Le Procureur c. Elie Ndayambaje et consorts, *Decision on Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List, 27 février 2004 (ICTR-96-8)*

*T.P.I.Y. : Chambre de première instance,* Le Procureur c. Dario Kordic et Mario Cerkez, *Décision concernant la requête du Procureur relative au déroulement du procès, 19 mars 1999 (IT-95-14/2)*

*Canada : Cour d'appel de l'Alberta,* R. v. Smuk, *[1971] W. W. R. 613, 1971; Cour d'appel de l'Ontario,* R. v. Angelantoni, *(1975) 28 C.C.C. (2d) 179, 30 septembre 1975; Cour de comté de l'Ontario,* R. v. Sparre, *(1977) 37 C.C.C. (2d) 495, 1977; Cour Suprême du Canada,* R. v. Smith (Joan), *[1992] 2 S.C.R. 915, 27 août 1992*

*Etats-Unis d'Amérique : Cour suprême des Etats-Unis,* Brooks v. Tennessee, *406 U.S. 605 (1972), 7 juin 1972*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

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BEING SEIZED OF the Prosecution "Motion to Compel Accused to Testify Prior to Other Defence Witnesses Pursuant to Rules 73, 90 (D) and 90 (F) (i) of the Rules of Procedure and Evidence", filed on 21 October 2004;

CONSIDERING the Responses of the Bagosora and Ntabakuze Defence, filed on 2 and 8 November 2004, respectively;

HEREBY DECIDES the motion.

## Introduction

1. On 14 October 2004, the Prosecution closed its case, subject to a motion for admission of evidence by written procedure. The Defence case is scheduled to commence on 30 March 2005, having been postponed from 12 January 2005. Between 11 and 17 November 2004, three of the Defence teams filed provisional lists of witnesses to be called during the first trial session, none of which indicated the appearance of the Accused.

## Submissions

2. The Prosecution argues that Rule 90 (D) of the Rules of Procedure and Evidence ("the Rules") prohibits an Accused from testifying after having heard the testimony of other Defence witnesses. Rule 90 (D) is said to apply to all witnesses, including a witness who is also a party to the proceedings. No substantive purpose is served by permitting an accused to testify after other Defence witnesses, with whom an accused might then consciously or unconsciously align his or her testimony. Statements from the law of the United States are cited in support of requiring an accused to testify before other Defence witnesses. If the Accused in this case wish to testify, the appropriate procedure is either that they testify before other Defence witnesses, or that they be excluded from the courtroom and deprived of any information about the substance of the testimony of Defence witnesses until they have themselves testified.

3. The Defence argues that the Accused have an unfettered discretion to choose when to testify, or not at all. The Accused are parties, not witnesses. Even assuming that Rule 90 (D) applies, it provides that witnesses shall not be disqualified merely for having heard the testimony of other witnesses. The Chamber is perfectly capable of weighing the credibility of testimony given after that of other Defence witnesses, including the possibility of alignment of testimony. The proposed remedy of sequestering the Accused prior to their testimony would violate their rights in Article 20 of the Statute. The Ntabakuze Defence suggests in the alternative that the Accused should all be declared to be expert witnesses who are expressly exempted from Rule 90 (D).

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SAISI de la requête du Procureur intitulée *Motion to Compel Accused to testify prior to other defence witnesses Pursuant to Rules 73, 90 (D) and 90 (F) (i) of the Rules of Procedure and Evidence*», déposée le 21 octobre 2004,

VU les réponses des équipes de défense de Bagosora et Ntabakuze, déposées respectivement les 2 et 8 novembre 2004,

STATUE à PRÉSENT sur la requête.

## Introduction

1. Le 14 octobre 2004, le Procureur a terminé la présentation de ses moyens, sous réserve d'une requête aux fins d'admission d'éléments de preuve sous forme écrite. La présentation des moyens de la défense, qui devait initialement commencer le 12 janvier 2005, a été reportée au 30 mars 2005. Entre le 11 et le 17 novembre 2004, trois des équipes de défense ont déposé des listes provisoires de témoins qu'elles comptent citer pendant la première session, et aucune de ces listes ne fait mention de la comparution des accusés.

## Arguments des Parties

2. Le Procureur fait valoir que l'article 90 (D) du Règlement de procédure et de preuve (le « Règlement ») interdit à un accusé de témoigner après avoir entendu la déposition d'autres témoins à décharge. Il estime que cet article s'applique à tous les témoins, y compris à ceux qui sont aussi des parties en cause. Aucun objectif fondamental n'est atteint en autorisant un accusé à déposer après d'autres témoins à décharge, car il pourrait consciemment ou inconsciemment calquer sa déposition sur la leur. Le Procureur invoque des lois et des décisions judiciaires des Etats-Unis à l'appui de sa thèse selon laquelle l'accusé doit témoigner avant les autres témoins à décharge. Au cas où les accusés en l'espèce souhaiteraient témoigner, il conviendrait soit qu'ils le fassent avant les autres témoins à décharge, soit qu'on les fasse sortir de la salle d'audience et qu'ils n'aient pas connaissance de la teneur de la déposition de ces témoins jusqu'à ce qu'ils aient eux-mêmes témoigné.

3. La Défense fait valoir que les accusés ont toute latitude pour choisir le moment auquel ils témoigneront ou pour tout simplement décider de ne pas témoigner. Les accusés sont des parties, et non des témoins. L'article 90 (D) du Règlement, à supposer qu'il trouve à s'appliquer, prévoit que la déposition d'un témoin n'est pas pour autant irrecevable pour la simple raison qu'il a entendu celles d'autres témoins. La Chambre est tout à fait capable d'apprécier la crédibilité d'un témoignage entendu après ceux d'autres témoins à décharge, y compris le risque que le témoin fasse concorder sa déposition avec les précédentes. La solution proposée consistant à isoler les accusés avant qu'ils témoignent violerait les droits que leur garantit l'article 20 du Statut. À titre subsidiaire, l'équipe de défense de Ntabakuze propose que tous les accusés soient déclarés témoins experts, car ces derniers sont expressément exclus du champ d'application de l'article 90 (D) du Règlement.

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**Deliberations**

4. Neither the Statute nor the Rules expressly govern the issue presently before the Chamber. No mention of the timing of the appearance of the accused is to be found in Articles 19 or 20 of the Statute, which enumerate the rights of the accused. Under Rule 90 (F), the Chamber has the obligation and authority to "exercise control over the mode and order of interrogating witnesses…". Chambers have considered the interests of justice and questions of judicial economy in ordering a particular sequence of witnesses[1]. The present motion, in effect, requests the Chamber to exercise its discretion under Rule 90 (D) to prescribe the timing of the appearance of the Accused as witnesses.

5. The Prosecution has not cited any case before the Tribunal in which such an order has been made. The Chamber observes that the consistent practice is that accused have chosen the timing of their testimony which, in most cases, has been given at or near the end of the Defence case. A Trial Chamber of the ICTY, applying the same rules as are relevant to the present application, has expressly held that an accused may determine the timing of his or her appearance as a witness[2]. The Chamber sees no reason to depart from this well-established practice and jurisprudence.

6. The Prosecution has argued that the practice of national jurisdictions supports such an order. However, national practices diverge widely. Some jurisdictions, both civil law and common law, do appear to favour the appearance of an accused as the first Defence witness[3]. Others require an accused to testify before any witness is heard, whether for the Prosecution or the Defence[4]. In a third group of countries, the Accused has an unfettered discretion to choose the timing of his or her testimony during the presentation of the Defence case[5]. Accordingly, it cannot be said that there is any uniform practice amongst national jurisdictions which provides compelling guidance to this international Tribunal.

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[1] *Ndayambaje et al.*, Decision on the Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List (TC), 27 February 2004.

[2] *Kordic and Cerkez*, Decision on Prosecutor's Motion on Trial Procedure (TC), 19 March 1999.

[3] *Police and Criminal Evidence Act 1984* (England), s. 79; *R. v. Smith (Joan)*, 52 Cr App R 224 (CCA); *Criminal Procedure (Scotland) Act 1995* (Scotland), s. 266(11).

[4] *Code de procédure pénale* (France), s. 442 : "Avant de procéder à l'audition des témoins, le président interroge le prévenu et reçoit ses déclarations"; *Act of 22 May 1981 No. 25 Relating to Legal Procedure in Criminal Cases (The Criminal Procedure Act)* (Norway), s. 91 : "The person charged shall first be examined by the president of the court. The other members of the court, the prosecuting authority, and defence counsel are then entitled to put questions to the person charged". Such systems may not exclude an accused from testifying at later stages of the trial as well.

[5] *R. v. Angelantoni*, 28 C.C.C. (2d) 179 (Ontario CA 1975); *R. v. Smuk*, [1971] W.W.R. 613 (Alberta CA); *R. v. Sparre*, 37 C.C.C. (2d) 495 (Ontario County Court 1977)). The discretion to choose the timing of testimony has constitutional status in the United States, where it is recognized as a component of the right of an accused not to incriminate himself (*Brooks v. Tennessee*, 406 U.S. 605 (1972)).

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**Deliberation**

4. Ni le Statut ni le Règlement ne règlent expressément la question dont la Chambre est saisie. Les articles 19 et 20 du Statut qui énumèrent les droits de l'accusé ne précisent pas à quel moment celui-ci doit témoigner. En vertu de l'article 90 (F) du Règlement, la Chambre a l'obligation et le pouvoir d'« exerce[r] un contrôle sur les modalités de l'interrogatoire des témoins». Les Chambres ont souvent pris en considération l'intérêt de la justice et l'économie judiciaire en imposant un ordre donné de comparution des témoins[1]. Dans la présente requête, le Procureur demande à la Chambre d'exercer le pouvoir discrétionnaire que lui confère l'article 90 (D) du Règlement pour déterminer le moment auquel témoigneront les accusés.

5. Le Procureur n'a pas cité un seul cas où une ordonnance de cette nature a été rendue dans le cadre d'une affaire dont le Tribunal est saisi. La Chambre fait remarquer qu'il est constant que les accusés choisissent le moment auquel ils témoigneront et qu'ils le font dans la plupart des cas à la fin ou vers la fin de la présentation des moyens à décharge. Se fondant sur les mêmes articles du Règlement que ceux qui s'appliquent à la présente requête, une chambre de première instance du TPIY a expressément jugé qu'un accusé peut choisir à quel moment il témoignera[2]. La Chambre ne voit aucune raison de s'écarter de cette pratique et de cette jurisprudence bien établies.

6. Le Procureur soutient que la pratique en vigueur des États plaide en faveur d'une telle ordonnance. Mais cette pratique varie considérablement. Certains États, tant de tradition romano-germanique que de « common law », semblent privilégier la solution de faire témoigner l'accusé avant les autres témoins à décharge[3]. D'autres exigent vue l'accusé fasse sa déposition avant tout autre témoin, à charge ou à décharge[4]. Dans un troisième groupe de pays, l'accusé a toute latitude pour choisir à quel moment il témoignera pendant la présentation des moyens à décharges[5]. En conséquence, on ne saurait parler d'une pratique uniforme des États qui indiquerait irrésistiblement au Tribunal international la voie à suivre.

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[1] *Le Procureur c. Ndayambaje et consorts*, Chambre de première instance, *Decision on Prosecutor's Motion to Modify the Sequence of Appearance of Witnesses on Her Witness List*, 27 février 2004.

[2] *Le Procureur c. Kordic et Cerkez*, Chambre de première instance, Décision concernant la requête du Procureur relative au déroulement du procès, 19 mars 1999.

[3] *Police and Criminal Evidence Act* 1984 (Angleterre), art. 79; *R. v. Smith (Joan)*, 52 Cr App R 224 (CCA); *Criminal Procedure* (Scotland) Act 1995 (Écosse), art. 266, par. 11.

[4] Code de procédure pénale (France), art. 442 : « Avant de procéder à l'audition des témoins, le Président interroge le prévenu et reçoit ses déclarations »; Loi n° 25 du 22 mai 1981 relative à la procédure en matière pénale (code de procédure pénale) (Norvège), art. 91 : «L'accusé est tout d'abord interrogé par le Président de la juridiction. Les autres membres de la juridiction, le ministère public et le conseil de la défense, peuvent ensuite lui poser des questions» (traduction). Ces systèmes n'excluent pas la possibilité qu'un accusé témoigne à nouveau à un stade ultérieur du procès.

[5] *R. v. Angelantoni*, (1075) 28 C.C.C. (2d) 179 (Cour d'appel de l'Ontario); *R. v. Smuk,* [1971] W. W. R. 613 (Cour d'appel de l'Alberta); *R. v. Sparre*, (1077) 37 C.C.C. (2d) 495 (Cour de comté de l'Ontario). La latitude de choisir la date de la déposition est inscrite dans la Constitution des Etats-Unis d'Amérique, où elle est reconnue comme une composante du droit de l'accusé de ne pas s'incriminer (*Brooks v. Tennessee*, 406 U.S. 605 (1972)).

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7. Rule 90 (D) does not compel the appearance of the Accused as the first Defence witness, as urged by the Prosecution. It provides that :

> A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

The interpretation suggested would require not only that an accused testify as the first Defence witness, but before any Prosecution witness as well. Such a procedure would conflict with Rule 85, which prescribes that the presentation of Prosecution evidence shall precede that of the Defence, and with the consistent practice of trials before this Tribunal as discussed above (para. 5). Even assuming that the section were to apply to an accused, the fact that the witness "shall not for that reason alone be disqualified from testifying" contradicts the Prosecution contention that an accused must appear before all other witnesses, or else be excluded from the courtroom and from all access to information regarding Defence witnesses.

8. In the circumstances, the Chamber does not consider it necessary to await further submissions from the Defence teams for Nsengiyumva and Kabiligi, which filed, on 2 and 5 November 2004, respectively, requests for extension of time to file a response.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 11 January 2005.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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7. L'article 90 (D) du Règlement ne prescrit pas, comme le soutient avec force le Procureur, que l'accusé soit le premier des témoins à décharge. Cet article est libellé comme suit :

> Un témoin, autre qu'un expert, qui n'a pas encore témoigné ne peut être présent lors de la déposition d'un autre témoin. Toutefois s'il a entendu cet autre témoignage, le sien n'est pas pour autant irrecevable

L'interprétation proposée exigerait non seulement que l'accusé soit le premier témoin à décharge, mais aussi qu'il dépose avant tout témoin à charge. Une telle solution serait contraire à l'article 85 du Règlement, qui prescrit que la présentation des preuves du Procureur doit précéder la présentation des preuves de la défense et à la pratique constamment suivie dans les procès ouverts devant le Tribunal ainsi qu'il est indiqué au paragraphe 5 ci-dessus. Même si l'article 90 (D) du Règlement s'appliquait à l'accusé, le fait que la déposition du témoin « n'est pas pour autant irrecevable » contredit la thèse du Procureur selon laquelle l'accusé doit témoigner avant tous les autres témoins ou, à défaut, se voir interdire l'accès à la salle d'audience et à toutes les informations concernant les témoins à décharge.

8. Dans ces conditions, la Chambre ne juge pas nécessaire d'attendre les conclusions des équipes de défense de Nsengiyumva et Kabiligi qui ont déposé respectivement les 2 et 5 novembre 2004 des requêtes en prorogation du délai de dépôt d'une réponse.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Fait à Arusha, le 11 janvier 2005.

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Admission of Statements of Deceased Witnesses 19 January 2005 (ICTR98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Tharcisse Renzaho – Admission of evidence of the statements of deceased witnesses, Purpose of witness list, Hearing of the witnesses by the Tribunal, Admission of testimonial statements as evidence, Conditions for the admission of testimonial statements as evidence, Acts and conduct of the Accused, Acts and conduct of proximate subordinates of the Accused, Background information, Standard of "satisfactory indicia of reliability", Probative value, Discretionary power of the Chamber – Extension of delay for admission of evidence, Limited scope and importance of the evidence admitted – Motion partially accepted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73* bis*, 89 (C), 90 (A), 92* bis*, 92* bis *(A) (i), 92* bis *(A) (i) (b), 92* bis *(A) (ii), 92* bis *(B), 92* bis *(C), 92* bis *(E), 93* bis *and 98* bis

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Prosecutor's Motion to Remove From Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of the Said Witnesses, 22 January 2003 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92* bis*, 9 March 2004 (ICTR-96-7); Trial Chamber,* The Prosecutor v. Mikaeli Muhimana, *Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92* bis*), 20 May 2004 (ICTR-95-1B)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Stanislav Galic, *Decision on Interlocutory Appeal Concerning Rule 92* bis *(C), 7 June 2002 (IT-98-29); Appeals Chamber,* The Prosecutor v. Slobodan Milosevic, *Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003 (IT-02-54)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution's "Motion to Admit Into Evidence the Statements of Various Deceased Witnesses", filed on 15 October 2004;

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CONSIDERING the "Declinatory Objection", "Objection", and "Response", filed by the Defence for Ntabakuze on 14 October 2004, 22 October 2004 and 2 November 2004, respectively; the "Response" filed by the Defence for Nsengiyumva on 25 October 2004; the "Notice of Objection" filed by the Defence for Kabiligi on 28 October 2004; the Prosecution "Partial Response to Ntabakuze and Bagosora Defence Replies", filed on 11 November 2004; and the oral arguments of the parties on 14 October 2004;

HEREBY DECIDES the motion.

## Introduction

1. On 14 October 2004, the Prosecution declared its intention to file a motion for the admission into evidence of the statements of deceased witnesses, and that it would

> "like to rest the case at this time subject to the filing of a motion at the end of the day tomorrow at 5 O'clock"[1].

All Defence teams objected that the motion was untimely and procedurally improper. After argument, the Chamber reserved its decision. On 15 October 2004, at 2.18 p.m., the Prosecution filed the motion requesting the admission of the statements of fifteen deceased persons.

2. The Defence for Kabiligi has requested an extension of the time-limit for filing a response to the present motion, arguing that the Registrar's decision of 26 October 2004 to withdraw the legal aid assignment of Lead Counsel has impaired its ability to respond to various motions[2]. Under Rule 92 *bis* (E) of the Rules of Procedure and Evidence ("the Rules"), an opposing party has seven days to respond to a motion to introduce statements under Rule 92 *bis*. As the motion was communicated to the Kabiligi Defence on 19 October 2004, the last day on which to respond was 26 October 2004. For that reason, the Registrar's decision had no impact on the ability of the Kabiligi Defence to respond and, accordingly, the request for extension of time is denied.

## Submissions

*(i) Objections to the Motion as Untimely*

3. The Defence argues that the motion is untimely and should be declared "moot *ab initio*". It asserts that the Prosecution was ordered to close its case by 15 October 2004 and that, accordingly, Prosecution evidence cannot be received after that date. In light of the time-limits prescribed in the Rules for filing a response to the motion, the Chamber could not possibly render a decision authorizing the admission of statements of the deceased witnesses until after the 15 October 2004 deadline. The Defence further argues that the deceased witnesses did not appear on the Prosecution's final witness list of 17 June 2004 and that no motion has been made for their addition.

[1] T. 14 October 2004 pp. 12, 41.

[2] Defence for Kabiligi's Request for Extension of Time Limit, etc., 5 November 2004.

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The Defence is prejudiced by this late attempt to add evidence to the Prosecution case because it has been deprived of the opportunity to conduct cross-examinations knowing that these witness statements might be part of the Prosecution case. The Prosecution's previous intimations that it might file a motion for admission of the statements of deceased witnesses did not constitute satisfactory notice that the motion would be filed. If the statements were to be admitted, the work program of Defence teams, predicated as it is upon the completion of the Prosecution case on 15 October 2004, would be disrupted.

4. The Prosecution argues that it previously gave notice of its intention to file the present motion on many occasions, both orally during status conferences and in writing. The Defence cannot be taken by surprise nor does the Defence suffer any prejudice as a result of the admission of these statements. Indeed, the jurisprudence of the ICTY and ICTR suggests that such motions should be filed at the end of the Prosecution case to allow the Chamber to assess the extent to which the statements corroborate live testimony, which is a criterion of admissibility. These persons need not have appeared on the witness list, the purpose of which is to circumscribe in-court testimony, not preclude admission of statements by written procedure. This interpretation is supported by the language of Rule 73 *bis* and the Chamber's previous decisions, which define witnesses as persons whom the Prosecution "intends to call". This reading is also supported by the language of Rule 92 *bis* (C) which refers to the admission of statements of deceased "persons", not "witnesses". In the alternative, the Prosecution seeks leave to amend its witness list to include the deceased witnesses.

*(ii) Admissibility of the Witness Statements Tendered*

5. The Prosecution seeks the admission of the statements of fifteen persons known by the pseudonyms AA, AJ, AU, CA, CP, CZ, DAG, DQ, EL, GH, OAO, OE, OJ, QZ and WD[3]. The Prosecution relies on Rules 89 (C), 90 (A) and 92 *bis* for the proposition that statements of deceased persons are admissible. It accepts that the conditions set forth in Rule 92 *bis* (C) for the admission of statements of deceased persons are subject to the conditions and criteria set forth in Rule 92 *bis* (A), in particular that the statements concern matters "other than the acts and conduct of the accused". That condition is said to be satisfied in respect of the statements of nine of the fifteen witnesses : AA, AU, CA, CP, CZ, EL, GH, OAO, and QZ[4]. The Prosecution concedes that the statements of the remaining six witnesses, AJ, DAG, DQ, OE, OJ, and WD, concern in part the acts and conduct of the Accused, but does not distinguish the admissible from the inadmissible portions. The Prosecution asks the Chamber to define and disregards the inadmissible content, and admits the remainder.

[3] The Prosecution motion occasionally refers to "sixteen witnesses" and includes Witness OAM on its list several times. These references appear to be erroneous and inadvertent. The statements of Witness OAM are not annexed to the motion, nor is Witness OAM listed in the "Relief Sought" section of the motion. Prosecution Motion, paras. 36, 47, 48, 51.

[4] Witness OAM is mistakenly included amongst the witnesses whose statements do not go to the acts and conduct of the Accused. Accordingly, of the fifteen witnesses who are properly part of the motion, the number whose statements are characterized as not going to the acts and conduct of the Accused is nine, not ten, as asserted in the motion. Prosecution Motion, para. 49.

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6. The Prosecution makes extensive reference to jurisprudence pre-dating Rule 92 *bis*, arguing that the statements of the deceased have probative value under Rule 89 (C) and should, therefore, be admissible. The implication, though never expressly stated, appears to be that the statements should be admissible under Rule 89 (C), independent of the requirements of Rule 92 *bis*.

7. The Defence for Ntabakuze argues that the requirements of relevance, probative value and reliability inherent in Rule 89 (C) are general requirements which supplement the specific mechanism for admission of statements of deceased persons set forth in Rule 92 *bis*. The statements are of "trifling" probative value and are "cumulative to the extent of being pointlessly repetitive". The minor probative value of the evidence is outweighed by the unreliability inherent in testimony given without cross-examination. Objection is also made to the request to have the Chamber distinguish the admissible from inadmissible portions of the statements. The moving party bears the burden of identifying the statements which it wishes to tender for admission. The Ntabakuze Defence questions the reliability of some of the specific statements because of erroneous pages (EL); misidentification of two different persons as a single witness (DAG); missing identification number on a death certificate (AU); absence of corroboration with live testimony (GH); and failure to properly explain the relevance or content of a witness statement (WD).

8. The Defence for Nsengiyumva agrees with the Prosecution concession that the statements of Witnesses OJ and OE concern the acts and conduct of the Accused. It claims that Witness OAO's statement also refers to the acts and conduct of the Accused Nsengiyumva, albeit in the form of hearsay evidence. There is also reference to criminal acts by one Munyagishari, over whom the Prosecution has alleged that the Accused had command responsibility. Accordingly, the statement should be considered inadmissible.

9. The Defence for Bagosora examines each statement in detail and variously questions their reliability, relevance or references to the acts and conduct of the Accused. This detailed analysis shall be considered below in respect of individual statements where necessary.

## Deliberations

(i) *Timeliness of the Motion*

10. The Defence argues that the present motion, filed on 15 October 2004, is untimely because it could not possibly have been decided by the Chamber before the deadline for the close of the Prosecution case, said to be 15 October 2004. The Prosecution counters that it has repeatedly given notice of its intention to file the motion, and that it is, in fact, appropriate to file such a motion at the very end of its case.

11. The argument of the Defence is predicated on the assertion that 15 October 2004 was the absolute deadline for the reception of evidence as part of the Prosecution case. Heavy emphasis is placed on the submission of Prosecution counsel during a status conference that "we'd be prepared to live or die with respect to that particular time frame" in estimating that it would "complete" its witnesses no later than 30 September 2004[5]. The Presiding Judge responded :

[5] T. 13 July 2004 p. 9.

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> "And the Prosecution may well finish by the end of September, but the Chamber will reserve time until Friday the 15th of October. But that's the end, and that's where we all, to use Mr. White's expression, 'Live and die with it'".

While it is certainly clear that no further court-time would be scheduled for hearing the Prosecution case, there is no suggestion that the Prosecution would be precluded from filing a motion for the admission of evidence by written procedure. Accordingly, the Chamber finds that the Prosecution was not barred from filing the motion immediately before the close of its case.

12. The Defence has already submitted motions for acquittal under Rule 98 *bis*, which must be filed within seven days of the close of the Prosecution case. By the present decision, all or part of four witness statements shall be admitted into evidence as part of the Prosecution case. The Defence is entitled to make supplemental filings on that additional evidence within seven days of receipt of this decision. In light of the limited scope and importance of the evidence admitted hereunder, the Chamber rejects the Defence argument that preparations for its case will be unduly disrupted.

13. Persons whose statements are tendered for admission by written procedure alone need not appear on a witness list. The purpose of Rule 73 *bis*, under which the Chamber has authority to require the filing of a witness list, is to circumscribe in-court testimony. This includes witnesses who may be called for cross-examination under Rule 92 *bis*. Persons who are deceased, however, can never be "called" to testify, as that term is used in Rule 73 *bis*. Accordingly, the absence of these individuals from the witness list does not preclude the filing of the motion, or the admission of their written statements.

(ii) *Admissibility*

(a) Applicable Principles

14. Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". This discretion is guided in respect of testimonial evidence by Rule 90 (A), which requires that

> "[w]itnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided by Rule 71".

An exception to the principle of direct testimony is Rule 92 *bis*, which provides detailed standards for admission of "Proof of Facts Other Than By Oral Evidence" :

*Rule 92* bis *: Proof of Facts Other Than by Oral Evidence*

> (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.
>
> (i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question :
>
> (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;

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(b) relates to relevant historical, political or military background;

(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement include whether :

(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by :

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or

(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing :

(a) that the person making the statement is the person identified in the said statement;

(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;

(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and

(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber :

(i) is so satisfied on a balance of probabilities; and

(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory *indicia* of its reliability.

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(E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

15. The detailed standards set out in Rule 92 *bis*, combined with the general requirement in Rule 90 (A) that testimony be given orally, indicate that testimonial statements can be admitted into evidence only through Rule 92 *bis*[6]. A condition for admission of all or part of a statement is that it concerns "proof of a matter other than the acts and conduct of the accused charged in the indictment". Once that threshold is met, the Chamber must exercise its discretion to admit the statements in light of the criteria for and against admission, set out in 92 *bis* (A) (i) and (ii), respectively[7]. Where an accused is charged with command responsibility, evidence should be excluded as a matter of discretion if the evidence concerns the acts of a proximate subordinate from which the guilt of the accused could be readily inferred[8]. Rule 92 *bis* (C) specifically addresses statements of deceased witnesses, providing that, where the Chamber is satisfied on the balance of probabilities that a witness is dead or has disappeared, the formalities required by subsection (B) are replaced by the more general standard that

[6] This Chamber previously rejected a motion to admit a statement under Rule 89 (C) independently of Rule 92 *bis*, distinguishing a decision of the ICTY Appeals Chamber. The Chamber noted that the Appeals Chamber relied on Rule 89 (F) of the ICTY Rules, permitting the admission of a witness's written statement "where the interests of justice allow", which has no counterpart in the Rules of this Tribunal. Further, the general rule set out in Rule 90 (A), that witnesses "shall, in principle, be heard directly by the Chambers", has been removed from the ICTY Rules. T. 20 November 2003 p. 15; *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, paras. 23-28; *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion to Remove From Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of the Said Witnesses (TC), 22 January 2003, para. 20 ("the general requirement under Rule 89 that admissible evidence be relevant and probative applies in addition to, and not in lieu of, the more specific provisions of Rule 92 *bis*"). Cf. *Milosevic*, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements (AC), 30 September 2003.

[7] *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, para. 26 ("Thus, the Chamber finds that although Rule 92 *bis* (C) provides for the specific situation where a witness has died or is untraceable, it remains part of Rule 92 *bis* as a whole, and the conditions laid down in Rule 92 *bis* (A) for admissibility remain valid as the umbrella section of the whole provision"); *Galic*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 24 ("*Galic* Decision") ("Rule 92 *bis* (C), however, does not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony").

[8] *Galic* Decision, para. 16 ("However, Rule 92 *bis* was primarily intended to be used to establish what has now become known as 'crime-base' evidence, rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know"); *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 14.

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the statement must have "satisfactory *indicia* of reliability"[9]. The general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied[10].

(b) Acts and Conduct of the Accused

16. The Prosecution concedes that the statements of six of the deceased witnesses (AJ, DAG, DQ, OE, OJ and WD) do, in part, concern the acts and conduct of the Accused. It argues, however, that redaction of the statements would make them difficult to comprehend and, therefore, that the statements should simply be "admitted unredacted with the understanding that the judges will identify and disregard the information that may go towards the acts and conduct of the accused as charged in the indictment".

17. Rule 92 *bis* (A) states that the Chamber may

> "admit, in whole or in part, the evidence of a witness … which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment".

This wording implies that evidence which concerns the acts and conduct of the Accused is inadmissible, but that other parts of a statement which do not concern the acts and conduct of an accused may be admitted. The Chamber has no discretion to follow the procedure suggested by the Prosecution, namely, to admit inadmissible evidence subject to an "understanding" that inadmissible portions will be ignored. Indeed, the suggested procedure is contrary to the very concept of "admissibility". While a Chamber is always free to disregard information which is unreliable or irrelevant, the purpose of rules of admissibility, including Rule 92 *bis*, is to provide a preliminary threshold for the exclusion of irrelevant, unreliable or otherwise improper information. Conditional admission would, in effect, destroy the preliminary threshold, leaving all parties in doubt as to which portions of the statements were properly before the Chamber as evidence, and which portions were not. The proposed procedure of conditional admission of the six statements is, accordingly, rejected.

18. The Chamber may admit those parts of the six statements which do comply with Rule 92 *bis* (A). In the present case, however, the Prosecution has failed to identify which portions of the statements it considers admissible. The statements of five of the six witnesses (AJ, DQ, OE, OJ and WD) arguably contain extensive references to the acts and conduct of the Accused. In the absence of submissions, the Chamber is not in a position to distinguish the admissible from inadmissible portions of the statements. Accordingly, the statements must be treated as inadmissible *in toto*. In contrast, the statement of Witness DAG contains only isolated and brief references which arguably pertain to the acts and

[9] *Galic* Decision, para. 24 ("Both in form and in substance, Rule 92 *bis* (C) merely excuses the necessary absence of the declaration required by Rule 92 *bis* (B) for written statements to become admissible under Rule 92 *bis* (A)"); *Muhimana*, Decision on the Prosecution Motion for Admission of Witness Statements (Rule 89 (C) and 92 *bis*) (TC), 20 May 2004, para. 26; *Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion to Remove From Her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of the Said Witnesses (TC), 22 January 2003, para. 21.

[10] *Bagosora et al.*, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

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conduct of the Accused. There are three fleeting references to the Accused Bagosora and one to the Accused Nsengiyumva[11]. Despite the absence of submissions, the Chamber is able to identify the portions of the statement which go to the acts and conduct of the Accused, and shall consider more fully below whether the remainder of the statement should be admitted under Rule 92 *bis*.

19. The Defence submits that the statements of Witnesses EL and OAO make explicit reference to the acts and conduct of the Accused as charged in the Indictments. Witness EL describes at some length the participation of the Accused Bagosora in a meeting at the Ministry of Defence on the morning of 7 April 1994, corresponding to allegations in paragraphs 6.4 and 6.8 of the Bagosora Indictment[12]. The statement of Witness OAO alleges that the Accused Nsengiyumva encouraged the killing and raping described in her statement[13]. These matters are inadmissible under Rule 92 *bis* (A). In light of the potential importance of the inadmissible portion to the whole, and in the absence of submissions justifying admission of the balance of the statements, the Chamber declines to admit any portion of these statements.

(c) Acts and Conduct of Proximate Subordinates

20. Several witness statements, though not describing the acts and conduct of the Accused themselves, offer evidence of actions of subordinates or of individuals who are alleged by the Prosecution to have been acting on the direct orders of the Accused. Witness CP's statement offers incriminating testimony concerning the actions of soldiers of the Paracommando Battalion, alleged to be under the command of the Accused Ntabakuze[14]. Witness CA describes the killing by soldiers of Augustin Maharangari, the general manager of the *Banque Rwandaise de Développement*, and members of his family by soldiers. Paragraph 6.49 of the Bagosora Indictment alleges that the Accused attempted to order this killing[15]. The statements of Witnesses DAG and CP recount the killing of UNAMIR soldiers on 7 April 1994 at Camp Kigali.

[11] The four references are : (1) a paragraph beginning "After the government shifted" at the bottom of p. 5 of the statement; (2) a sentence beginning "several missions" on page 6; (3) a line making reference to "the FAR Chief of Army Staff" on page 4; and (4) a sentence making reference to the Accused Nsengiyumva on page 4. In addition to the statement of Witness DAG dated 14 May 1999, there is another statement dated 25 February 2001 by a person with an identical name. It is apparent from the contents thereof and the identification information that these are, in fact, two different persons. Appendix B to the motion and the Prosecution Pre-trial Brief indicate that Witness DAG is, in fact, the person who gave the statement dated 14 May 1999. The other statement appears to have been inadvertently appended to the motion.

[12] Statement of Witness EL, 27 December 1994, pp. K0676580 – K0676582.

[13] Statement of Witness OAO, 30 April 1998, p. 3 (English).

[14] Statement of Witness CP, (CP-1), p. 2 (English) ("I saw nine soldiers of the paracommando battalion and the Presidential Guard and a civilian who was apparently guiding them. He was holding a list of names. It was the list of names of people to be killed. They went to the house of another neighbour, threw grenades and forced the door of the house open by firing at it. They killed the occupants of the house and left on foot").

[15] Paragraph 6.49 of the Indictment, though not naming the victim, states : "On 8 April 1994, Colonel Théoneste Bagosora communicated by radio with the *Préfet* of Kigali, Tharcisse Renzaho, to make sure that the manager of the *Banque Rwandaise de Développement* had been 'liquidated'. Tharcisse Renzaho replied in the affirmative".

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Count 5 of the Bagosora Indictment imputes responsibility for these killings to the Accused. By virtue of the alleged position of the Accused Ntabakuze as commanding officer of the Paracommando soldiers, or by virtue of the direct orders or responsibility imputed to the Accused Bagosora, the evidence in these statements describes highly incriminating conduct of proximate subordinates of the Accused, and must be deemed inadmissible under Rule 92 *bis*.

21. The statement of Witness GH describes the involvement of soldiers in an attack on Kigabagaba Mosque in Kigali. Though the soldiers are not expressly identified as subordinates of the Accused, or as having acted on the orders of the Accused, each of the Indictments mentions the incident at Kigabagaba Mosque as a basis for the superior responsibility of the Accused[16]. Accordingly, the evidence concerns the acts and conduct of proximate subordinates of the Accused and is, therefore, inadmissible.

(d) Descriptions Not Concerning the Acts and Conduct of the Accused Or Their Proximate Subordinates

22. The statements of Witnesses AA, AU and CZ also describe the criminal conduct of soldiers, or people who may have appeared to be soldiers. With a single exception, however, these statements do not concern incriminating acts and conduct of soldiers who are alleged to be proximate subordinates of the Accused. Witness AA describes the actions of soldiers of the Huye Battalion in Nyamirambo, on Mount Kigali, and of Presidential Guard soldiers at a roadblock in Gisenyi. Nothing in the statement or the Indictment suggests that any of the Accused were directly superior, or gave orders, to these soldiers. While the Indictment may well allege, as suggested by the Defence for Bagosora, that the Accused is criminally responsible as a superior for the acts described in Witness AA's statement, none of the perpetrators of those acts are proximate subordinates whose actions could lead readily to an inference of guilt. The nature of the relationship between the soldiers described in Witness AA's statement and the Accused remains to be established by other evidence. The only exception is the suggestion on page 5 that :

> "all army units had received a telegramme from the army headquarters asking them to get assistance from the *Interahamwe* and the population in order to eliminate all the enemies"[17]

Paragraph 6.35 of the Bagosora Indictment mentions the issuance of such a telegram from the General Staff, implying the direct responsibility of the Accused. That event must be understood as attributed by the Prosecution to the Accused himself, or to a proximate subordinate. In either case, the substance of the sentence is inadmissible. With that exception, the criteria set out in Rule 92 *bis* (A) favour admission of the statement. There are no references to acts or conduct of proximate subordinates; the acts described are cumulative of testimony already heard; and they are relevant as background information and have probative value[18].

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[16] Events at Kigabagaba Mosque, described in paragraph 6.39 of the Kabiligi/Ntabakuze Indictment, are said to be the basis for criminal responsibility under Art. 6 (3) of the Statute in Counts 1, 2, 3, 4, 5, 7, 8 and 9 of that Indictment.

[17] Statement of Witness AA, 6 December 1997, p. 5 (English).

[18] The presence and actions of soldiers is described in Nyamirambo on 7 April is described, for example, by Witnesses A, CE and XXJ.

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23. Witness AU's statement describes the distribution of weapons at the General Headquarters of the Army to *conseillers de secteur* in Kigali Prefecture, on the instructions of the Prefect, Tharcisse Renzaho. The Defence for Bagosora objects that this evidence "directly implicates" the Accused, who is alleged in paragraph 5.1 of the Indictment to have conspired with Renzaho. However, as described by the Appeals Chamber in *Galic*, the actions of a co-conspirator are not necessarily inadmissible under Rule 92 *bis* when they are not indicative of the Accused's participation in a joint criminal enterprise, or of the fact that he shared the requisite intent for the crime[19]. Further, the statement does not suggest that the weapons were distributed for the criminal purpose alleged in paragraphs 5.1 and 6.48 of the Bagosora Indictment, or that Renzaho's criminal intent (which could arguably be inferred from subsequent conduct described in the statement) was shared by the Accused. The statement does not otherwise describe the actions of soldiers, but does describe the role of civilian authorities in killings of Tutsi in Kigali Prefecture. In these circumstances, the statement provides only background evidence of a type which has already been placed before the Chamber, is relevant, and has probative value. Accordingly, the statement is admissible under Rule 92 *bis*.

24. The statement of Witness CZ describes the killing and pursuit of Tutsi by soldiers of the Presidential Guard and militiamen in or near Kigali. The witness also saw individuals at a roadblock in "paratrooper uniforms". The incidents in question are not specifically mentioned in the Indictment and there is no other suggestion that the perpetrators of the criminal conduct were proximate subordinates of the Accused. The reference to individuals in "paratrooper uniforms" without more detail is ambiguous and does not show that they were soldiers of the Paracommando Battalion under the command of the Accused Ntabakuze. In any event, there is no evidence in the statement of criminal acts by the individuals wearing the paratrooper outfits. The evidence thus constitutes background information concerning the atmosphere in Kigali in April 1994 and is, in that sense, cumulative with evidence already admitted. It is also, to that limited extent, relevant to the charges in the Indictments. The statement is admissible.

25. Witness DAG's statement contains a section describing the Rwandan air force as it existed in April 1994. This information is manifestly unrelated to the inadmissible evidence described above (para. 19) and illuminates the military background of events in April 1994, which is expressly mentioned as appropriate for admission under Rule 92 *bis* (A) (i) (b). The information is relevant and is contained in a statement with sufficient indicia of reliability. Accordingly, the Chamber will admit as evidence pages 3 and 4 of the statement of Witness DAG, up to the heading "Civilian Authorities".

(e) Irrelevant Evidence

26. The statements of Witness QZ primarily concern the alleged acts and conduct of Pauline and Shalom Nyiramasuhuko, and make no reference to soldiers of the Rwandan Army. The Prosecution has failed to identify, and the Chamber is unable to discern, the relevance of the statements to the Accused in the present case. Accordingly, the statements are inadmissible.

[19] *Galic* Decision, para. 10.

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FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the French and English versions of the statements of Witnesses AA, AU and CZ to be admitted in their entirety, with the exception of the sentence in the statement of Witness AA containing the words "all army units had received a telegramme from army headquarters", which is declared inadmissible;

DECLARES pages three and four of the English version of the statement of Witness DAG, up to the heading "Civilian Authorities", and the French version thereof, to be admitted;

REQUESTS the Registry to ensure that the admitted documents are marked and assigned exhibit numbers;

DECLARES that the Defence has seven days from receipt of the present decision to file supplemental submissions under Rule 98 *bis*, if any, in respect of the statements admitted hereunder;

DENIES the Prosecution motion in all other respects;

DENIES the Kabiligi request for an extension of time to respond to the present motion.

Arusha, 19 January 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi 19 January 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Defence Counsel, Lead Defence Counsel, Directive on the Assignment of Defence Counsel, Fraud by the Defence Counsel, Practice of fee splitting, Fee splitting arrangement with the Accused, Code of conduct, Binding force of the Code of conduct, Criteria of "serious violations of the Code of Conduct" – Right to free legal assistance by counsel, Right of the Accused to choose his/her (lead) Counsel, Balance between the right to free legal assistance by counsel and the right to choose the counsel, Right of the Accused to a Fair Trial, Right to be tried with undue delay, Right to have adequate time and facilities to prepare the defence – Power of the Registrar, Responsibility to administer the legal aid system, Withdrawal of his/her assignment*

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*of a Counsel,* Proprio motu *authority of the Registrar – Authority for Trial Chambers to review a decision by the Registrar, Inherent Powers of the Chamber, Obligations of the Chamber, Fairness of the trial – Power of the Registrar, Responsibility to administer the legal aid system, Withdrawal of his/her assignment of a Counsel,* Proprio motu *authority of the Registrar – Amicus Curiae, Association des Avocats de la Defence – ICTR Completion Strategy – Interests of Justice – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 15* bis*, 33 (B), 45 (H), 45 (I), 45* quater*, 46, 54, 73 (B) and 74; Statute, art. 19 and 20*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Eliezer Niyitegeka, *Judgement, 9 July 2004 (ICTR-96-14)*

*I.C.T.Y. : ICTY President,* The Prosecutor v. Mitar Rasevic, *Decision on the Assignment of Defence Counsel, 16 October 2003 (IT-97-25/1); Appeals Chamber,* The Prosecutor v. Milan Milutinovic et al., *Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87); Appeals Chamber,* The Prosecutor v. Slobodan Milosevic, *Decision on the Interlocutory Appeal by the* Amici Curiae *against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (IT-02-54); Appeals Chamber,* The Prosecutor v. Zeljko Mejakic et al., *Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic, 6 October 2004 (IT-02-65)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Joint Defence Motion for the Reinstatement of Jean Yaovi Degli as Counsel for General Gratien Kabiligi", filed on 18 November 2004; and Kabiligi's "*Requête en extrême urgence en recours contre la décision du 26 octobre 2004*", filed on 20 December 2004;

CONSIDERING the Registrar's representations under Article 33 (B), filed on 8 December 2004; the Kabiligi Defence Reply, filed on 16 December 2004; and the Natabakuze Defence Reply, filed on 20 December 2004;

HAVING RECEIVED submissions from the "*Association des Avocats de la Defence*", entitled "*Demande d'intervention volontaire et soumissions de l'ADAD au titre de l'amicus curiae*", filed on 30 November 2004;

HAVING HEARD the parties on 20 December 2004 and rendered an oral decision on the same date;

HEREBY RENDERS its written decision.

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## Introduction

1. The Prosecution case against the four Accused concluded on 14 October 2004 after eighty-two witnesses had testified. In a decision of 26 October 2004, the Registrar withdrew the assignment of Mr. Jean Yaovi Degli as Lead Counsel for the Defence of Gratien Kabiligi under the framework of the legal aid system. The decision was based on evidence that he played a major role in an elaborate fraud scheme[20]. The Defence case for all four Accused was originally scheduled to start on 12 January 2005. During a status conference on 21 December 2004, the Chamber postponed the commencement of the Defence case to 30 March 2004[21].

2. The Registrar's withdrawal of Mr. Degli as Lead Counsel was based on Article 19 (A) (iii) of the Directive on the Assignment of Defence Counsel ("the Directive"), following findings by the Investigations Division of the Office of Internal Oversight Services of the United Nations ("OIOS") that Mr. Degli had misappropriated Tribunal funds, in excess of USD 300,000. The investigation of Mr. Degli was triggered in May 2003, after his Co-Counsel, Mrs. Sylvia Olympia, informed the Registry that her bar qualifications had been falsified. The Registry referred the matter to OIOS, which interviewed all parties concerned and reviewed various billing statements and bank documents, including alleged transfers from Mrs. Olympio's account to Mr. Degli's wife. The Registrar received the OIOS report in August 2004. On 15 October 2004, the Registry provided a summary of the report to Mr. Degli for his comment and invited him to make observations and offer a defence within eight days. Mr. Degli's response was received by the Registry on 22 October 2004. In his decision of 26 October 2004, the Registrar ordered Mr. Degli to deliver to the Accused or the present Co-Counsel, all original documents in the file within fifteen days of the decision. The Accused was invited to submit without delay a list of three names of individuals who could be assigned as new Lead Counsel.

3. On 2 November 2004, Mr. Kabiligi requested the President to suspend the Registrar's decision to withdraw Mr. Degli in order to ensure that his rights as an Accused be respected. The Registrar filed submissions on Mr. Kabiligi's request pursuant to Rule 33 (B) on 18 November 2004. In a letter of 13 December 2004 to Mr. Kabiligi, the President stated that Mr. Kabiligi had raised issues that were virtually identical to matters raised in a joint motion by all four Defence teams which was then pending before the Trial Chamber (see paras. 4 and 5 below). Under these circumstances, it would not be appropriate for the President to intervene in the matter. The Chamber has been informed that Mr. Degli has later pursued the matter before the Secretary-General of the United Nations.

4. In a joint motion, filed on 18 November 2004, all Defence teams challenged the Registrar's decision, arguing that it detrimentally affected the fair trial of the four Accused[22]. On 30 November 2004, the "*Association des Avocats de la Defence*"

[20] Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004. The Registrar's decision fully recounts the procedural history of the investigation of Mr. Degli as well as the nature of the allegations against him. The Chamber will only recount salient aspects here.

[21] T. 21 December 2004 p. 27.

[22] Mr. Degli filed a motion before the Chamber on 3 November 2004 but withdrew it the next day.

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(ADAD) filed a request to make submissions as *amicus curiae* in connection with Mr. Kabiligi's request to the President and the joint Defence motion. On 8 December 2004, the Registrar made written submissions, pursuant to Rule 33 (B), on the joint Defence motion as well as ADAD's request to be heard as *amicus curiae*. The Kabiligi Defence, through Co-Counsel, filed a reply on 16 December 2004. A reply from the Ntabakuze Defence was filed on 20 December 2004. Mr. Kabiligi filed a motion on 20 December 2004. The Prosecution made no written submissions.

5. At the request of the Defence, a status conference was scheduled for 20 December 2004. On that date, the Chamber, sitting under Rule 15 *bis* in Judge Reddy's absence, decided to hold a public hearing and heard oral submissions from Mr. Kabiligi, the four Defence teams and the Registrar. The Prosecution stated that it took no position on the motion[23]. ADAD was present during the hearing and was given the opportunity to make further written submissions[24]. After deliberating, the Chamber made an oral decision denying the request to reinstate Mr. Degli and stated that its written reasons would follow. A status conference was scheduled for the following day.

6. During this status conference on 21 December 2004, Mr. Kabiligi proposed that Mr. Skolnik, presently Co-Counsel for Bagosora, be appointed his Lead Counsel given his knowledge of the case. The Bagosora Defence stated that this was acceptable. The Registry indicated that it was favourable to the solution proposed by the Accused. The Chamber postponed the commencement of the Defence case until 30 March 2005. The Chamber also postponed the date for the filing of Kabiligi's pre-Defence brief and witness list until 28 February 2005, subject to further representations from Mr. Skolnik if named Lead Counsel. The deadlines for the other three Accused to file the pre-Defence brief and the witness statements were also postponed, until 3 January and 7 February 2005, respectively. The Chamber scheduled a status conference for 28 February 2004 to assess the situation.

7. On 27 December 2004, following correspondence from the Registry and Mr. Skolnik, Mr. Kabiligi requested the Registry to suspend all proceedings concerning the nomination of a new Lead Counsel and formally withdrew his proposal made on 21 December 2004 to the effect that Mr. Skolnik should represent him.

## Submissions

### *Joint Defence Motion*

8. The joint Defence motion seeks the suspension of the decision to withdraw the assignment of Mr. Degli and his re-appointment as Lead Counsel for the Kabiligi Defence until the trial judgement is rendered. The Defence asserts that the Registrar failed to follow the proper procedure for removal of Counsel set forth in the Statute and the Rules of Procedure and Evidence ("the Rules"). The illegal withdrawal of the assignment of Mr. Degli at this late stage of the proceedings during the final prepa-

[23] T. 20 December 2004 p. 25.

[24] T. 20 December 2004 pp. 73-74. The Chamber reserved its position as to whether ADAD would be given status as *amicus curiae* (p. 1).

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rations for a jointly prepared defence denies Kabiligi the right to counsel of his choice and further substantially disrupts the trial strategy and preparations of all Defence teams.

9. The Defence argues that Article 19 (A) (iii) of the Directive, upon which the Registrar based his decision, is not specifically sanctioned in the Statute or the Rules. The Directive is subsidiary to the Statute and the Rules and conflicts with Rules 45 (H), (I), 45 *quater*, 46, and 54 which indicate that only the President, the Bureau, and the Chamber have the power to order the removal of counsel. The Registrar's role is strictly administrative. He has no power to take action on his own. It is for the Chamber to ensure that the trial is fair and issue all necessary orders. The Code of Professional Conduct for Defence Counsel ("the Code of Conduct") refers to the Rules as the basis for disciplinary action. The Registrar's role in removing counsel is limited to bringing misconduct to the Chamber's attention and to carrying out the Chamber's instructions. The Defence therefore asks the Chamber to consider the Registrar's decision to be only a "report" to the President or Bureau, in conformity with the principles behind Rule 46 (D).

10. The Defence also raises specific concerns related to the nature of the procedure utilized by the Registrar in removing Mr. Degli. The Registrar failed to disclose the entire OIOS report and the nature of all his consultations, and he did not convoke a formal hearing before a neutral adjudicator. Therefore, Mr. Degli is entitled to a new procedure that is fair and transparent.

11. The four Defence teams emphasize that they have a "highly integrated" joint defence in the interest of trial efficiency and in order to avoid unnecessary overlap. Each Defence team has its own witnesses to bring, but certain very important witnesses have only spoken to Mr. Degli and have predicated their willingness to testify on the basis of their working relationship with him. All Defence teams are relying on these witnesses to cover certain vital ground in each of their defences. No other Defence team has a relationship with these witnesses comparable to Mr. Degli. Witnesses who should have been called in January 2005 are now reluctant to appear. The absence of Mr. Degli will significantly disrupt the strategy of all teams and necessitate significant time to prepare and to adjust in an effort to fill the newly created gaps in evidence by identifying and interviewing additional witnesses. Mr. Degli's knowledge of the Kabiligi dossier is unmatched after having been involved in the case for seven years. Proceeding with the Defence case in January 2005 without Mr. Degli leaves all teams in an inadequate state of preparation leading to an unfair trial due to lack of adequate time to prepare. Postponing the trial by several months to allow for re-preparation and integration of new counsel would also lead to an unfair trial by denying the rights of the Accused to an expeditious trial.

*Kabiligi's Motion*

12. Referring to his request to the President of 2 November 2004 and the response of 13 December 2004, Mr. Kabiligi asks the Chamber to suspend the Registrar's decision to withdraw the assignment of his Lead Counsel. The timing of the decision was intended not to disturb the presentation of the Prosecution case, but has greatly disrupted the preparations for his defence case. Mr. Degli has been the sole lawyer to follow the case since its inception, and all the principal witnesses have primarily dealt with and been interviewed by him. The present Co-Counsel is not familiar with the

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case and is not therefore capable of representing the Accused. Members of Mr. Kabiligi's family have informed him that his principal witnesses are aware of the removal of Mr. Degli and no longer wish to appear. In order to ensure a fair trial and in the interests of justice, the Chamber should maintain Mr. Degli as Lead Counsel until the completion of the trial at first instance. Mr. Kabiligi agrees with the submissions in the joint Defence motion and ADAD.

*ADAD*

13. ADAD, an association of over sixty Defence lawyers practicing before the Tribunal and seven legal assistants qualified to practice as lawyers in their national jurisdictions, seeks to intervene in this matter given its interests in the right to an effective defence and to a trial without undue delay as well as in the procedures used by the Registry to discipline and withdraw Defence lawyers. ADAD recalls that it has submitted proposals to revise the disciplinary procedures of Defence Counsel before the Tribunal and was invited to the last Plenary session to present its proposals.

14. Referring to Article 19 of the Statute, which provides for a fair trial, ADAD reiterates the submissions made in the joint Defence motion concerning the alleged prejudice faced by the four Accused if Mr. Degli is not reinstated. The core of ADAD's submissions, however, concern the procedure followed by the Registry in investigating and removing Mr. Degli. In ADAD's view, the Registry has no authority to sanction the misconduct of counsel. Pursuant to Rule 46 (D) and Article 21 of the Code of Conduct, the Registry may only bring misconduct to the attention of the President and Bureau or a counsel's national bar. Therefore, the Registry erred in requesting the OIOS to investigate Mr. Degli. According to ADAD, Defence counsel before the Tribunal are not bound by the Code of Conduct because the Registry has never consulted the organisation in connection with amendments, contrary to Rule 46 (D). The Advisory Panel envisaged in Article 29 of the Directive is not sufficient in this context.

15. In withdrawing the assignment of Mr. Degli, the Registry failed to take proper consideration of the impact the decision would have on the fairness of the trial to all four Accused or the Tribunal's Completion Strategy. Referring to the Niyitegeka case, the Defence also argues that the Registrar's decision results in discriminatory treatment between counsel for the Prosecution and for the Defence who are both bound by the Code of Conduct. ADAD also notes that a Co-Counsel is not automatically entitled to take over the defence, and Mr. Kabiligi has confirmed his confidence in Lead Counsel. Moreover, Article 20 (A) of the Directive provides that where the assignment of Defence Counsel is withdrawn by the Registrar, he may not withdraw until a replacement has been found.

16. General concern is raised about the present disciplinary procedure before the Tribunal which provides less procedural guarantees for counsel than in national bars or at other international systems such as the one in effect at the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). ADAD requests the Chamber to find that the Code of Conduct is not in conformity with the Rules; that Rule 46 (D) of the Rules and Article 21 of the Code of Conduct have not been respected; that the Registrar's decision represented an untimely intervention in the proceedings; and that it should be declared invalid and the matter referred to a disciplinary body possessing sufficient guarantees, such as the Paris Bar. In the alternative, it is requested

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that the Registrar's decision be suspended until judgement has been rendered by the Trial Chamber.

*The Registrar*

17. The Registrar submits that the joint Defence motion should be dismissed because the remaining Defence Counsel only are authorized to represent their clients and hence lack standing to represent Mr. Degli. The motion is also inadmissible because the appropriate forum for reviewing the Registrar's decision is the office of the President. ADAD's request to act as *amicus curiae* should also be dismissed because it has not been formally recognized by the Tribunal nor properly incorporated under Tanzanian law. The purpose of an *amicus curiae* intervention is to enlighten the Chamber on a legal issue in dispute, not to advocate a particular side. ADAD's submissions simply reiterate the arguments made in the joint Defence motion.

18. On the merits, the Registrar recalls his submissions filed on 18 November 2004 in connection with Mr. Kabiligi's application for presidential review. It is true that Mr. Degli has the greatest familiarity with the Kabiligi dossier. However, any possible efficiency gained by continuing with him cannot be used as a shield against disciplinary action based on fraudulent conduct. Mr. Degli's own past actions of requesting the dismissal of his second Co-Counsel and putting off the assignment of his present Co-Counsel have largely contributed to the present problems concerning continuity. The Registry notes that the best remedy is for the Accused to immediately select a new Lead Counsel as the Accused's further delay only compounds the situation.

19. The Registrar notes that it is difficult to imagine, and indeed an abdication of responsibility, for one Defence team to delegate the preparation of an important witness to a different Defence team. Moreover, the various Defence teams seem to concede that Mr. Degli will not cooperate with them and provide them with his contacts and preparatory material. Rather than challenge the Registry's decision, the Defence teams should seek an order requiring Mr. Degli to communicate to his successor all information in his possession. The relevant witnesses to be called are Mr. Kabiligi's witnesses and not Mr. Degli's. The Defence arguments in favour of retaining Mr. Degli based on their planned joint defence are not genuine.

20. According to the Registrar, the complaints concerning the procedure employed to remove Mr. Degli are without merit. Article 19 (A) (iii) of the Directive gives the Registrar the authority to withdraw the assignment of counsel. It was adopted at the Plenary by the Judges under the same conditions as any amendment to the Rules and is thus not inferior. The references to criminal law standards and adversarial proceedings concerning the removal of Mr. Degli are also misplaced. The Registrar simply administers the legal aid system in a contractual manner and does not discipline counsel in the same way that a national bar would do. A lawyer removed from the list is still entitled to practice law elsewhere until his national bar states otherwise.

*Kabiligi Defence Reply*

21. The Kabiligi Defence, through Co-Counsel, emphasizes a reading of the Rules that allows only the Chamber, the Bureau, or the President to sanction counsel in accordance with Rule 46.

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*Ntabakuze Defence Reply*

22. The Ntabakuze Defence points out that the signatories to the joint Defence motion are representing their clients, rather than Mr. Degli. Nothing in Article 19 of the Directive states that review of the Registrar's actions are the exclusive domain of the President.

## Deliberations

*Admissibility*

23. Before considering the merits of the motion, the Chamber will address issues of admissibility. First, the Registry argues that the joint Defence motion should be dismissed because the remaining Defence Counsel lack standing to represent Mr. Degli. According to the Defence, the removal of Mr. Degli at this stage of the proceedings has disrupted the preparations of all four Defence teams, because of their highly integrated strategy. In particular, reference is made to Mr. Degli's exclusive contact with certain witnesses that are material to the defence of all four Accused. The Chamber will consider the substance of the Defence submissions below. In relation to the issue of standing, the Chamber accepts that these arguments potentially affect the position of all four Accused, including their right to be tried with undue delay and to have adequate time and facilities to prepare for their defence. Consequently, the Chamber is satisfied that not only the Kabiligi Defence, but also the other three teams, may challenge the Registrar's decision to withdraw Mr. Degli.

24. Second, the Registry has asserted that the appropriate forum for reviewing the Registrar's decision is the office of the President, not the Chamber. The Chamber observes that there is authority for Trial Chambers to review a decision by the Registrar pursuant to their inherent powers to ensure the fair and expeditious trial of accused persons. The Appeals Chamber has stated that where the Directive expressly provides for a review of the Registrar's decision, a Trial Chamber cannot interfere in the Registrar's decision, and its only option is to stay the trial until that procedure has been completed. Where, however, the Directive does not expressly provide for a review of the Registrar's decision, the Trial Chamber, pursuant to its statutory obligation to ensure the fairness of the trial, is competent to review the decision in the light of its effect upon the fairness of the trial[25].

25. In the present case, the Registrar made his decision pursuant to Article 19 (A) (iii) of the Directive. Article 19 (E), which provides for review of decisions made under Article 19 (A), does not contain any explicit provision for review of decisions pursuant to Article 19 (A) (iii). Presidential review is only expressly provided when the Registrar denies a "request for withdrawal" emanating from the Accused or

[25] *Blagojevic,* Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 7; *Milutinovic et al.*, Decision on Interlocutory Appeal on Motion for Additional Funds (AC), 13 November 2003, para. 19. These two decisions departed from previous case-law. See also *Mejakic et al.*, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic (AC), 6 October 2004, para. 7.

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Counsel[26]. In reviewing the Registrar's decision, the Chamber will not appropriate any power that has been conferred elsewhere[27]. Consequently, the Chamber is satisfied that it has authority to entertain the motion in order to ensure a fair trial in conformity with Articles 19 and 20 of the Statute[28]. The extent of this review will be considered below. Finally, the Chamber notes that Mr. Degli, who is directly affected by the Registrar's decision, has not brought the matter before the President in pursuance of the general principles in Rules 19 and 33 of the Rules but has sought the intervention of the Secretary-General (see para. 3 above).

26. The last procedural issue is whether ADAD should be granted standing as *amicus curiae*. The Registry opposes ADAD's application and argues that the organisation has not been formally recognized by the Tribunal or the Tanzanian Government, and it has taken a partisan position in its submissions. In the Chamber's view, it follows from the wording of Rule 74 that these are not relevant considerations. According to this provision,

> "[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber".

For leave to be granted, the proposed submissions must be relevant to the case and assist the Chamber in the proper determination of it[29]. The Chamber is of the view that in the present case, ADAD should be granted leave to make submissions in connection with the current procedures to withdraw and discipline counsel at the Tribunal and comparative remedies in place in national jurisdictions and in the ICTY. ADAD's submissions supplement those in the joint Defence motion. These issues are relevant to the case to the extent that they suggest the proper procedure to be followed under the Tribunal's present legal regime, and the submissions may assist the Chamber in the proper determination of the case[30].

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[26] Article 19 is quoted in full below (para. 30).

[27] *Blagojevic,* Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 7; *Mejakic et al.,* Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic (AC), 6 October 2004, para. 7.

[28] *Milutinovic et al.*, Decision on Interlocutory Appeal on Motion for Additional Funds (AC), 13 November 2003, paras. 19-20. The propriety of the Chamber exercising jurisdiction in this case is also supported by Articles 12 (C) and 18 (E) of the Directive, the closest parallel to the instant case, which contemplate review before the Trial Chamber if the Registrar denies an assignment of counsel or withdraws an assignment based on a later finding that the Accused had sufficient means to pay for his defence.

[29] *Bagosora et al.*, Decision on *Amicus Curiae* Request by the Rwandan Government (TC), 13 October 2004, para. 4; *Bagosora et al.*, Decision on *Amicus Curiae* Request by African Concern (TC), 23 March 2004 para. 4; *Bagosora et al.,* Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium (TC), 6 June 1998, which also makes the point that the general definition of *amicus curiae* does not call for impartiality on the part of the filing party.

[30] The appropriate forum for advocating broad based reform of the administration of the legal aid system is the Plenary and not the Trial Chamber. *See Milutinovic et al.*, Decision on Interlocutory Appeal on Motion for Additional Funds (AC), 13 November 2003, paras. 17-18.

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*Merits*

27. The Registrar's decision to withdraw the assignment of Mr. Degli under the legal aid system as Lead Counsel for the Kabiligi Defence raises three principal issues : (i) whether the Tribunal's governing instruments grant the Registrar this authority; (ii) if it so exists, whether the Registrar properly exercised this authority; and (iii) the implications that the exercise of this authority during an ongoing trial has on the fair trial rights of the four Accused. The Chamber will consider these questions below, as well as matters relating to Mr. Kabiligi's Defence (iv).

(i) *Did the Registrar Have Authority to Withdraw the Assignment?*

28. Referring to Rules 45 (H) and (I), 45 *quater*, 46, and 54 of the Rules as well as Article 21 (2) of the Code of Conduct, the Defence argues that only the Chamber, the President, or the Bureau is competent to discipline or withdraw the assignment of counsel[31]. It follows that the Registrar's functions under Article 19 of the Directive

[31] The provisions referred to by the Defence read as follows :

Rule 45 : Assignment of Counsel

(H) Under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.

(I) It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he as been assigned in the most exceptional circumstances.

Rule 45 *quater* : Assignment of Counsel in the Interests of Justice

The Trial Chamber may, if it decides that it is in the interests of justice instruct the Registrar to assign a counsel to represent the interests of the accused.

Rule 46 : Misconduct of Counsel

(A) A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for the prosecution.

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission or, if a professor and not otherwise admitted to the profession, to the governing body of his University.

(C) If a counsel assigned pursuant to Rule 45 is sanctioned in accordance with Sub-Rule (A) by being refused audience, the Chamber shall instruct the Registrar to replace counsel.

(D) The Registrar may set up a Code of Professional Conduct enunciating the principles of professional ethics to be observed by counsel appearing before the Tribunal, subject to adoption by the Plenary Meeting. Amendments to the Code shall be made in consultation with the representatives of the Prosecutor and Defence counsel, and subject to adoption by the Plenary Meeting. If the Registrar has strong grounds for believing that Counsel has committed a serious violation of the Code of Professional Conduct so adopted, he may report the matter to the President or the Bureau for appropriate action under this rule.

Rule 54 : General Provision

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are administrative in nature, and that he only has authority to report to competent authorities or to implement their decision to sanction counsel. The Defence's proposed reading is based at least in part on the view that the Directive is somehow subsidiary to the Rules.

29. This argument challenges the legal basis for the withdrawal of Mr. Degli and not directly the fairness of the procedure by which he was withdrawn. It may be argued that such submissions should be dealt with in administrative review instituted by Mr. Degli, who is directly affected by the Registrar's decision. The Chamber observes, however, that the submissions, albeit of a preliminary nature, raise legal issues and require interpretation of provisions adopted by the Judges[32]. They involve questions of principle and would, if accepted, imply that the Registrar acted *ultra vires*. Case law has accepted that the Trial Chambers, when reviewing the Registrar's decision under the Directive, control whether he has failed to comply with the legal requirements of the Directive, and the review may include the proper interpretation of the Directive[33]. The Chamber will therefore consider the submissions as part of its fair trial review.

30. Article 19 (A) of the Directive reads as follows :

Article 19 : Withdrawal of Assignment in Other Situations

(A) The Registrar may :

(i) In exceptional circumstances, at the request of the accused, or his Counsel, withdraw the assignment of Counsel;

(ii) In exceptional circumstances, at the request of Lead Counsel withdraw the assignment of co-Counsel;

(iii) In the case of a serious violation of the Code of Conduct, withdraw the assignment of Counsel or co-Counsel

(B) The Registrar shall withdraw the assignment of Counsel :

(i) Upon the decision by a Chamber to refuse audience to assigned Counsel for misconduct inder Rule 46 (A) of the Rules;

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At the request of either party or *proprio motu*, a Judge or Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Article 21 : Reporting Misconduct

… (2) The Registrar may also communicate any misconduct of Counsel to the professional body regulating the conduct of Counsel in his State of admission or, if a Professor and not otherwise admitted to the profession, to the governing body of his University.

[32] See, *mutatis mutandis,* Decision (Appeal of the family of Félicien Kabuga against Decisions of the Prosecutor and President of the Tribunal), 22 November 2002 (AC) : "CONSIDERING moreover that the action of the Prosecutor was taken pursuant to a Rule made by the Judges and that, by implication, the Judges, through the appropriate mechanism of a Trial Chamber, retain a responsibility to review the working of such action, particularly where hardship is alleged by a non-party." Unlike the present case, that decision affected "the liberty of individuals or their property", but it was taken by a non-judicial body, as here.

[33] *Kvocka et al,*, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic (AC), 7 February 2003, para. 13.

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(ii) Where Counsel no longer satisfies the requirements of Article 13 (i) of this Directive;

(iii) Where Counsel or co-Counsel fails to observe the undertaking by him pursuant to Rule 45 *ter*.

(C) The Accused, the Counsel concerned and his respective professional or governing body shall be notified of the withdrawal.

(D) The Registrar shall immediately assign a new Counsel to the suspect or accused, and where appropriate, a co-Counsel.

(E) Where a request for withdrawal, made pursuant to paragraph (A), has been denied, the person making the request may seek the President's review of the decision of the Registrar.

31. Contrary to submissions by the Defence, it follows clearly from the wording of Article 19 (A) (iii) that the Registrar can withdraw *proprio motu* the assignment of Defence counsel appointed under the legal aid system. It is not correct, as argued by the Defence, that this is the "sole exception to the explicit requirement" that withdrawal by the Registrar requires the request or order of someone else[34]. Indeed, Article 19 B (ii) and (B) (iii) explicitly authorize the Registrar to withdraw assignment at his own initiative. Furthermore, Article 18 (A) and (B) of the Directive allows him to withdraw assignment *proprio motu* when a suspect or accused is no longer indigent. Case law has confirmed this competence of the Registrar[35].

32. The authoritative nature of the Directive along with its subsequent amendments flows from its adoption by the Judges during Plenary meetings (Article 32 of the Directive) under the same conditions as the Rules of Procedure and Evidence. The fact that the text is prepared and proposed by the Registry, rather than the Judges, is of no consequence to its legal status[36].

33. Not only the Directive, but also the Rules clearly envision the possibility that the Registrar takes independent action. If a counsel fails to appear before the Tribunal, as undertaken, the Registrar may withdraw his assignment in parallel to other sanctions taken by the Tribunal or the Chamber. Rule 45 *ter* (B) states :

> Failure by Counsel or Co-Counsel to appear before the Tribunal, as undertaken, shall be a ground for withdrawal *by the Registrar* of the assignment of such Counsel or Co-Counsel <u>or</u> the refusal of audience by the Tribunal or the imposition of any other sanction by the Chamber concerned. (Emphasis added)

[34] Joint Defence motion para. 15.

[35] *Kvocka et al.,* Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic (AC), 7 February 2003, para. 2. See also *Nahimana et al.,* Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings (AC), 22 October 2004 ("Noting that under Article 18 of the Directive, the Registrar may withdraw the assignment of Counsel if he finds that the accused is no longer in fact indigent …").

[36] Indeed, proposals for amendments to the Rules emanate from Judges, the Prosecutor, the Registry, or Defence Counsel. Moreover, the hierarchical reading proposed by the Defence is based primarily on an analogy to a national law distinction between statutes passed by a legislature, elected by the people, and administrative regulations, passed by an agency. This hierarchy is typically justified by the fact that administrative regulations are adopted by administrative bodies, not by the legislature itself. Here, the Judges, not the Registrar, have approved the Directive.

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34. The Defence is also wrong that the Code of Conduct does not contemplate the Registrar taking independent action to remove counsel appointed under the legal aid system. According to Article 5 *bis* (5) of the Code of Conduct, the Registrar shall take action in accordance with Article 19 (A) (iii) of the Directive if Counsel is found to have engaged in a practice of fee splitting or to have entered into a fee splitting arrangement with his client. The Chamber notes that the Code of Conduct can only be amended by the Registrar after consultation with the Judges (Article 23). The Appeals Chamber has confirmed that the Code is binding[37].

35. The interpretation suggested by the Defence that the Registrar is not authorized to withdraw assignment of Counsel but shall submit reports to the competent authorities of the Tribunal or implement their decisions is not supported by the Statute of the Tribunal, which is silent on the issue. Neither is there any basis for this view in the Directive, the Rules, or the Code of Conduct, when read in context. The various instruments supplement each other and reflect the functions of the Registrar, the Chamber, the Bureau, and the President. To some extent, their competence overlaps, but there is no conflict which requires an interpretation establishing a hierarchy between the various sets of provisions. Under Rule 45 and the Directive, the Registrar has the primary responsibility to administer the legal aid system. He therefore has particular interest in the conduct of assigned Defence counsel that does not exist in relation to engaged counsel or counsel for the Prosecution. The Chambers have primary responsibility to administer its cases and may issue orders for the conduct of the trial (Rule 54). Like all courts, they must have the discretion, independent of the Registrar, to deal appropriately with all counsel who appear before them. This is reflected in Rule 46 concerning misconduct of counsel. In addition, Chambers may, under Rule 45 (H) and (I) and Rule 45 *quater* issue instructions to the Registrar concerning Defence counsel. The President, assisted by the Bureau (Rule 23), has a general supervisory role under Rules 19 and 33. This explains why the Registrar, under Rule 46 (D), may wish to report serious violations of the Code of Conduct to the President and the Bureau.

36. The Chamber concludes that the Registrar had authority to withdraw the assignment under the legal aid system of Mr. Degli pursuant to Article 19 (A)(iii) of the Directive. The Registrar's authority to withdraw the assignment of counsel *proprio motu* pursuant to Article 19 (A)(iii) is entirely consistent with what the Appeals Chamber has described as his "primary responsibility of determining matters relating to the assignment of counsel under the legal aid system"[38].

*(ii) Did the Registrar Exercise His Authority Properly?*

37. The Chamber will now consider whether the Registrar exercised his authority properly when he decided to withdraw the assignment of Mr. Degli under the legal aid system. The standard of review has been described as follows :

> Judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which

[37] *Niyitegeka*, Judgement(AC), 9 July 2004, para. 16.

[38] *Mejakic et al.*, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic (AC), 6 October 2004, para. 7; *Milutinovic et al.*, Decision on Interlocutory Appeal on Motion for Additional Funds (AC), 13 November 2003, para. 19.

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> the Registrar reached the particular decision and the manner in which he reached it. The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. The administrative decision will also be quashed if the Registrar has failed to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached there can be no interference with the margin of appreciation of the facts or the merits of that case to which the maker of such an administrative decision is entitled[39]

38. Article 19 (A) (iii) of the Directive requires "serious violations of the Code of Conduct" but does not set forth a particular procedure that the Registrar must follow in withdrawing the assignment of a counsel. The Defence has not disputed that the alleged acts reproached in the Registrar's decision would, if true, represent a serious violation of the Code of Conduct[40]. In assessing the nature of the procedure employed, the Chamber is mindful that a basic legal principle is that a deprivation of some protected interest must be preceded by notice and an opportunity for the person concerned to make known his views before a decision is taken.

39. The Registrar's decision was based on the OIOS report of August 2004, following investigations after he referred the matter to this agency in May 2003. OIOS submitted its report after hearing all relevant parties, including Mr. Degli. On 15 October 2004, the Registrar served on Mr. Degli a summary of the investigative report and gave him eight days to respond. Mr. Degli indicated that he could not respond until provided with the full report, but in any case he requested the Registrar to make his decision as quickly as possible so that he could appeal.

40. The Defence has argued that the Registrar should have entrusted the investigation to a different entity than OIOS, in particular to the Paris Bar association. The Chamber disagrees. The Registrar, who is responsible for the administration of the legal aid system, funded by the United Nations budget, was at liberty to submit this task to OIOS, which is an independent United Nations agency tasked with oversight functions. The Defence has emphasized that Mr. Degli should have been given the entire report, and not only a summary. According to the Registrar's decision, this was not done because "OIOS informed the Registrar that it was neither necessary nor usual to share its report with persons other than the few people who had received copies thereof"[41]. Whatever view one may hold about this practice, the Chamber observes that the Registrar took the initiative to provide a summary of the report which contained the material facts on which the decision of 26 October 2004 was based. Accordingly, Mr. Degli was informed of the nature of the evidence against him. In other cases concerning assignment of counsel, case law has considered a summary

[39] *Sljivancanin*, Decision on Assignment of Defence Counsel (ICTY President), 20 August 2003, para. 22, quoting *Kvocka et al.*, Decision on Review of Registrar's Decision to withdraw Legal Aid from Zoran Zigic (AC), 7 February 2003, para. 12.

[40] Joint Defence motion para. 19.

[41] See Registrar's decision para. 16 with footnote 1.

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as sufficient, and an oral hearing has not been a requirement[42]. As for the time afforded to Mr. Degli to respond, the Chamber notes that he elected not to respond to the merits. He did not indicate that the time was insufficient or ask for more time to respond but requested that a decision be taken as soon as possible. Nothing in the decision suggests that the Registrar took account of irrelevant material.

41. The Defence and *amicus* suggest that the Registrar erred in failing to take proper consideration of the impact his decision would have on the trial or the Tribunal's Completion Strategy. However, the Appeals Chamber has established that a decision's impact on the Tribunal's Completion Strategy is an irrelevant consideration[43]. On the other hand, the Registrar did take into consideration the impact of his decision on the trial by refraining from action until a suitable break in the proceedings[44]. The Chamber does not consider this an improper consideration. Once he had received the OIOS report, the Registrar had to act on it, given the serious allegations contained in it. He decided to do so in the three months break between the presentation of the Prosecution and the Defence case. Whether he should have waited until the end of the trial, several months later, is a matter of appreciation. In the present context, it does not fall under the Chamber's review to substitute its discretion to that of the Registrar. The Chamber will consider below under (iii) whether the timing of the decision interfered with the right of the four accused to a fair trial.

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[42] *Kvocka et al.*, Decision on Review of Registrar's Decision to withdraw Legal Aid from Zoran Zigic (AC), 7 February 2003, para. 39-40 (Para. 39 : "The Directive does not impose upon the Registrar an obligation to hold a formal hearing, and the nature of the inquiry to be conducted in accordance with the Directive does not attract such an obligation. Where, however, action pursuant to the Directive detrimental to an accused is contemplated, procedural fairness dictates that the accused be afforded the right to be heard. Bearing in mind that the withdrawal of legal aid may well impact negatively upon the accused's ability to conduct his defence in the relevant criminal proceedings in the Tribunal, such a right entitles the accused to be given (a) notice of the allegations against him, (b) notice in reasonable detail of the nature of the material upon which the contemplated action is to be based, and (c) the opportunity to respond to that material." In that case, meetings were held between Zigic and representatives of the Registry, see para. 40); *Sljivancanin*, Decision on Assignment of Defence Counsel (ICTY President), 20 August 2003, para. 23 ("The Registrar, of course, cannot be required to conduct a mini-trial each time a defendant seeks assignment of a particular lawyer. He need not hold a hearing of any kind. But the Registrar must provide the accused with at least a summary of the evidence upon which the Registrar intends to rely, and he must take into account whatever materials the accused (in consultation with his preferred attorney) wishes to submit within some very short period to be determined by the Registrar so as to avoid undue delay. It is important to emphasize that the requirement to give the affected accused an opportunity to respond to at least a summary of the evidence upon which the Registrar intends to rely does not in any way relieve the accused of the burden of establishing that the interests of justice demand the assignment of the preferred attorney."); Footnote 17 ("It should be emphasized that the accused (and thus his preferred attorney) need not be given an opportunity to respond to all the materials collected by the Registrar, only to those upon which the Registrar intends actually to rely in making his decision.").

[43] *Milosevic*, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004, paras. 17, 18.

[44] Registrar's decision para. 16 ("… also making sure not to abruptly interrupt the course of justice").

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42. The Chamber recalls that Mr. Degli is not being criminally sanctioned, prevented from practicing law in general, nor from appearing before the ICTR as a counsel privately engaged by an Accused. He is being barred from participating in the Tribunal's legal aid system. As such, analogies to more extensive protections in national systems are not directly applicable here. The fact that different disciplinary procedures exist at the ICTY does not imply that the present system, established by the Judges and applied for a considerable period, is insufficient and should be set aside. More specifically, the Chamber observes that although a disciplinary panel at the ICTY makes a finding concerning the violation of the Code of Conduct, the Registrar still retains the authority to "suspend the assignment of counsel" if a disciplinary procedure has been initiated[45]. Case law suggests that counsel in a comparable situation at the ICTY could have been removed from the case and prevented from any future assignments before the disciplinary panel reached a decision on the merits[46].

43. After carefully reviewing the decision and the arguments of the parties, the Chamber does not find that the Registrar failed to comply with the requirements of the Directive or that he acted without procedural fairness. Furthermore, he did not reach a conclusion which no reasonable person, properly informed, could have reached.

(iii) *Did the Registrar's Decision Violate the Right of the Accused to a Fair Trial?*

44. The Defence asserts that the removal of Mr. Degli, particularly at this stage of the proceedings, denies Mr. Kabiligi the right to counsel of his choice. All four Accused are denied the right to adequate time and facilities to prepare for their Defence and to be tried with undue delay, as guaranteed by Articles 19 and 20 of the Statute.

45. The Chamber does not accept the assertion that Mr. Kabiligi is being denied the right to counsel of his choosing. According to Article 20 (A) of the Directive, Mr. Degli remains Lead Counsel for Mr. Kabiligi and is required to continue acting until a replacement counsel has been provided[47]. The Registrar's decision ordered Mr. Degli to deliver all the original documents in the file which are in his possession to Mr. Kabiligi or to Co-Counsel, and Mr. Kabiligi to submit three names for a new Lead Counsel. These orders were made in conformity with Article 20 of the Directive and were aimed at ensuring continuation at the level of Lead Counsel. Mr. Kabiligi also has a Co-Counsel, who continues to represent him. The Appeals Chamber has consistently stated that "the right to choose counsel applies only to those accused who can financially bear the costs of counsel" and that "the right to free legal assistance

[45] Article 19 (B) of the ICTY Directive on the Assignment of Counsel.

[46] See *Rasevic*, Decision on the Assignment of Defence Counsel (ICTY President), 16 October 2003, para. 4.

[47] Article 20 (A) of the Directive states : "Where the assignment of Counsel is withdrawn by the Registrar or where the services of assigned Counsel are discontinued, the Counsel assigned may not withdraw from acting until either a replacement Counsel has been provided by the Tribunal or by the suspect or accused, or the suspect or accused has declared his intention in writing to conduct his own defence."

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by counsel does not confer the right to choose one's counsel"[48]. Mr. Kabiligi's insistence on having Mr. Degli as Lead Counsel and his alleged lack of confidence in his present Co-Counsel do not implicate his right to counsel[49].

46. The next question is whether the removal of Mr. Degli jeopardizes the right of Mr. Kabiligi, or any of the other Accused, to have adequate time and facilities to prepare their Defence and to be tried without undue delay. The Chamber is mindful that Mr. Degli has conducted the Kabiligi Defence since 8 August 1997. Since the trial started in April 2002, he has been assisted by three Co-Counsel[50]. The present Co-Counsel, Mr. René Saint-Léger, is relatively new. He was appointed on 15 June 2004 and has participated in the final two trial segments of the Prosecution's case, although he has been on mission at various points. The Chamber accepts that Mr. Degli had exclusive contact with some witnesses that were relevant to all four accused. The Defence has not identified these prospective witnesses or even the general area of their proposed testimony, but the Chamber realizes that the integration of a new Lead Counsel would result in some delay of the proceedings for all four Accused, because of the remaining Counsels' lack of familiarity with these witnesses and the reluctance of some of them to appear.

47. In response to the changed circumstances facing all four Defence teams, in particular for Mr. Kabiligi, the Chamber has postponed the commencement of the Defence case from 12 January 2005 until 30 March 2005. This was done in order to enable the Defence teams to adjust and to undertake any additional investigations or preparatory work. Other relevant filing deadlines have also been postponed to meet these new circumstances (para. 6 above)[51]. The Chamber notes that Mr. Kabiligi's witnesses need not be called until later during the presentation of the Defence case. It is willing to consider further requests for relevant relief should the circumstances warrant it, such as the recall of Defence witnesses to allow further cross-examination by the Kabiligi Defence. In the Chamber's view, these measures adequately address the fair trial concerns of all four Accused based on the present circumstances. The Chamber is mindful of the need to continually follow the situation. Finally, it is recalled that the Defence may make appropriate requests to the Chamber in connection with witnesses who are reluctant to appear.

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[48] *Akayesu*, Judgement (AC), 1 June 2001, para. 61; *Kambanda*, Judgement (AC), 19 October 2000, para. 33. See also *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22.

[49] *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 54.

[50] Mrs. Sylvia Olympio, was assigned as Co-Counsel on 15 February 2002, but withdrew on 27 April 2003 after acknowledging that her Paris bar qualifications had been forged. See Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004, paras. 1-3. The next Co-Counsel, Mr. David Martin-Sperry, served from 8 August 2003 until 11 February 2004 when his assignment was withdrawn at Mr. Degli's request for conducting plea negotiations with the Prosecution without Lead Counsel's approval. See Decision of Withdrawal of David Martin-Sperry as Co-Counsel of the Accused Gratien Kabiligi (Registrar), 11 February 2004.

[51] As a consequence, the Kabiligi Defence request of 4 November 2004 for a postponement of the proceedings and certain filing deadlines is moot.

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48. In view of the particular circumstances that have arisen in connection with the withdrawal of Mr. Degli's assignment, the postponement of the Defence case was inevitable in order to ensure sufficient time for the Defence to prepare and does not affect the four Accused's right to a trial without undue delay. At this juncture, the Chamber is not faced with a situation where it may have to consider severance of Mr. Kabiligi's case in order to ensure the right of the other three Accused to trial without undue delay.

49. The Chamber concludes that the right of the four Accused to a fair trial without undue delay has not been affected by the Registrar's decision of 26 October 2004. In reaching this decision and modifying the trial schedule in view of the changed circumstances, the Chamber has not been guided by the ICTR Completion Strategy nor the desirability of a rapidly progressing trial but simply the need to ensure a fair trial.

(iv) New Lead Counsel

50. During the status conference on 21 December 2004, Mr. Kabiligi requested the Chamber to order the Registrar to appoint Mr. Skolnik, the present Co-Counsel in the Bagosora Defence, to serve as his new Lead Counsel given his familiarity with the case. The Bagosora Defence concurred with this proposed solution. Both suggested that the Chamber act pursuant to Rule 45 *quater* to facilitate the appointment immediately[52]. The Registry indicated that it was favorable to appointing Mr. Skolnik[53]. The Chamber left it to the Registry to pursue this option[54].

51. In furtherance of Mr. Kabilgi's request, the Registry corresponded with Mr. Kabiligi and Mr. Skolnik to gain further assurances and information related to the proposed solution prior to making an appointment. In a letter dated 22 December 2004, Mr. Skolnik expressed his willingness to accept the appointment as Lead Counsel for Mr. Kabiligi. However, he also indicated a measure of uncertainty due to possible certification to appeal the Trial Chamber's decision as well as Mr. Degli's pursuit of a separate administrative appeal with the Secretary General. Mr. Skolnik proposed that he be named interim Lead Counsel until the situation was clarified. Subsequently, Mr. Kabiligi withdrew his proposal, stating that it had caused confusion and indicating his desire for Lead Counsel to act in his interests exclusively. He asked that the process of assigning a new Lead Counsel be suspended until the various avenues for reinstating Mr. Degli had been exhausted.

52. The Chamber finds that there is now an immediate need for clarity and action. As mentioned above (para. 45), the Registrar's decision requested Mr. Kabiligi to propose three names for a new Lead Counsel. This has not been done. The Registrar's

[52] T. 21 December 2004 p. 2 (Kabiligi : "I would like to propose to you … that you order the Registrar to a appoint a counsel, a co-counsel … the name I would like to propose … is that of Counsel Paul Skolnik, of course, subject to his assent and the assent of Mr. Constant, as well as the agreement of Mr. Constant's client".) and p. 6 (Constant : "… and I think it is in the interest of all Defence teams that the Chamber orders the Registrar to appoint Paul Skolnik pursuant to Rule 45 *quater*".).

[53] T. 21 December 2004 p. 12 (". . . in the circumstances of this case, we would support and act expeditiously to get Mr. Skolnik . . . as counsel in this case, because it eases a lot of problems which we usually encounter when we have to make that decision.").

[54] T. 21 December 2004 pp. 12-13.

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decision also required Mr. Degli to provide the case file to Co-Counsel or the Accused. In addition, Article 20 (A) of the Directive further mandated that he actively continue until replaced. From the submissions as well as his apparent lack of participation in the case since the Registrar's decision, the Chamber notes that it seems that Mr. Degli has not fulfilled these obligations. The Chamber recalls that Co-Counsel is relatively new (para. 46). He is presently undergoing a medical procedure[55]. Therefore, Mr. Kabiligi has been without adequate representation capable of assisting him in the preparation of his Defence case since 26 October 2004[56]. He appears reluctant to take the necessary steps to facilitate the appointment of a new counsel.

53. In order to ensure that Mr. Kabiligi is adequately represented at this critical juncture of the trial, the Chamber, pursuant to Rule 45 *quater*, instructs the Registrar to appoint immediately Mr. Skolnik as Lead Counsel for the Kabiligi Defence[57]. The Chamber is aware that the assignment of a particular counsel is typically within the province of the Registry, but recalls the Registry's previously expressed amenability to this solution. This assignment is in the interests of justice in view of the circumstances noted above; Mr. Skolnik's familiarity with the case and willingness to accept the assignment; the fact that the proposal originated from Mr. Kabiligi; and that Mr. Bagosora as well as his Lead Counsel supported the proposal[58]. Mr. Kabiligi's subsequent withdrawal of his proposal stems largely from the confusion flowing from the complicated situation. The present decision, however, reduces that lack of clarity. It implies that Mr. Skolnik will assist Mr. Kabiligi exclusively and that the Registry must find a new Co-Counsel for Mr. Bagosora. It also addresses Mr. Kabiligi's concern about a possible conflict of interest in connection with the previously suggested interim solution.

54. Mr. Kabiligi's request to suspend the process of appointing a new Lead Counsel in the hope that Mr. Degli will be reinstated is not justifiable. Given the present circumstances, Mr. Kabiligi is in need of immediate additional legal assistance. Staying the procedures further only results in undue delay which implicates fair trial concerns. Mr. Kabiligi has previously indicated that he wants to appeal the Chamber's decision not to reinstate Mr. Degli[59]. It follows from Rule 73 (B) that the decision is, as a general rule, not subject to interlocutory appeal. Mr. Degli's request for review by the Secretary-General is not contemplated in the Tribunal's Statute or Rules.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motions for the reinstatement of Mr. Jean Yaovi Degli as Lead Counsel for Mr Kabiligi.

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[55] According to medical attestations, Mr. Saint-Léger is presently undergoing surgery in his Achilles tendon. He is unable to work and travel for several weeks.

[56] In the Chamber's view, Mr. Saint-Léger's familiarity with the case has been sufficient to respond to pending motions.

[57] Even if Rule 45 *quater* may have been adopted to address situations similar to the one faced by the Chamber in *Barayagwiza*, Decision on Defence Counsel Motion to Withdraw (TC), 2 November 2000, Mr. Kabiligi's reluctance to facilitate the assignment of a new Lead Counsel is similar to such a situation, and, in any event, the plain language of the Rule covers the situation in the present case.

[58] T. 21 December 2004 pp. 2, 4, 12.

[59] T. 21 December 2004 p. 2.

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INSTRUCTS the Registrar to assign immediately Mr. Paul Skolnik as new Lead Counsel for Mr. Kabiligi.

Arusha, 19 January 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Kabiligi Defence Request for Extension of Time 20 January 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Gratien Kabiligi – Extension of time – Motion denied*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Defence for Kabiligi's Request for Extension of Time Limit for Filing a Response/Reply to Prosecution Motions/Response and to Allow Time to Co-Counsel to Take Cognizance of the File", filed on 5 November 2004[1];

CONSIDERING the Prosecution's response, filed on 4 November 2004;

HEREBY DECIDES the motion.

1. During the status conference on 14 October 2004, the Chamber requested the Defence teams to file on 12 November 2004 a provisional list of all Defence witnesses and witness summaries for those to be called during the first trial segment, originally scheduled to begin on 12 January 2005. The deadline for filing the Pre-trial Brief was set for 12 December 2004[2].

2. On 15 October 2004, the Prosecution filed a motion to admit into evidence the statements of several deceased witnesses. The Prosecution filed a subsequent motion to compel the Accused to testify prior to other Defence witnesses on 21 October 2004. In addition, on 29 October 2004, the Prosecution filed its Response to Kabiligi's

[1] The Kabiligi Defence sent an earlier version of its request dated 3 November 2004 via e-mail to the Registry, which was informally circulated on 4 November 2004, pending receipt of the original for filing. The Prosecution responded to this version. The Kabiligi Defence faxed a new and somewhat modified version of the request to the Registry on 5 November 2004 for filing.

[2] T. 14 October 2004 pp. 12, 13, 15.

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Defence Motion for Extremely Urgent Relief to Exclude Testimony on Facts Not Contained in the Indictment.

3. In a decision dated 26 October 2004, the Registrar withdrew the assignment under the Tribunal's legal aid program of Mr. Jean Yaovi Degli as Lead Counsel for the Kabiligi Defence[3]. Co-Counsel, who has been assigned since June 2004, asserts that he cannot effectively answer pending motions or respect the various deadlines set by the Chamber in anticipation of the upcoming trial segment. In light of the Registry's decision, the Kabiligi Defence requests a waiver of the time limit required to respond to all Prosecution submissions filed since 15 October 2004 and an extension of at least six months for filing the provisional witness list and Pre-trial Brief so that the Co-Counsel can complete his study of the file.

4. The Prosecution is not opposed to an extension of time for the Kabiligi Defence to respond to its pending motions. The Prosecution maintains that it should receive the provisional list of witnesses sixty days and the Pre-trial Brief thirty days before the commencement of the Defence case, noting that to date none of the other substantial changes in legal personnel among the parties has led to requests for postponement.

5. The Chamber recalls that it has rendered decisions on the two pending motions for which the Defence seeks an extension of time to respond, addressing the issues presented in this request[4]. In addition, the Rules of Procedure and Evidence do not provide for a right of reply to a response to a motion[5]. Moreover, on 21 December 2004, the Chamber postponed the commencement of the Defence case and extended all related filing deadlines based on the circumstances which followed the Registrar's decision[6].Therefore, the Defence motion has become moot.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 20 January 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[3] *Decision to Withdraw the Assignment of Mr. Jean Y. Degli as Counsel for Gratien Kabiligi* (Registrar), 26 October 2004. Though the decision is dated 26 October 2004, it was not filed until 27 October 2004.

[4] *Bagosora et al.*, Decision on Motion to Compel Accused to Testify Prior to Other Defence Witnesses (TC), 11 January 2005, para. 8; *Bagosora et al.*, Decision on Admission of Statements of Deceased Witnesses (TC), 19 January 2005, para. 2.

[5] See *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004. para. 3. However, the Defence remains at liberty to file one to the Prosecutor's Response to Kabiligi's Defence Motion for Extremely Urgent Relief to Exclude Testimony on Facts Not Contained in the Indictment until a decision has been rendered.

[6] T. 21 December 2004 p. 27; *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005, para. 6.

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## *Decision on motions for judgement of acquittal 2 February 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Genocide, Modes of commission, "Aiding and abetting", Approving spectator, Accomplice Liability, Superior responsibility, Chain of command, Criteria of "knew or had reason to know", Relationship of "effective control" – Conspiracy to commit genocide,* Actus Reus, Mens Rea *- Incitement to commit genocide, Interpretation of the "direct and public" criteria,* Mens Rea *– Crimes against Humanity, Murder, Condition of* Mens Rea*, Condition of "widespread or systematic attack", Extermination, Distinction with Murder, Rape, Persecution, Characteristic of "severe deprivation of fundamental rights", Other inhumane acts, Violence to life, health and physical or mental Well-Being, Conditions for the applicability of art. 4 of the Statute, Outrages Upon Personal Dignity – Murder of ten Belgian UNAMIR soldiers – Evidence "sufficient to sustain a conviction", Evidence "beyond a reasonable doubt", Sufficiency of evidence in relation to the count, Credence of Prosecution evidence, Probative value, Uncorroborated evidence, Hearsay evidence, Contradictory evidence, Circumstantial evidence, Expert evidence – Sufficiency of notice to the Defence –* Ratione temporis *jurisdiction of the Tribunal – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 98* bis*; Statute, art. 2 (2), 2 (3) (b), 2 (3) (c), 3, 4, 4 (a), 4 (e), 6 (1) and 6 (3)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Ferdinand Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, 17 September 2002 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Decision on Kamuhanda's Motion for Partial Acquittal, 20 August 2002 (ICTR-99-54); Trial Chamber,* The Prosecutor v. Laurent Semanza, *Judgement, 15 May 2003(ICTR-97-20); Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka, *Judgement, 16 May 2003 (ICTR-96-14); Trial Chamber,* The Prosecutor v. Nahimana et al., *Judgement, 3 December 2003 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Judgement, 22 January 2004 (ICTR-99-54); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and 96-17); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Defence Motions for Acquittal Under Rule 98* bis*, 16 December 2004 (ICTR-98-42)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Radislav Krstic, *Judgement, 14 December 1999 (IT-98-33); Trial Chamber,* The Prosecutor v. Zoran Kupreskic et al.*, Judgement, 14 January 2000 (IT-95-16); Trial Chamber,* The Prosecutor, v. Dario Kordic and

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Mario Cerkez, *Decisions on Defence Motions for Judgment of Acquittal, 6 April 2000 (IT-95-14/2); Trial Chamber,* The Prosecutor v. Dragoljub Kunarac et al., *Decision on Motion for Acquittal, 3 July 2000 (IT-96-23 and 23/1); Trial Chamber,* The Prosecutor v. Mirsolav Kvocka et al., *Decision on Defence Motions for Acquittal, 15 December 2000 (IT-98-30/1); Trial Chamber,* The Prosecutor v. Dragoljub Kunarac et al., *Judgement (TC), 22 février 2001 (IT-96-23 et 23/1); Appeals Chamber,* The Prosecutor v. Goran Jelisic, *Judgment, 5 July 2001 (IT-95-10); Trial Chamber,* The Prosecutor v. Dusko Sikirica et al., *Judgement on Defence Motions to Acquit, 3 September 2001 (IT-95-8); Appeals Chamber,* The Prosecutor v. Dragoljub Kunarac et al., *Judgement, 12 June 2002 (IT-96-23 and 23-1); Trial Chamber,* The Prosecutor v. Milosevic, *Decision on Motion for Judgement of Acquittal, 16 June 2004 (IT-02-54)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF motions for judgement of acquittal, filed by the Bagosora Defence on 18 October 2004, and by the Defence teams of the other Accused on 21 October 2004;

CONSIDERING the Prosecution Response, filed on 26 October 2004; the Ntabakuze Replies, filed on 8 and 25 November 2004; the Nsengiyumva Reply, and Corrigenda, filed on 22 and 28 December 2004, respectively; and the Bagosora Reply, filed on 7 January 2005;

HEREBY DECIDES the motion.

## Introduction

1. After calling eighty-two witnesses and entering 326 exhibits, the Prosecution closed its case on 14 October 2004, subject to the filing of a motion to introduce statements of deceased witnesses. The Prosecution filed its motion the next day. All Defence teams filed motions for judgement of acquittal within seven days of the conditional closure of the Prosecution case on 14 October 2004. On 19 January 2005, the Chamber granted the Prosecution motion in part, admitting three witness statements and part of a fourth. The Chamber also granted the Defence seven days to make additional submissions in support of the 98 *bis* motions in relation to the newly admitted evidence.

## Submissions

2. The parties have made three types of submissions : on the nature of the Chamber's inquiry under Rule 98 *bis*; on the sufficiency of the evidence in relation to the crimes alleged in the counts of the Indictments; and on the sufficiency of the evidence in relation to individual paragraphs of the Indictments. The parties' submissions totalled more than six hundred pages, and are too voluminous to be meaningfully summarized here. In any event, for the reasons elaborated below, exhaustive recitation is unnecessary. In the present section, only selected general arguments concerning the scope of the inquiry under Rule 98 *bis* will be reviewed. Specific submissions con-

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cerning the sufficiency of evidence, where relevant, will be considered in the "Deliberations" section below. The Chamber emphasizes, however, that it has reviewed all of the arguments and submissions of the parties, and that it has exercised its judgement in limiting references thereto.

3. The parties are agreed as to the standard which must be met by Prosecution evidence to resist a motion for judgement of acquittal : there must be evidence upon which a reasonable trier of fact could find the accused guilty of the crime charged[1]. For that to be the case, there must be evidence upon which a reasonable trier of fact could find that each element of the offence had been proven beyond a reasonable doubt. The Defence argues, further, that the sufficiency of evidence should be evaluated not only in relation to entire counts of an indictment, but also in respect of individual paragraphs. In other words, individual paragraphs of an indictment should be struck out where they are not supported by sufficient evidence for any reasonable trier of fact to believe[2]. Although the Prosecution does not expressly agree with this argument, it has submitted charts detailing the evidence in support of each paragraph of the Indictments challenged by the Defence.

4. The Defence argues that a judgement of acquittal should be entered where charges in an Indictment are impermissibly vague or otherwise defective regardless of the nature of the evidence adduced. Where no reasonable Chamber, at the end of the trial, could enter a finding of guilt because of such a legal defect, a judgement of acquittal is appropriate[3]. No submissions were made by the Prosecution in opposition to this argument.

5. The Defence concedes that, in principle, the Chamber should defer evaluation of the weight of the evidence until the end of the trial, and must treat the Prosecution evidence as provisionally credible[4].This principle should give way, however, where the evidence is uncorroborated or unsubstantiated hearsay[5]; "obviously unreliable and not credible"[6]; expert evidence whose factual foundation has not been the object of factual proofs[7]; or where the Prosecution case has "completely broken down"[8]. The Prosecution opposes any such evaluation of evidence, arguing that it is impractical for the parties, given the time limits imposed by Rule 98 *bis*, to prepare adequate submissions showing the inter-relationship of all the evidence. Further, such a procedure would unduly duplicate judicial effort, requiring the Chamber to weigh the totality of the Prosecution evidence at the end of the Prosecution case and again at the end of the trial[9]. The Nsengiyumva Defence argues that other categories of evidence should

[1] Nsengiyumva Motion, paras. 17-25; Bagosora Motion, paras. 8-12; Kabiligi Motion, paras. 4-7; Ntabakuze Motion, paras. 4-10; Prosecution Reply, para. 156. The parties also agree that the burden of proof to show an absence of sufficient evidence rests with the Defence, as the moving party : Ntabakuze Motion, paras. 25-26; Bagosora Motion, para. 6 (endorsing all legal arguments of the Ntabakuze Defence); Prosecution Response, para. 159.

[2] Nsengiyumva Motion, paras. 14, 29-43; Bagosora Motion, para. 13; Kabiligi Motion, para. 9.

[3] Ntabakuze Motion, paras. 12-15, 38-64; Kabiligi Motion, paras. 13-29.

[4] Ntabakuze Motion, para. 7; Kabiligi Motion, para. 11; Bagosora Motion, para. 10; Nsengiyumva Motion, para. 46.

[5] Ntabakuze Motion, paras. 20-24.

[6] Kabiligi Motion, para. 11.

[7] Bagosora Motion, paras. 15-20.

[8] Kabiligi Motion, para. 11; Nsengiyumva Motion, paras. 47-63.

[9] Prosecution Response, paras. 161-62.

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be disregarded by the Chamber, including uncorroborated testimony of a single witness to an event, and evidence which is vague or inconsistent with other testimony[10].

## Deliberations

(i) *General Principles*

6. Rule 98 *bis*, "Motion for Judgement of Acquittal", provides that :

> If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber shall order the entry of judgement of acquittal in respect of those counts.

In interpreting a substantially identical provision of the ICTY Rules, the Appeals Chamber succinctly defined the phrase "insufficient to sustain a conviction" :

> The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond a reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond a reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond a reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond a reasonable doubt[11].

In assessing whether there is sufficient evidence upon which a reasonable trier of fact could, at the end of the trial, enter a conviction, the Chamber must "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief"[12]. Accordingly, the object of the inquiry under Rule 98 *bis* is not to make determinations of fact having weighed the credibility and reliability of the evidence; rather, it is simply to determine whether the evidence – assuming that it is true – could not possibly sustain a finding of guilt beyond a reasonable doubt. That will only be the case where there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief[13]. To be incapable of belief, the evidence must be obviously incredible or unreliable;

[10] Nsengiyumva Motion, paras. 64-66, 72-74.

[11] *Jelisic*, Judgement (AC), 5 July 2001, para. 37.

[12] *Id.* para. 55; *Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC), para. 18.

[13] As to the necessity that there be evidence in support of each element of the crime : *Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC), para. 18 ("if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction"); *Sikirica et al.*, Judgement on Defence Motions to Acquit (TC), 3 September 2001, para. 9 ("if … an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction, and the motion filed under Rule 98 *bis* would succeed"); *Milosevic*, Decision on Motion for Judgement of Acquittal (TC), 16 June 2004, para. 13 (sufficiency of evidence to be assessed in relation to "elements of a charge").

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the Chamber should not be drawn into fine assessments of credibility or reliability[14]. Needless to say, a finding that evidence is not obviously incredible does not foreclose the Chamber, at the end of the trial, from finding that the evidence is, in fact, neither credible nor reliable.

7. The inquiry under Rule 98 *bis* is limited to determining whether "the *evidence* is insufficient to sustain a conviction". The Chamber is not mandated to consider whether the Defence has had insufficient notice of charges to sustain a conviction, or whether there are other legal defects in an Indictment which could lead to acquittal[15]. Furthermore, recent jurisprudence confirms that the sufficiency of notice involves a careful assessment of, *inter alia*, the timing and content of disclosure[16]. Understandably, in light of the time-limits imposed by Rule 98 *bis*, the parties have not made submissions on such matters. Accordingly, the Chamber is neither legally authorized by Rule 98 *bis* nor factually able to consider such matters[17].

8. The Defence argues that the Chamber should inquire into the sufficiency of evidence in relation to each paragraph of the Indictments. The Chamber considers such an approach to be neither necessary under the Rules, nor appropriate in relation to the Indictments presently under consideration. Rule 98 *bis* requires the Chamber to determine only whether "the evidence is insufficient to sustain a conviction on one or more *counts* charged in the indictment", and to order a "judgement of acquittal in respect of those *counts*". Most previous 98 *bis* decisions in this Tribunal have examined the evidence in relation to counts, without also testing the sufficiency of evidence

[14] *Strugar*, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 21 June 2004, para. 17 (where the Chamber stated that the evidence must be "inherently incredible" to be rejected at the 98 *bis* stage, and that such situations would arise only "rarely"); *Kordic and Cerkez*, Decision on Defence Motions for Judgement of Acquittal (TC), 6 April 2000, para. 28 (credibility and reliability of evidence only to be considered where "the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case"); *Semanza*, Decision on the Defence Motion (TC), 27 September 2001, para. 16 (rejecting Defence arguments concerning credibility and reliability of evidence as beyond the scope of the 98 *bis* inquiry); *Kvocka et al.*, Decision on Defence Motions for Acquittal (TC), 15 December 2000, paras. 15-20 (the Chamber will only reject evidence which is "so unreliable that no reasonable trier of fact could credit it").

[15] *Nyiramasuhuko et al.*, Decision on Defence Motions for Acquittal Under Rule 98 *bis* (TC), 16 December 2004, paras. 73-75; *Semanza*, Decision on the Defence Motion (TC), 27 September 2001, para. 18; *Kunarac et al.*, Decision on Motion for Acquittal (TC), 3 July 2000, para. 27 (rejecting a request to consider cumulative charging as beyond the scope of the 98 *bis* inquiry).

[16] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197 ("Whether the Prosecution cured a defect in the indictment depends, of course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensated for the indictment's failure to give notice of the charges asserted against the accused"); *Ntakirutimana*, Judgement (AC), 13 December 2004 para. 27 ("the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant").

[17] The Defence for Ntabakuze argues that only the paragraphs specifically cited in the counts of the Indictment can be used to substantiate the charges in the count. The Chamber expresses no view on this legal argument at this stage. Under Rule 98 *bis*, however, the Chamber is directed to consider the totality of the evidence regardless of an alleged defect in the Indictment which might disqualify some evidence from consideration.

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in relation to each paragraph of an indictment[18]. The approach at the ICTY is not markedly different. The Defence has misinterpreted certain ICTY Trial Chamber decisions which have dismissed counts in part, where there is insufficient evidence in respect of some alleged incidents of the crime, but not others. For example, in *Kordic & Cerkez*, the Chamber dismissed charges of a war crime in respect of some geographic locations, but not others[19]. This does not mean that the Chamber considered itself bound under 98 *bis* to consider every allegation in the indictment in relation to the war crime, but simply that it was required to consider each distinct incident challenged by the Defence which could sustain the count[20].

9. Examining the evidence in relation to counts charged is particularly appropriate in the present case. Many paragraphs of the Indictments are inter-dependent, narrating disparate material facts which, when viewed as a whole, purport to show that the Accused encouraged, and gave support to, militia and soldiers who committed criminal acts. The Chamber would easily be drawn into an unwarranted substantive evaluation of the quality of much of the Prosecution evidence if it were to pronounce on the sufficiency of evidence in relation to each material fact in each paragraph in the Indictments. Rule 98 *bis* requires no such exercise. The inquiry under Rule 98 *bis* is simply whether there is sufficient evidence to say that a reasonable trier of fact could find a count proven beyond a reasonable doubt, if the evidence were to be believed.

10. The Defence has urged that certain rules be applied in assessing the sufficiency of evidence. It suggests that expert evidence cannot be used to prove factual matters without factual evidence as a foundation; that "indirect" evidence, such as hearsay, should not count as evidence; that uncorroborated testimony should be disregarded; and that weak, vague, or contradicted evidence should be discounted or ignored. The guiding principle, as stated above, is that Prosecution evidence is entitled to credence unless the Chamber determines that no reasonable trier of fact could rely upon it. In determining whether evidence is sufficient, however, the Chamber must evaluate whether the evidence invoked by the Prosecution is actually probative of the elements of the offence charged. The significance of the evidence should not be viewed narrowly, and is entitled to any inferences or presumptions which a reasonable trier of fact could make[21]. As it is well-established

[18] *Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC); *Ntagerura et al.*, T. 6 March 2002 (oral argument and decision); *Kamuhanda*, Decision on Kamuhanda's Motion for Partial Acquittal, 20 August 2002. Cf. *Nyiramasuhuko et al.*, Decision on Defence Motions for Acquittal Under Rule 98 *bis* (TC), 16 December 2004.

[19] *Kordic and Cerkez*, Decision on Defence Motions for Judgement of Acquittal (TC), 6 April 2000, para. 35.

[20] See *Kvocka et al.*, Decision on Defence Motions for Acquittal (TC), 15 December 2000, para. 9 (the Chamber "may enter a judgement of acquittal not only with regard to an entire count of the indictment, but also with regard *to a factual incident or event cited* in the indictment in support of the offence, if the Prosecutor's evidence on that particular *incident* does not rise to the level of the standard laid down in Rule 98 *bis* (B)" (emphasis added); *Kunarac et al.*, Decision on Motion for Acquittal (TC), 3 July 2000 (entering acquittals in respect some, but not all, incidents of rape, charged in the indictment). Cf. *Milosevic*, Decision on Motion for Judgement of Acquittal (TC), 16 June 2004.

[21] *Kvocka et al.*, Decision on Defence Motions for Acquittal (TC), 15 December 2000, para. 13 ("The Chamber finds that the applicable standard is whether a reasonable trier of fact could, upon the evidence presented by the Prosecutor, taken together with all reasonable inferences and applicable legal presumptions and theories that might be applied to it, convict the accused").

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that a reasonable trier of fact may reach findings based on uncorroborated or hearsay evidence; that contradictory evidence may nevertheless be reliable, at least in part; and that circumstantial evidence may be sufficient to prove guilt beyond a reasonable doubt, there is no justification for discounting these types of evidence on a motion to acquit[22]. As for expert evidence, it may include not only opinion evidence, but also factual evidence as introduced through documents or, possibly, hearsay. Accordingly, the categorical limitation on the use of expert evidence suggested by the Defence is also unjustified.

11. The sufficiency of evidence in relation to each count of the Indictments is examined in the following section. The evidence related to each required element of the offence will be evaluated in light of the totality of the evidence, along with any reasonably possible inferences. The evidence shall be assumed to be reliable and credible unless convincing arguments have been raised that it is obviously unbelievable, such that no reasonable trier of fact could rely upon it. The Chamber's sole concern is to determine whether the sufficiency threshold under Rule 98 *bis* is satisfied.

(ii) *Sufficiency of Evidence in Relation to Counts*

(1) *Conspiracy to Commit Genocide – Count 1 of the Indictments*

12. Conspiracy is constituted when two or more persons agree to a common objective, the objective being a criminal act[23]. The *actus reus* of conspiracy to commit genocide, prescribed as an offence under Article 2 (3) (b) of the Statute, is, accordingly, the act of entering into an agreement whose common object is to commit genocide; the *mens rea* is the intent to enter into such an agreement. Neither the *actus reus* nor the *mens rea* exists unless the perpetrator has, in common with his or her co-conspirators, the requisite specific intent of the crime of genocide[24]. That intent may be proven by what the perpetrator said or, as with any crime, by drawing inferences from conduct which may show intent[25]. The offence is complete upon the agreement itself : the criminal object of the agreement need not be achieved. The existence of the agreement may be demonstrated by circumstantial evidence as, for example, co-ordinated action in pursuit of the unlawful act[26].

13. Genocide is defined in Article 2 (2) of the Statute as :

> […] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;

[22] *Kupreskic*, Judgement (AC), 23 October 2001, para. 31; *Ndindabahizi*, Judgement (TC), para. 24; *Rutaganda*, Judgement (AC), 26 May 2003, paras.3 4-35.

[23] *Musema*, Judgement (TC), para. 190.

[24] *Id.* para. 192 ("With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such"); *Niyitegeka*, Judgement (TC), 16 May 2003, para. 423.

[25] *Ndindabahizi*, Judgement (TC), para. 454 (with further references).

[26] *Nahimana et al.*, Judgement (TC), paras. 1046-1049.

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(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring members of the group to another group.

14. The time frame of the alleged conspiracy is "from late 1990 until July 1994"[27]. In accordance with the principles enunciated above, the Chamber's task is to determine whether there is evidence upon which a reasonable trier of fact could find that a conspiracy was formed amongst the Accused during the period identified in the Indictment.

15. The evidence is generally not based on direct observation of the Accused entering into an agreement with one another. Rather the evidence concerns the words and conduct of the Accused, sometimes in the presence of one another, which is said to be indicative of the existence of the alleged agreement. The words and conduct must be viewed, according to the Prosecution, in the context of evidence that a conspiracy to commit genocide had been conceived, and that preparations for its execution undertaken, by elements of the military and militia groups during the period in question. Furthermore, the Prosecution has asserted that the manner in which events unfolded after 6 April 1994, including the behaviour of the Accused, is indicative of the existence of a conspiracy and of concerted planning prior to that date[28]. An overview of selected elements of that evidence clarifies the nature of the inferences suggested by the Prosecution :

- clandestine groups of senior military officers, of which some or all of the Accused were members, were hostile to the civilian Tutsi population prior to April 1994[29];
- Bagosora, Ntabakuze and Nsengiyumva were members of a commission which produced a report distributed to the military in late 1992 which arguably equated the civilian Tutsi population of Rwanda with the enemy[30];
- Bagosora, Ntabakuze, Kabiligi and Nsengiyumva made remarks prior to April 1994, sometimes in the presence of other alleged co-conspirators, which arguably could be interpreted as threats or exhortations to kill civilian Tutsi[31];

[27] Paragraph 5.1 of the Indictments.

[28] Prosecution Response, paras. 30, 34, and evidence cited in appendices.

[29] ZF testified that all four Accused were members of the "zero network", which was connected to the "death squads" and to an organization called *abakozi* (27 November 2002, pp. 67-68);

[30] P13.1 purports to be a copy of at least a portion of the alleged report; Witnesses CE and DBQ claim that they saw the report in 1992 (T. 14 April 2004, pp. 9, 11; T. 22 September 2003, p. 9); interpreting the language of the document, Expert Witness DesForges testified that the report identified "Tutsi as the enemy and, in a general sense, equating them, that is Tutsi civilians, with members of the military force which had attacked the country, the RPF" (10 September 2002 p. 77); CE, DBQ and XXQ also testified that they interpreted the report as identifying Tutsi civilians as the enemy (T. 14 April 2004, pp. 9, 11; T. 22 September 2003, p. 9; 11 October 2004, pp. 38-39).

[31] Bagosora : leaving the Arusha negotiations in late 1993 to "prepare the apocalypse" (Sagahutu, T. 28 April 2004, p. 32; XAM, T. 29 September 2004, p. 3); in the presence of Ntabakuze and Nsengiyumva, declared to an assembly at Butotori Camp that the "Tutsi had to be exterminated" because they had, in turn hatched a plot to exterminate the Hutu (ZF, 27 November 2002, pp. 71-72); similar testimony by DCH (23 June 2004, p. 39), and by XBM, referring to an assembly on 24 May 1994 at the Meridien Hotel in Gisenyi, at which Nsengiyumva was also present

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- Bagosora, Ntabakuze, Nsengiyumva, and Kabiligi made remarks after 6 April 1994, sometimes in one another's presence, which arguably could be interpreted as threats or exhortations to kill Tutsi civilians[32];
- there were communications amongst the Accused arguably suggesting co-ordinated conduct and that they were, on some occasions, together[33];
- lists of Tutsi were prepared by the Accused prior to 7 April 1994, and were used thereafter to identify and kill Tutsi and moderate leaders; either by inference or direct evidence, the purpose of the lists was to carry out a genocide of the Tutsi population[34];

(14 July 1994, pp. 24-26); Bagosora's voice heard on an audio-tape of a celebration for the Bishop of Ruhengeri in November 1993 that the Tutsi must be exterminated (XXY, 11 June 2004, pp. 9-10). Ntabakuze : told his soldiers that if hostilities resumed, "they were going to start with the Tutsi living close to the [Kanombe] camp instead of going to fight the *Inkotanyi* who were too far in the forest, they would start with the enemy, the Tutsi who were living close to the camp" (DBQ, 23 September 2003, pp. 47-48). Kabiligi : at a meeting on 15 February 1994, identified the enemy as "Tutsis and the pro-RPF Hutus who were therefore opposed to the Habyarimana government", and that Tutsi should start to be killed through commando operations (XXQ, 11 October 2004, pp. 7, 38-39). Nsengiyumva : said, in Bagosora's presence, that strategies had been developed to solve the "problem of accomplices", which could be interpreted as a veiled reference to Tutsi civilians (XBM, 14 July 2003, p. 23).

[32] Witness ABQ testified that some time between April and July 1994, he heard Bagosora, in the presence of Nsengiyumva, tell a story to an assembly in Gisenyi whose import was that even Tutsi children should be killed (6 September 2004, pp. 26-27); DAS testified that Bagosora, in the presence of Nsengiyumva, said that "the time of the Tutsi men and women is all over", that people were killed at a roadblock in the presence of Bagosora and Nsengiyumva, and that Bagosora expressly ordered the killing of Tutsi (5 November 2003, pp. 41, 50-51); DCH testified that Bagosora encouraged a group, possibly Interahamwe, to kill a group of Tutsi after they had been taken away from the Hotel Mille Collines (22 June 2004, p. 72) . Kabiligi : passes through a roadblock, manned by soldiers and others, where there are many dead civilian bodies, but says nothing to the soldiers (DY, 16 February 2004, pp. 37-38); reportedly reprimands a soldier for not cooperating with the *Interahamwe* to kill Tutsi in Mururu and Nyarushishi (XXY, 11 June 2004, p. 5) . Ntabakuze : encourages or orders soldiers and *Interahamwe* to take away and kill Tutsi hiding in St. André college (DBQ, 25 February 2004, pp. 9-11); urges the killing of Tutsi in a hospital in Kabgayi, (XAI, 8 September 2003, pp. 54-59) Nsengiyumva : orders strengthening of roadblocks in Gisenyi after 7 April 1994 and urges others to kill Tutsi (DO, 30 June 2003, pp. 15-23; ABQ, 6 September 2004, pp. 4-8; OQ, 16 July 2003, p. 10).

[33] ZF offered hearsay evidence that Nsengiyumva was on the telephone with Bagosora on the night of 6 April 1994 and that Nsengiyumva used the word "apocalypse" during the conversation (28 November 2002, pp. 64-65).

[34] Bagosora : "[The] captain asked the soldiers, 'But why do you want to kill this lady?' [Soldiers replied] Bagosora has given us a list, and he has said that we should finish that list by 1 p.m. Do you think we are going to do everything, finish off all those who are on that list? Do you think we'll have scoured the whole Kiyovu neighbourhood?" (ATY, 27 September 2004, pp. 22-25). Nsengiyumva : "He had a sheet of paper in his hand. On that paper there was a list of the major *Inyenzi* who had to be eliminated at all cost. He read the names of those who were on that list" (ABQ, 6 September 2004, pp. 6-7); XBH testified that in February 1994, Bagosora, Nsengiyumva and a third military officer prepared lists of names of Tutsi to be eliminated in Gisenyi and that these lists were distributed to military and government leaders in Gisenyi (3 July 2003, p. 17; 4 July 2003, pp. 40-41). Generally : Beardsley testified that UNAMIR soldiers in Kinihira neighbourhood of Kigali saw Presidential Guard soldiers, gendarmerie, and militia moving from house to house using lists, and could hear gunfire and screaming (3 February 2004, p. 40).

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- the military, including the Accused, were involved in the training and distribution of weapons to the *Interahamwe* and other militia groups prior to 6 April 1994[35];

- prior to 6 April 1994, the *Interahamwe* were preparing to kill large numbers of Tutsi and, *inter alia*, had prepared lists to identify targets[36];
- the genocidal goals of the *Interahamwe* were subsequently confirmed by their involvement in widespread killings after 6 April 1994, during which period the Accused continued to supply weapons and support them, lending support to the inference that they had supported those goals all along[37].

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[35] "Ntabakuze sometimes came to attend these [*Interahamwe*] meetings [in 1993 in Kabuga], and I remember one occasion when he came in the company of Lieutenant Colonel Nzabanita, Innocent, also known as *Dictionnaire*. And they said that weapons were available and that there were also instructors available, that there were reserve soldiers living in our locality who were going to train people, and that he -- they would even place at our disposal soldiers for the training. And that is exactly what happened …." (DCH, 23 June 2004, pp. 5-7); there was evidence that Bagosora and Nsengiyumva were in favour of *Interahamwe* training, and that widespread training of *Interahamwe* took place on military bases. There was also evidence that weapons were distributed to the *Interahamwe* from military stores on the orders of Bagosora, Nsengiyumva and Ntabakuze : e.g. (KJ, 27 April 2004, pp. 65-67; ZF, 28 November 2002, p. 8; A, 1 June 2004, pp. 39-40; DBY, 22 September 2004, p. 7). It is not clear whether there is evidence of Kabiligi's direct involvement in this training or distribution of weapons.

[36] The *Interahamwe* was said to be an organization through which Hutu could close ranks against the Tutsi, and that the Tutsi were the enemy (DCH, 23 June 2004, pp. 3-4). Songs were sung during training whose import was that the Tutsi should be exterminated (Sagahutu, 29 April 2004, pp. 7-10; LAI, 31 May 2004, p. 30) and lists of Tutsi to be targeted were prepared by the *Interahamwe* (DCH, 23 June 2004, pp. 5-6; BY, 2 July 2004, pp. 39-41). Claeys reported hearsay information that an *Interahamwe* informant, "Jean Pierre", had been ordered to register the entire Tutsi population of Kigali for the purpose of exterminating them, and that a plan had been prepared for the killing of a thousand people every twenty minutes. (7 April 2004, pp. 33-35).

[37] Bagosora : "When I saw [Bagosora], he was accompanied by Nzabanita and other *Interahamwe* leaders in the neighbourhood. I think he was giving them instructions to start operations … He had sheets of paper in his hands … I thought he [Bagosora] was giving instructions because he was asking them to begin working from house to house and seek out Tutsi, and at that time, the Tutsi were referred to as *Inyenzi*." (CW, 8 October 2004, pp. 8-11); "Col. Theoneste Bagosora invited us [*Interahamwe* leaders] to a meeting before the arrival of Mr. General Romeo Dallaire … there were three other chef de secteur, *Interahamwe* secteur leaders at the level of Kigali … He began by thanking the *Interahamwe chef de secteurs* who were present regarding the way they had conducted themselves during that period. He congratulated them, and he asked them to be vigilant because at that time the killings had almost come to an end, and it was necessary to see in what way they were going to collaborate or to cooperate with the soldiers. There was one *chef de secteur*, that is the one from Gikondo, who had problems, because the RPF had set up a corridor to resupply the soldiers at the *Hôtel Rebero l'Horizon*; they had set up a corridor between the CND and the Rebero Horizon Hotel. So the *chef de secteur* of Gikondo asked Mr. Bagosora to see how to reinforce the *Interahamwe* with soldiers, and Mr. Bagosora responded that he was going to see to it, together with the soldiers and the gendarmerie … at the time Col. Theoneste Bagosora was a very powerful man; he was the most powerful man in Rwanda ..." (A, 1 June 2004, pp. 71-72, 74); in June 1994, in Bulinga, Bagosora is alleged to have told the witness "You can see that Tutsi are causing you to flee. Wherever you go, kill the Tutsi, right up to the babies" (XXY, 11 June 2004, p. 17); (XBM, 14 July 2003, pp. 24-26). Ntabakuze : urges the killing of Tutsi in a hospital in Kabgayi, and says that he will send in *Interahamwe* to do

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This synopsis should not be understood as an indication that the Chamber accepts the evidence summarized to be truthful and reliable. The evidence enumerated above is not, however, obviously incredible such that no reasonable trier of fact could give it credit.

16. The Prosecution asserts that the inter-relationship of the Accused as senior officers within the military sets the stage for what appears to be a series of co-ordinated or even common actions : the promulgation of the definition of the enemy, which may arguably have targeted Tutsi civilians; the dissemination of that definition amongst soldiers in the army by the Accused; the uncanny repetition of that definition by the four Accused on various occasions; support for the *Interahamwe* using the resources of the military; and, finally, the direct evidence of some of the Accused being together on various occasions during one or more acts – speeches, preparing lists, ordering killings – which arguably encouraged the commission of genocide. If believed, the evidence could lead to a finding that the Accused, and others, entered into a conspiracy to commit genocide at some point during the period alleged in the Indictment.

(2) *Genocide – Count 2 of the Indictments*

17. The elements of genocide were described above in paragraph 13. Various modes of commission of genocide are defined under Article 6 (1) of the Statute. A person who

> "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute"

is individually criminally responsible. Instigation is urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed. In accordance with general principles of accomplice liability, instigation does not arise unless it has directly and substantially contributed to the perpetration of the crime by another person. Unlike the crime of direct and public incitement, instigation does not give rise to liability unless the crime is actually committed by a principal or principals[38]. Aiding and abetting refers broadly

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so (XAI, 8 September 2003, pp. 54-59); distributes weapons to *Interahamwe* in Camp Kanombe (DCH, 22 June 2004, p. 86). Kabiligi : during a visit to a hospital in Gisenyi in June or July 1994, is joined by Nsengiyumva : "I don't know what they talked about, then Kabiligi said that in the Kibuye area there were still Tutsi who were being supplied, being fed, and all things had to be done to ensure that such supplies are cut off, and then he went off … He said that at Karongi and Bisesero there still were Tutsi … He wanted to use or pass through the Turquoise area, take advantage of that situation so as to ensure that no Tutsi survived in that area ... He said he was going to go down to ensure that Tutsis no longer obtained those supplies. He said that he did not want any Tutsi still alive at the time the Turquoise operation soldiers would get to that area." (XAI, 9 September 2003, pp. 13-16); hearsay evidence of reprimanding a soldier for not cooperating with the *Interahamwe* to kill Tutsi in Mururu and Nyarushishi (XXY, 11 June 2004, pp. 2-6); hearsay evidence that Kabiligi sent soldiers to assist the *Interahamwe* in killing Tutsi civilians (XXY, 11 June 2004, p. 6). Nsengiyumva : distributed weapons and gave instructions to *Interahamwe* leaders on 7 April and subsequent days, including reading lists of Tutsi to be killed (DO, 30 June 2003, pp. 15-23; ABQ, 6 September 2004, pp. 4-8; OQ, 16 July 2003, p. 10).

[38] *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 456 (with further references).

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to any form of assistance and encouragement given to another person to commit a crime. As with instigation, aiding and abetting is a form of accomplice liability that requires direct and substantial contribution to the perpetration of the crime by another person. The assistance and encouragement may consist of physical acts, verbal statements, or even failure to act where the presence of a person in a position of authority at a place where a crime is being committed may convey approval for those crimes. The person aiding and abetting need not possess the principal's intent to commit genocide, but must at the least have knowledge of the principal's general and specific intent[39].

18. Much of the evidence concerning the Accused goes to alleged acts of support and encouragement of soldiers and militia to engage in genocide. As detailed above, there is evidence that Bagosora, Ntabakuze and Nsengiyumva, on specific occasions after 6 April 1994, urged civilians or soldiers to kill Tutsi civilians[40]. There is evidence that Kabiligi reprimanded a soldier for not cooperating with the *Interahamwe* in the killing of Tutsi civilians[41].

19. Evidence also exists to support the broader Prosecution theory that the Accused lent encouragement and support to elements of the armed forces and militias in furtherance of a systematic campaign to kill Tutsi civilians, which was the goal of the conspiracy described above. According to this theory of the case, the military and the militias were instrumentalities used by the Accused to execute a broad campaign of killings, of which there were many specific instances throughout Rwanda. The absence of the Accused at locations where episodes of killings took place, upon which the Defence has frequently relied in its submissions, does not necessarily preclude criminal responsibility under the various modes of commission described in Article 6 (1) of the Statute, or under the doctrine of superior responsibility prescribed by Article 6 (3).

20. The Chamber is not mandated under Rule 98 *bis* to make findings of fact as to whether the actions of the Accused did, or did not, substantially contribute to any of the episodes of genocidal killing described in the Indictments. However, on the basis of the evidence discussed in the previous section, along with all reasonably possible inferences arising therefrom, there is evidence which, if believed, could lead a reasonable trier of fact to conclude that the Accused espoused and supported genocidal killings[42]. Whether their support and encouragement (assuming that the evidence is believed) was sufficient to constitute instigation or aiding and abetting, or any of the other forms of liability enumerated under Article 6 (1) of the Statute, is a question of fact and law which must be determined at the end of the trial after full argument by the parties. In the meantime, the Chamber cannot say that there is insufficient evidence for any reasonable trier of fact to find the Accused criminally responsible, even for events such as those at Butare in support of which the Prosecution has not cited

[39] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 501; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 457 (with further references).

[40] *Supra* note 35.

[41] *Id.*

[42] Presence is not a *sine qua non* of aiding and abetting liability. *Semanza*, Judgement (TC), 15 May 2003, para. 385 ("Except in the case of an 'approving spectator', the assistance may be provided before or during the commission of a crime, and an accused need not necessarily be present at the time of the criminal act").

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any evidence of immediate participation of the Accused[43]. Accordingly, the Chamber denies the Defence motions to the extent that they seek a declaration that the Accused has no case to answer in respect of specific genocidal acts for which there is no evidence of direct involvement of the Accused.

(3) *Complicity in Genocide – Count 3 of the Indictments*

21. Aiding and abetting genocide and complicity in genocide are substantially overlapping, if not materially identical, forms of criminal conduct[44]. In any event, it is clear that a finding of aiding and abetting genocide could also sustain a conviction for complicity in genocide. This being the case, the Chamber is of the view that the same evidence discussed in the preceding two sections, if believed, could be sufficient to sustain a finding by a reasonable trier of fact that the Accused are guilty of complicity in genocide.

(4) *Incitement to Commit Genocide – Count 4 of the Nsengiyumva Indcitment*

22. Only Nsengiyumva is charged with incitement to commit genocide, as prescribed by Article 2 (3) (c) of the Statute. The incitement must be "direct and public", which has been interpreted as a

> "call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media".

To be direct, the exhortation must be more than a "vague or indirect suggestion", but, on the other hand, it need not actually lead to the genocidal act. The *mens rea* is the "intent to directly prompt or provoke another to commit genocide"[45].

23. Nsengiyumva is charged with incitement on three distinct occasions. As to the first occasion, on the night of 6-7 April 1994 (para. 6.14 of the Indictment), Witness ZF testified that he heard Nsengiyumva tell a certain *Lieutenant* Bizumuremyi under his command that "work had to begin to finish off the *Inyenzi*" and later that the Tutsi were evil. Shortly after speaking with Nsengiyumva, Bizumuremyi ordered soldiers to kill Tutsi civilians, including babies[46]. In light of the possible range of interpretations of the words spoken in the context, the Chamber cannot say that there is insufficient evidence upon which any reasonable trier of fact could find the Accused guilty of incitement for this event. Several witnesses testified to the second alleged

[43] Prosecution Motion, Appendix 1, pp. 48-49; Bagosora Reply, pp. 53-54.

[44] *Semanza*, Judgement (TC), 15 May 2003, para. 394 ("In the view of the Chamber, there is no material distinction between complicity in Article 2 (3) (e) of the Statute and the broad definition accorded to aiding and abetting in Article 6 (1)"); *Krstic*, Judgement (AC), 19 April 2004, paras. 138-39 ("As the Trial Chamber observed, there is an overlap between Article 4 (3) as the general provision enumerating punishable forms of participation in genocide and Article 7 (1) as the general provision for criminal liability which applies to all offences punishable under the Statute, including the offence of genocide … In this case, the two provisions can be reconciled, because the terms "complicity" and "accomplice" may encompass conduct broader than that of aiding and abetting genocide").

[45] *Akayesu*, Judgement (TC), 2 September 1998, para. 560; *Nahimana et al.*, Judgement (TC), 3 December 2003, paras. 1011-1015.

[46] ZF, T. 28 November 2002, pp. 40-42.

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act of incitement (para. 6.16 of the Indictment), at which Nsengiyumva allegedly called for the killing of Tutsi, urged roadblocks to be reinforced, and distributed weapons to *Interahamwe*. As to the third incident (para. 6.30 of the Indictment), a witness testified that Nsengiyumva told a municipal leader during an assembly at Umuganda stadium in Gisenyi that he should reinforce roadblocks and "to warn his Muslim friends not to continue hiding Tutsi in their houses"[47]. This evidence, if believed, is not insufficient to possibly lead to a finding of guilt beyond a reasonable doubt.

(5) *Murder – Count 4 (civilians) and 5 (Belgian soldiers) Bagosora Indictment; Count 4 (civilians) Ntabakuze/Kabiligi Indictment; Count 5 (civilians) Nsengiyumva Indictment*

24. Article 3 of the Statute enumerates nine "Crimes Against Humanity", of which the Accused are charged with five : murder, extermination, rape, persecution, and other inhumane acts. In order to qualify as a crime against humanity, these offences must satisfy two conditions under the Statute : the crime must be committed as "part of a widespread or systematic attack"; and, the attack must be against "any civilian population on national, political, ethnic, racial or religious grounds". "Widespread" is defined as massive or large-scale, involving many victims; "systematic" refers to an organized pattern of conduct, as distinguished from random or unconnected acts committed by independent actors[48]. The second requirement nourishes the *mens rea* element unique to crimes against humanity : the perpetrator must, at a minimum, know that his action is part of a widespread or systematic attack against civilians on discriminatory grounds, though he or she need not necessarily share that discriminatory intent[49].

25. Murder is the intentional killing of a person, or intentional infliction of grievous bodily harm with knowledge that such harm will likely cause the victim's death or with recklessness as to whether death will result, without lawful justification or excuse, which leads to death[50]. An obvious distinction between a genocidal killing and murder is that the latter must be committed as part of a widespread and systematic attack (with at least knowledge of its discriminatory character), whereas the former must be committed with the specific intent to destroy, in whole or in part, the group to which the victim belongs. Much of the evidence discussed above in respect of genocide of Tutsi civilians is also probative of the requirements of murder as a crime against humanity against them. The testimony of statements by the Accused after 7 April 1994, if believed, could establish that the Accused supported and encouraged those who were killing Tutsi civilians with the requisite discriminatory intent[51]. There is also evidence capable of establishing that these killings were widespread, if not also systematic.

[47] DO, T. 1 July 2003, p. 34.
[48] *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 477 (with further references).
[49] *Id.*, paras. 477, 484 (with further references).
[50] *Id.* para. 487 (with further references).
[51] *Supra* notes 35-37.

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26. Bagosora is also charged with the murder of ten Belgian UNAMIR soldiers at Camp Kigali on the morning of 7 April 1994. There is evidence that during the time that the Belgians were being beaten and killed at Camp Kigali, Bagosora was chairing a meeting at the *Ecole Superieure Militaire* a short distance away. There is some evidence that Bagosora knew that the Belgians were at Camp Kigali and were in danger of being killed by soldiers of the Rwandan Army[52]. There are indications that he was in the direct chain of command above those who were conducting the attack on the Prime Minister's residence on the morning of 7 April 1994, during which the Belgian officers were detained and taken to Camp Kigali[53]. There is also evidence to suggest that Bagosora was in a position to exercise control over the soldiers at Camp Kigali, and that at least one of them knew that he was nearby, but that Bagosora did nothing[54].

[52] AE, T. 16 December 2003, p. 39 ("[The Camp Commander, Nubaha] went back to the ESM running. Just at the entrance there was a meeting hall. He asked for reinforcement from ESM. There was a meeting there. He went to the ESM to -- he went to the ESM and called for help for the Belgians but in spite of that the Belgian soldiers were killed. And it took a lot because the Belgians had the kalashnikov guns … The distance is not long [between ESM and Camp Kigali where the UNAMIR soldiers were killed], the distance between our position and the Kigali camp. I would say 200 to 300 metres. So even if you use a pistol, you could hear. But in that case, machine-guns and grenades were being used, so the explosions could be heard. And the multiple grenade launcher makes a lot of noise."

[53] DA, T. 17 November 2003, pp. 30-31 ("[Captain] Sagahutu [commander of the Reconnaissance Battalion, who had ordered the Presidential Guard to prevent Prime Minister Uwilingiyimana from leaving her residence] called Nzuwonemeye [who] was in a meeting [at ESM]. [Sagahutu] was asking if it was necessary to send reinforcements … In any case, something had to be done because time was being wasted. The objective [of arresting Uwilingiyimana] had not been attained … Nzuwonemeye said he could not take any decision, that he was going to ask for instructions so that the operation should be carried out immediately. But that was not a decision he had to take on his own. So he had to seek the opinion of those who were with him at the meeting … The meeting had been convened by Colonel Bagosora, and instructions had to be sought from him to be able to answer Captain Sagahutu … [Sagahutu] received an answer … 20 to 30 minutes later … he was asked to do everything possible to complete the mission, but that he should ensure that nobody should have access to the studios of Radio Rwanda to give any contradictory versions … Q. Was the mission he was talking about the mission concerning the prime minister? A. Yes. Q. And who did that message come from, if you know? A. The message came from Colonel Bagosora and even the letterhead had the call sign which was used by the colonel").

[54] During the alleged killings, Bagosora is alleged to have been directing and chairing a meeting attended by all the senior military leaders of the army. Dallaire, 19 January 2003, pp. 36, 39, 41 ("It was the morning of the 7th, around 10 :30 in the morning when I burst into the meeting chaired by Colonel Bagosora with General Ndindiliyimana to his side of all senior officers, commanders. I say 'all' because the room was full of the government, and government forces and gendarmerie … Well, when I finished speaking, Colonel Bagosora took the lectern again and repeated his concerns that the security of the nation was crucial and that the commanders had to maintain control on their troops so that they would have a very reasonable resolution of the current reactions by a few units that were in Kigali, or words to that effect … it was clear that Colonel Bagosora was giving instructions, direction, and General Ndindiliyimana acquiescing to that and that meeting broke up." Lt. Nubaha apparently knew that Bagosora was nearby, and Major Nzuwonemeye is described by one witness, DAK (T. 10 November 2003, p. 36) as having been present during the beatings and killings, and by another witness as having been at the meeting with Bagosora at ESM (DA, *supra* note 53).

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27. At this stage, it is useful to recall the possibility of aiding and abetting as "an approving spectator" :

> Criminal responsibility as an 'approving spectator' does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct. The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement. Responsibility, however, is not automatic, and the nature of the Accused's presence must be considered against the background of the factual circumstances[55].

Given this statement of the law, and the different elements of evidence presented, the Chamber cannot say that no reasonable trier of fact could find the Accused guilty under either Article 6 (1) or 6 (3) of the Statute for murder.

(6) *Extermination – Count 6 of the Bagosora and Nsengiyumva Indictments; Count 5 of the Ntabakuze/Kabiligi Indictment*

28. Extermination has recently been defined by the Appeals Chamber as participation in a widespread or systematic killing of a group[56]. In so doing the Appeals Chamber emphasized that the perpetrator need not kill (by the forms of commission in Article 6 (1) of the Statute) any particular individual and that the victims need not be named in an indictment. The essential distinction between murder and extermination is that the latter is directed at a group collectively resulting in a mass killing, and that the forms of commission ("participation") are broader than what is required for murder. Whether the participation is sufficient to constitute extermination depends on a concrete assessment of the facts, including the actions of the perpetrator, their impact on a defined group, and awareness of the impact on the defined group[57].

29. In light of the evidence discussed above in respect of the charge of genocide, the Chamber is satisfied that there is some evidence which, if believed, shows that each of the Accused participated in measures whose purpose and effect was to cause mass death of Tutsi civilians. In addition, there is evidence that such mass killings did, in fact, result. Those measures included ordering reinforcement of roadblocks by militia and the military for the purpose of stopping and killing large numbers of Tutsi who were in flight; urging soldiers to cooperate with the *Interahamwe* knowing that they were killing large numbers of Tutsi civilians; and supplying weapons to the *Interahamwe* knowing that they were systematically killing Tutsi civilians[58].

(7) *Rape – Count 7 of the Bagosora and Nsengiyumva Indictments; Count 6 of the Ntabakuze/Kabiligi Indictment*

30. Rape is the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the per-

[55] *Semanza*, Judgement (TC), 15 may 2003, para. 386.
[56] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 522.
[57] *Ndindabahizi*, Judgement (TC), 15 July 2004, paras. 479, 483, 485; *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 536-547.
[58] *Supra* notes 30 to 35.

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petrator, or of the mouth of the victim by the penis of the perpetrator[59]. Consent must be given freely and voluntarily and is assessed within the context of the surrounding circumstances. The mental element of rape is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim[60]. The Accused are charged only with superior responsibility under Article 6 (3), that is, that the crime was committed by a subordinate and that the Accused "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof". A person is a superior not only to those over whom he is a superior in a traditional chain of military command, but also to those over whom "he exercises effective control"[61].

31. There was testimony that rapes were committed by subordinates of Ntabakuze, and that he knew of these rapes[62]. Although the Defence has characterized this evidence as unreliable, the Chamber cannot say that the evidence is obviously incredible, such that no reasonable trier of fact could give it credit. More generally, there was evidence that rape by soldiers and *Interahamwe* was widespread and notorious between April and July 1994[63]. The evidence discussed above of the relationship between the four Accused and the *Interahamwe* could, if believed, establish a relationship of "effective control" over the *Interahamwe*[64]. That determination must be based on findings of fact which the Chamber can only make at the end of the trial and in light of full argument by the parties.

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[59] *Kunarac et al.,* Judgement (TC), 10 December 1998, para. 387; *Kunarac et al.,* Judgement (AC), 12 June 2002 para. 128 ("The Appeals Chamber concurs with the Trial Chamber's definition of rape"); *Semanza,* Judgement (TC), 15 May 2003, para. 345 ("While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber"); *Kajelijeli*, Judgement (TC), 12 January 2002, para. 915 ("Given the evolution of the law in this area, culminating in the endorsement of the *Furundžija/Kunarac* approach by the ICTY Appeals Chamber, the Chamber finds the latter approach of persuasive authority and hereby adopts the definition as given in *Kunarac*"); *Kamuhanda,* Judgement (TC), 22 January 2004, para. 709.

[60] *Kunarac et al.,* Judgement (AC), 12 June 2002, para. 127; *Semanza,* Judgement (TC), 15 May 2003, paras. 344, 346; *Kajelijeli*, Judgement (TC), 12 January 2002, para. 915.

[61] *Blaskic*, Judgement (AC), 29 July 2004, para. 67.

[62] DBQ, T. 23 September 2003 p. 34; T. 25 February 2004 p. 15; XAB, T. 6 April 2004, p. 39.

[63] Dallaire, T. 20 January 2004, pp. 31-33 ("Some of the sites … and you could see by the layout of the women and so on that rape and then mutilation had happened … that is I am speaking about my observers and myself – that young girls, young women, would be laid out with their dresses over their heads, the legs spread and bent. You could see what seemed to be semen drying or dried. And it all indicated to me that these women were raped. And then a variety of material were crushed or implanted into their vaginas; their breasts were cut off … a number of the women had their breasts cut off or their stomach open … I would say generally at the sites you could find younger girls and young women who had been raped or, you know, deducting that they were raped … I would say that not many sites that were reported did not have such scenes of rape"); Beardsley, T. 3 February 2004 pp. 42-46 ("women's breasts, women vaginas had been cut with machetes … there was rape that had taken place in addition to the killings, and the murder").

[64] *Supra* note 36.

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(8) *Persecution – Count 8 of the the Bagosora and Nsengiyumva Indictments; Count 7 of the Ntabakuze/Kabiligi Indictment*

32. Persecution is the gross or blatant denial, on discriminatory grounds, of a fundamental right, reaching the same level of gravity as other crimes against humanity defined in the Statute[65]. Unlike the other crimes against humanity enumerated for which knowledge of the overall discriminatory nature of a widespread attack is the minimum threshold, a persecutor must himself or herself intend to discriminate on racial, religious, or political grounds[66]. Persecution may take diverse forms whose defining characteristic is the severity of deprivation of fundamental rights[67]. Examples of acts that have been found to be persecution include hate speech[68], destruction of

[65] *Kupreskic et al.*, Judgement (TC), 14 January 2001, paras. 619, 621 ("[A]t a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated"); *Nahimana et al.*, Judgement (TC), 3 December 2001, para. 1072; *Semanza*, Judgement (TC), 15 May 2003, para. 347.

[66] *Nahimana et al.*, Judgement (TC), 3 December 2001, para. 1071 ("The Chamber notes that this requirement has been broadly interpreted by the International Criminal Tribunal for Yugoslavia (ICTY) to include discriminatory acts against all those who do not belong to a particular group); *Semanza*, Judgement (TC), 15 May 2003, para. 350 ("The act of persecution must have been committed on political, racial, or religious grounds. Unlike the other enumerated crimes against humanity, persecution requires a discriminatory intent. This Chamber observes that the enumerated grounds of discrimination for persecution in Article 3(h) of the Statute do not include national or ethnic grounds, which are included in the list of discriminatory grounds for the attack contained in the chapeau of Article 3"); *Kordic and Cerkez*, Judgement (TC), 26 February 2001, para. 212 ("This intent – the discriminatory intent – is what sets the crime of persecution apart from other Article 5 crimes against humanity").

[67] *Semanza*, Judgement (TC), 15 May 2003, paras. 348-349 ("Persecution may take diverse forms and does not necessarily require a physical act … Acts of persecution must be evaluated in context, by looking at their overall cumulative effects"); *Vasiljevic,* Judgement (TC), 29 November 2002, para. 246 ("The act or omission constituting the crime of persecution may assume various forms, and there is no comprehensive list of what acts can amount to persecution. It may encompass acts that are listed in the Statute as well as acts that are not listed in the Statute. The persecutory act or omission may encompass physical or mental harm or infringements upon individual freedom"); *Kupreskic et al.*, Judgement (TC), 14 January 2001, para. 622 ("In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane". This delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute").

[68] *Nahimana*, Judgement (TC), 3 December 2001, para. 1072 ("The Chamber considers it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3 (h) of its Statute … Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm"); para. 1078 ("The Chamber notes that persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms").

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property or means of subsistence[69], unlawful detention of civilians[70], deportation or forcible transfer of civilians[71], and crimes of sexual violence other than rape[72].

33. The Prosecution asserts that evidence that the Accused identified, and publicly denounced, Tutsi civilians *en masse* as the enemy was, itself, persecution[73]. Evidence of unlawful detention of civilians by *Interahamwe* has also been adduced in respect of the paragraphs cited in the count, including paragraph 5.45 of the Bagosora Indictment (which is common to the other Indictments)[74]. Of course, the criminal responsibility of the Accused in respect of the latter depends on a finding that support of the *Interahamwe* is sufficient to satisfy forms of commission in Article 6 (1), or superior responsibility under Article 6 (3). As has been found above, there is sufficient evidence to preclude a determination that no such finding could be made by any reasonable trier of fact[75].

(9) *Other Inhumane Acts – Count 9 of the the Bagosora and Nsengiyumva Indictments; Count 8 of the Ntabakuze/Kabiligi Indictment*

34. "Other inhumane acts" are those of comparable gravity and seriousness to the enumerated acts[76]. The act or omission must deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity[77]. Inhu-

[69] *Blaskic*, Judgement (TC), 3 March 2003, para. 227 ("[P]ersecution may … take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina").

[70] *Id.* para. 234 ("The unlawful detention of civilians, as a form of the crime of persecution, means unlawfully depriving a group of discriminated civilians of their freedom").

[71] *Id.* para. 234 ("The deportation and forcible transfer of civilians [as a form of the crime of persecution] means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law").

[72] *Semanza*, Judgement (TC), 15 May 2003, para. 345.

[73] Prosecution Response, para. 109; *supra* notes 29, 30 and 31.

[74] XXY, T. 11 June 2004, p. 20 ("I remember that we saw a nun who had been stopped at the roadblock in the morning, and the nun was a Tutsi. And we were asking ourselves, are they also going to kill nuns? Have they done something bad? And the *Interahamwe* told us that all the Tutsis were enemies. The nun was taken to a house near the roadblock, and I was there. It was around 5 p.m. She was screaming. We did not remain at the roadblock very long because we were sent away. And when I returned, I heard her scream inside the house, so she was calling out for help. And I was able to find out that she had been raped, because I saw her again the following day and she was sitting in front of the house").

[75] *Supra* note 36.

[76] *Bagilishema,* Judgement (TC), 7 June 2001, para. 92; *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, paras. 150-151; *Musema*, Judgement (TC), 27 January 2000, para. 232 ("The Chamber finds that an act or omission will fall within the ambit of "Other inhumane Acts", as envisaged in Article 3 (i) of the Statute, provided the nature and character of such act or omission is similar in nature, character, gravity and seriousness to the other acts, as enumerated in sub-articles (a) to (h) of Article 3"). *See also* Rome Statute of the International Criminal Court, Article 7(k) which defines "other inhumane acts as "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

[77] *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, para. 151 ("The prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental

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mane acts have been found to include sexual violence[78], mutilation, beatings and other types of severe bodily harm[79], and the forcible transfer of civilians[80].

35. The Prosecution contends that civilians endured deprivations of liberty falling short of detention; were lured from their hiding places with promises of safety; were stripped of clothing in public; were compelled to commit criminal acts; and were forced to endure the sight of loved ones being killed or abused. Evidence of one or more of these incidents having been inflicted by *Interahamwe* militia and soldiers between April and July 1994 has been presented by the Prosecution[81]. Whether criminal responsibility for these acts can be attributed to the Accused will, of course, depend on the ultimate findings as to the nature of their support or control over the direct perpetrator and whether the actions of the direct perpetrators were foreseeable or known to the Accused. The evidence described above concerning the connection between the Accused and the *Interahamwe* and soldiers involved is sufficient to preclude a finding that no reasonable trier of fact could ultimately conclude that the Accused were criminally responsible for these acts.

(10) *Violence to Life, Health and Physical or Mental Well-Being of Civilians (Count 10 of Bagosora and Nsengiyumva Indictments; Count 11 of Ntabakuze/Kabiligi Indictment); and of Ten Belgian Soldiers (Count 11 of Bagosora Indictment)*

36. This charge is prescribed by Article 4 of the Statute, which criminalizes serious violations of Article 3 common to the 1949 Geneva Conventions, and of Additional Protocol II thereof. In particular, Article 4 (a) criminalizes

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or physical health of the victim"); *Krnojelac,* Judgement (TC), 14 December 1999, para 52 (The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering would result"); *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, para. 151.

[78] *Akayesu*, Judgement (TC), 2 September 1998, para. 688 ("Sexual violence falls within the scope of 'other inhumane acts' ").

[79] *Niyitegeka,* Judgement (TC), 16 May 2003, para. 465, 467 ("[T]he acts committed with respect to Kabanda [decapitation, castration and piercing his skull with a spike] and the sexual violence to the dead woman's body [insertion of a sharpened piece of wood into her *genitalia*] are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole").

[80] *Krstic*, Judgement (TC), 14 December 1999, para. 52 ("[F]orcible displacement within or between national borders is included as an inhumane act under Article 5 (i) defining crimes against humanity").

[81] DBJ, T. 24 November 2003 p. 8 ("When a victim was about to be killed, the victim was asked to undress … That was done by all of the killers [who were *Interahamwe*]. I would say it was a system that they were using by killing people and making them feel even worse because just to shoot at them without humiliating them or torturing them, was not good enough. So they had to torture them first and then kill them later"); AS, T. 2 September 2003, p. 51 ("When Innocent was being beaten up, being tortured, *Interahamwes* [who were accompanied by one soldier] put us there so that we would watch the scene. For instance if you just turned your head so as not to see how Innocent was being tortured or how my husband was being tortured, we were hit on the head so that we can watch what was happening").

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> "violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporeal punishment".

There are three pre-requisites for the applicability of the crimes enumerated in Article 4 (1) : the existence of a non-international armed conflict on the territory of the concerned state; a nexus between the alleged violation and the armed conflict; and, the victims were not directly taking part in the hostilities at the time of the alleged violation[82]. The nexus requirement is satisfied where the perpetrator "acted in furtherance of or under the guise of the armed conflict". Factors to be considered in this regard include, *inter alia* :

> "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; [and] the fact that the act may be said to serve the ultimate goal of a military campaign"[83].

37. There is evidence upon which a reasonable trier of fact could find that each of the general prerequisites for crimes enumerated in Article 4 existed at the relevant times : there is evidence of an armed conflict in Rwanda in 1994; of the close relationship between that armed conflict and the alleged crimes; and that many of the victims were civilians not taking part in the hostilities. For the reasons in the foregoing sections, there is also evidence which, if believed, could sustain a finding that crimes of violence were committed which may be criminally attributed to each of the Accused under Articles 6 (1) or 6 (3).

38. The murder of the Belgian soldiers as a crime against humanity has been discussed above (paras. 26-27). For those same reasons, the Chamber also denies the motion in respect of this count.

(11) *Outrages Upon Personal Dignity (Count 12 of the Bagosora Indictment; Count 11 of the Nsengiyumva Indictment; Count 10 of the Kabiligi/Ntabakuze Indictment)*

39. Article 4 (e) of the Statute criminalizes as a serious violation of Article 3 common to the 1949 Geneva Conventions, and of Additional Protocol II thereof,

> "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".

The Accused are charged only with superior responsibility for this crime. Outrages upon personal dignity has been described as acts which "cause serious humiliation, degradation or [are] otherwise a serious attack on human dignity"[84].

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[82] *Ntagerura et al.*, Judgement (TC), 25 February 2004, para. 766; *Semanza*, Judgement (TC), 15 May 2003, paras. 354-371, 512.

[83] *Kunarac et al.,* Judgement (AC), 12 June 2002, para. 59.

[84] *Id.*, para. 161("[T]he humiliation of the victim must be so intense that any reasonable person would be outraged"). The crime has been found to have been committed for using detainees as human shields or trench-diggers; forcing detainees to relieve bodily functions in their clothing; and imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees. *Aleksovski*, Judgement (TC), 25 June 1999, para. 229; *Kvocka et al.*, Judgement, (TC), 2 November 2001, para. 173.

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40. In its Response, the Prosecution has identified the alleged acts which it considers relevant to this charge : forced incest, burying corpses in latrine pits; leaving infants without care after killing their guardians; and removing foetuses from the womb. The Defence has not specifically challenged the sufficiency of the evidence in relation to the different forms of the crime alleged. Having reviewed the evidence cited by the Prosecution, and in light of the foregoing discussions of the connection between each of the Accused and soldiers and the *Interahamwe*, the Chamber finds that a reasonable trier of fact could, if the evidence were to be believed, find the Accused guilty beyond a reasonable doubt of outrages upon personal dignity for one or more of the criminal acts described.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motions.

Arusha, 2 February 2005

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on the Defence Requests for Certification of the "Decision on the defence motions for the reinstatement of Jean Yaovi Degli as lead counsel for Gratien Kabiligi" 2 February 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Fairness of the Trial – Right to free legal assistance by counsel, Right of the Accused to choose his/her (lead) Counsel, Balance between the right to free legal assistance by counsel and the right to choose the counsel – Discretionary power of the Trial Chamber, Assignment of counsel – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 45* quater *and 73 (B)*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean Kambanda, *Judgement, 19 October 2000 (ICTR-97-23); Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1 June 2001 (ICTR-96-4)*

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*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Vidoje Blagojevic, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team, 7 November 2003 (IT-02-60)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Joint Defence Request for Certification to Appeal the Chamber's Decision on the Reinstatement of Jean Degli as Counsel for General Gratien Kabiligi", filed on 26 January 2005; and Mr. Kabiligi's "*Requête aux fins d'autorisation d'interjeter Appel contre votre décision écrite du 19 janvier 2005* : 'Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi'", filed on 28 January 2005;

NOTING that the Prosecution has not filed a response.

HEREBY DECIDES the requests.

## Introduction

1. In a decision of 26 October 2004, the Registrar withdrew the assignment of Mr. Jean Yaovi Degli as Lead Counsel for the Defence of Gratien Kabiligi under the framework of the legal aid system[1]. At the time, the Defence case was scheduled to start on 12 January 2005. All Defence teams, as well as Mr. Kabiligi individually, challenged this decision before the Trial Chamber and requested Mr. Degli's reinstatement. On 20 December 2004, the Chamber heard oral arguments on the Defence motions. After deliberating, the Chamber rendered an oral decision denying the request to reinstate Mr. Degli and stated that its written reasons would follow. A status conference was scheduled for the following day.

2. During the status conference on 21 December 2004, Mr. Kabiligi expressed his intention to request certification when he received the written decision. In addition, he proposed that Mr. Skolnik, the Co-Counsel for Bagosora at the time, be appointed his Lead Counsel given his knowledge of the case. The Registry indicated that it was favourable to the solution proposed by Mr. Kabiligi. The Bagosora Defence also concurred with this solution. Both Mr. Kabiligi and the Bagosora Defence requested that the Chamber instruct the Registry to make this appointment pursuant to Rule 45 *quater*. The Chamber left it to the Registry to pursue the appointment. In light of the changed circumstances, the Chamber postponed the commencement of the Defence case until 30 March 2005. The Chamber also postponed the date for the filing of Kabiligi's pre-Defence brief and witness list until 28 February 2004, subject to further representations from Mr. Skolnik if named Lead Counsel. The deadlines for the other three Accused to file the pre-Defence brief and the witness statements were also extended, until 3 January and 7 February 2005, respectively.

[1] Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004.

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3. In furtherance of Mr. Kabiligi's request, the Registry corresponded with Mr. Kabiligi and Mr. Skolnik to gain further assurances and information related to the proposed solution prior to making an appointment. In a letter dated 22 December 2004, Mr. Skolnik expressed his willingness to accept the appointment as Lead Counsel for Mr. Kabiligi. However, he also indicated a measure of uncertainty due to possible certification to appeal the Trial Chamber's decision as well as Mr. Degli's pursuit of a separate administrative review with the Secretary-General of the United Nations. Mr. Skolnik proposed that he be named interim Lead Counsel until the situation was clarified. Subsequently, on 27 December 2004, Mr. Kabiligi withdrew his proposal, stating that it had caused confusion and indicating his desire for Lead Counsel to act in his interests exclusively. He asked that the process of assigning a new Lead Counsel be suspended until the various avenues for reinstating Mr. Degli had been exhausted.

4. On 19 January 2005, the Chamber delivered its written decision setting forth in detail its reasons for denying the Defence motions. The Chamber also instructed the Registrar to appoint Mr. Paul Skolnik as Lead Counsel for the Kabiligi Defence[2]. On 24 January 2005, the Registrar appointed Mr. Skolnik as Lead Counsel for the Kabiligi Defence and subsequently withdrew his assignment as Co-Counsel for the Bagosora Defence.

5. On 24 January 2005, Mr. Kabiligi requested that the decision be translated into French and that he be accorded a corresponding extension of the time to file his request for certification. The Presiding Judge responded to Mr. Kabiligi's letter on 26 January 2005, informing him that the French translation had been filed on 25 January 2005 and that his request for certification was due seven days from this date. All defence teams, through counsel, filed a joint request for certification on 26 January 2005. Mr. Kabiligi filed a separate request, individually, on 28 January 2005.

## Submissions

### *Joint Defence Request*

6. The Defence asserts that it may be injustice to force Mr. Kabiligi to complete the trial represented by a counsel, Mr. Skolnik, without his consent. In effect, the situation regarding Mr. Kabiligi's legal representation remains "up in the air" which may lead to future postponements either before or during the next trial segment. According to the Defence, the Chamber's decision not to reinstate Mr. Degli has already led to a "significant postponement" of the trial from 12 January 2005 until 30 March 2005. These factors significantly affect the expeditious conduct of the proceedings. In addition, it is asserted that an immediate resolution by the Appeals Chamber would either reinstate Mr. Degli as Lead Counsel, thus allowing the trial to proceed as originally envisaged, or would definitively resolve the question so that another lawyer could be appointed secure in the knowledge that the appointment is not on an interim basis.

[2] *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005.

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*Kabiligi's Request*

7. Mr. Kabiligi asserts that the Chamber's refusal to suspend the Registrar's decision withdrawing his Lead Counsel until the end of the trial is a significant issue affecting the fair and expeditious progress of the proceedings. The removal of Mr. Degli at the close of the Prosecution case, when the Registrar suspected misconduct in April 2003, punishes only Mr. Kabiligi. Mr. Degli's departure after following the dossier from its inception compromises the presentation of the evidence and prolongs Mr. Kabiligi's preventative detention while a new Lead Counsel is integrated. The Chamber's decision only considered the situation globally with respect to the trial as a whole and failed to take sufficient consideration of his individual circumstances. The Chamber's concern was for the rapid progress of the trial of Mr. Kabiligi's three co-Accused, who benefit from the additional time to prepare. Mr. Kabiligi is now at a disadvantage in contrast to the other three Accused who each have counsel who have followed the case from the early stages. Immediate resolution by the Appeals Chamber would definitively resolve the issue of Mr. Degli's status. If Mr. Degli is reinstated, then the proceedings can be resumed in three months. In any event, prompt resolution will allow Mr. Skolnik to proceed without the uncertainty of the present circumstances.

**Deliberations**

8. Rule 73 (B) provides :

> Decisions rendered on such motions are without interlocutory appeals save with certification by the Trial Chamber, which may grant such certification if the decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

9. The Chamber is mindful that the departure of Mr. Degli at the close of the Prosecution case created a complicated situation for Mr. Kabiligi, as well as the other three Accused. The Chamber's decision noted the changed circumstances and addressed them, paying particular attention to the direct impact that the Registrar's decision had on Mr. Kabiligi's Defence. The joint Defence request has suggested that the situation of Mr. Kabiligi's Defence team is not clear, given his lack of consent to Mr. Skolnik's assignment, and that this may lead to further postponements. Mr. Kabiligi also alludes to the present uncertainty with the composition of his defence.

10. In the Chamber's view, none of these grounds constitutes an issue that would significantly affect the fair and expeditious conduct of the trial. Mr. Saint-Léger, the present Co-Counsel, is relatively new and in need of medical treatment, necessitating a prolonged absence from the case. The Chamber was therefore required to act immediately in order to safeguard Mr. Kabiligi's right to counsel and the fairness of the proceedings at this critical juncture in the case[3].The Chamber resolved this situation

[3] Mr. Kabiligi in his submissions noted that "[p]ourtant, votre Chambre elle-même reconnaît que depuis le 26 octobre 2004, je ne suis pas défendu adéquatement, parce que ni Maître Degli, ni Maitre Rene, ne fait plus rien; le premier suite a son renvoi, et le second suite a son ignorance du dossier".

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by instructing the Registrar to assign Mr. Skolnik to serve exclusively as Mr. Kabiligi's Lead Counsel and to withdraw him as Co-Counsel for Bagosora. This was in conformity with Mr. Kabiligi's own proposal. His subsequent withdrawal of consent to have Mr. Skolnik assigned as Lead Counsel does not in anyway implicate the fairness of the proceedings or the validity of the appointment. Mr. Skolnik's competence and ability to represent Mr. Kabiligi, if permanently assigned, have not been questioned. He knows the case well through his previous role as Co-Counsel for the Bagosora Defence. The Appeals Chamber has repeatedly stressed that an Accused does not have the right to a particular counsel under the legal aid system[4].

11. In reaching its decision to instruct the Registrar to appoint Mr. Skolnik, the Chamber fully considered and addressed Mr. Kabiligi's subsequent concerns related to Mr. Skolnik's assignment. Mr. Kabiligi's principal ground for withdrawing his proposal was the interim solution and the possible eventual return of Mr. Degli. The Chamber's assignment of Mr. Skolnik, expressly rejecting any sort of interim solution, provided clarity and certainty to the Kabiligi Defence and thereby ensured the fair and expeditious conduct of the proceedings. The Appeals Chamber case law reflects that a Trial Chamber's assignment of counsel falls squarely within its discretion[5].

12. Mr. Kabiligi principally argues that the Chamber's refusal to suspend the Registrar's decision to withdraw Mr. Degli has compromised the presentation of his evidence, putting him on unequal footing with his three co-Accused, and prolonged his preventative detention due to the need to integrate a new Lead Counsel. In this regard, the Chamber indicated that any specific problem could be brought to its attention for appropriate resolution. Mr. Skolnik is presently Mr. Kabiligi's Lead Counsel. He is a competent and qualified lawyer with a great deal of familiarity with the case in general. Mr. Kabiligi has been provided with additional extensions of time, the possibility of recalling witnesses, and the ability to present his evidence at the end of the case. Additional appropriate relief may be granted based on further representations from Mr. Skolnik. Given the Chamber's response to the changed circumstances and its continued attention to this matter, there is no indication at this stage that the presentation of Mr. Kabiligi's evidence has been compromised or that there has been undue delay. The Appeals Chamber has stated that the authority best placed to determine what time is sufficient for the Accused to finish the preparation of his defence is the Trial Chamber[6].

13. In the Chamber's view, certification would only result in the delay that the Defence seeks to avoid. As explained in detail in the Chamber's written decision, the Registrar acted neither illegally nor arbitrarily in withdrawing Mr. Degli's assignment

[4] *Akayesu*, Judgement (AC), 1 June 2001, para. 61; *Kambanda*, Judgement (AC), 19 October 2000, para. 33. See also *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22.

[5] *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004, para. 9 ("[A Trial Chamber's assignment of counsel] draws on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and, requires a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.").

[6] *Milosevic*, Decision on the Interlocotory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and preparation of the Defence Case (AC), 20 January 2004, para. 18.

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under the legal aid system for serious misconduct. The Defence has not pointed to any jurisprudence suggesting that this conclusion is incorrect or which supports its reading of the Tribunal's governing instruments. The Chamber is not convinced that Mr. Degli's return at this point would materially advance the case. Therefore, an immediate resolution by the Appeals Chamber is not required. The denial of these requests for certification definitively closes the issue of Mr. Degli's return as Lead Counsel of the Kabiligi Defence under the legal aid program[7].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence requests for certification.

Arusha, 2 February 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Mr. Degli's Request for Authorization to Communicate with Mr. Kabiligi 2 February 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and natole Nsengiyumva – Communication between the Accused and his Counsel – Motion granted*

*International Instrument cited :*

*Directive on the Assignment of Defence Counsel, art. 20 (A) and 20 (B)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF Mr. Degli's request to have authorization to communicate with Mr. Kabiligi, filed on 31 January 2005;

HEREBY DECIDES the request.

[7] In a letter of 31 January 2005 to the Chamber, Mr. Degli submits that he has remained actively involved in the Kabiligi Defence. Mr. Degli's submissions do not alter the Chamber's disposition.

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## Introduction

1. In a decision of 26 October 2004, the Registrar withdrew the assignment of Mr. Jean Yaovi Degli as Lead Counsel for the Defence of Gratien Kabiligi under the framework of the legal aid system[1]. The Registrar's decision also ordered Mr. Degli to deliver to the Accused or the present Co-Counsel, all original documents in the file within fifteen days of the decision.

2. All Defence teams, as well as Mr. Kabiligi individually, challenged this decision before the Trial Chamber and requested Mr. Degli's reinstatement. The Chamber denied the motions orally on 20 December 2004. On 19 January 2005, the Chamber delivered its written decision setting forth in detail its reasons for denying the Defence motions. The Chamber also instructed the Registrar to appoint Mr. Paul Skolnik as Lead Counsel for the Kabiligi Defence[2]. The appointment was made on 24 January 2005.

3. All Defence teams, through Counsel, filed a joint request for certification to appeal the Chamber's decision on 26 January 2005. Mr. Kabiligi filed a separate request, individually, on 28 January 2005. The Chamber has denied the requests for certification in a separate decision filed today[3].

## Submissions

4. Mr. Degli requests the Chamber to authorize him to contact Mr. Kabiligi by telephone so that he can discuss and obtain instructions concerning the case file. Mr. Degli recalls that the Chamber in its decision of 19 January 2005 at paragraph 52 stated :

> "In addition, Article 20 (A) of the Directive further mandated that he actively continue until replaced. From the submissions as well as his apparent lack of participation in the case since the Registrar's decision, the Chamber notes that it seems that Mr. Degli has not fulfilled these obligations."

In response, Mr. Degli emphasises that he respected and conformed to his professional obligations and the instructions of his client, in particular by remaining in contact with the witnesses. Mr. Degli did not respond to the ongoing proceedings because the Registry stopped sending him copies of relevant documents and opposed his contact with Mr. Kabiligi. Therefore, he did not believe that he was obliged to participate in the proceedings related to his reinstatement. In addition, the fact that the other Defence teams requested his reinstatement did not necessitate his intervention.

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[1] Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004.

[2] *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005.

[3] *Bagosora et al.*, Decision on the Defence Requests for Certification of the "Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi" (TC), 2 February 2005.

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**Deliberations**

5. Article 20 (A) and (B) of the Directive on the Assignment of Defence Counsel ("the Directive") states :

(A) Where the assignment of Counsel is withdrawn by the Registrar or where the services of assigned Counsel are discontinued, the Counsel assigned may not withdraw from acting until either a replacement Counsel has been provided by the Tribunal or by the suspect or accused, or the suspect or accused has declared his intention in writing to conduct his own defence.

(B) Where the assignment of Counsel is withdrawn by the Registrar or where the services of assigned Counsel are discontinued, the Counsel must deliver within fifteen days of withdrawal all the original documents in the file to the Counsel who succeeds him, or otherwise, to his client.

6. Mr. Degli's submissions concerning his continued activity on behalf of Mr. Kabiligi are noted[4]. The Chamber does not find it necessary to address these submissions. The Registrar's appointment of Mr. Skolnik as Lead Counsel for Mr. Kabiligi on 24 January 2005 has now concluded Mr. Degli's obligations pursuant to Article 20 (A) of the Directive. With the Chamber's denial of the Defence requests for certification, all that remains is an orderly transfer of the case file from Mr. Degli to Mr. Skolnik as envisioned by Article 20 (B) of the Directive. In this respect, Mr. Degli should be authorized to communicate with Mr. Kabiligi.

FOR THE ABOVE REASONS, THE CHAMBER

INSTRUCTS the Registrar to authorize Mr. Degli to have telephone communication with Mr. Kabiligi in order to facilitate the orderly transfer of the case file to the new Lead Counsel, Mr. Skolnik.

Arusha, 2 February 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[4] These submissions do not alter the Chamber's decision of 19 January 2005 not to reinstate Mr. Degli, which was based on other considerations, or to instruct the Registrar to appoint Mr. Skolnik as Lead Counsel.

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## *Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance 7 February 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Request for assistance, The Netherlands, United Nations Assistance Mission for Rwanda (UNAMIR) – Ancillary jurisdiction of the Tribunal over persons – Interests of Justice – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 54; Statute, art. 28 and 28 (2)*

*International Cases Cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Deicision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54, 20 August 2002 (ICTR-99-54); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Request to the Government of Belgium for Cooperation and Assistance pursuant to Article 28 of the Statute, 17 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Subpoenas, 10 June 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Request to the Government of Rwanda for Cooperation and Assistance pursuant to Article 28 of the Statute 31 August 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Request to the Republic of France for Cooperation and Assistance pursuant to Article 28 of the Statute, 22 October 2004 (ICTR-98-41)*

*I.C.T.Y : Appeals Chamber,* The Prosecutor v. Radislav Krstic, *Decision on Application for Subpoena, 1 July 2003 (IT-98-33)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Bagosora Motion for Request for Cooperation From the Government of the Netherlands Pursuant to Art. 28 of the Statute of the International

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## *Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas 7 février 2005 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Requête d'assistance, Pays-Bas, Mission des Nations Unies au Rwanda (MINUAR) – Compétence accessoire du Tribunal pour les personnes – Intérêts de la justice – Requête partiellement acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 54; Statut, art. 28 et 28 (2)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Jean de Dieu Kamuhanda, *Décision sur la requête en extrême urgence conformément à l'article 54 du Règlement de procédure et de preuve, 20 août 2002 (ICTR-99-54); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Demande de coopération et d'assistance adressée au Gouvernement belge en vertu de l'article 28 du Statut du Tribunal, 17 septembre 2003 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision sur la demande d'injonctions de comparaître, 10 juin 2004 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR 98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Demande de coopération et d'assistance adressée au Gouvernement du Rwanda en vertu de l'article 28 du Statut du Tribunal, 31 août 2004 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut, 22 octobre 2004 (ICTR-98-41)*

*T.P.I Y : Chambre d'appel,* Le Procureur c. Radislav Krstic, *Arrêt relatif à la demande d'injonctions, 1 juillet 2003 (IT-98-33)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI DE la requête intitulée « *Bagosora Motion for Request for Cooperation From the Government of the Netherlands Pursuant to Art. 28 of the Statute of the Interna-*

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Criminal Tribunal For Rwanda and Rule 54 of the Rules of Procedure and Evidence", filed on 19 January 2005;

HEREBY DECIDES the motion.

## Introduction

1. The Bagosora Defence requests the Chamber to order the Kingdom of the Netherlands to authorize and facilitate a meeting with Major Robert Alexander van Putten, a Dutch military officer and a former officer of the United Nations Assistance Mission for Rwanda (UNAMIR) in 1994. The Defence also requests the Chamber to order Major van Putten to produce any personal notes that he has relating to certain facts and events enumerated in its Motion.

## Submissions

2. The Defence asserts that Major van Putten may have information relevant to the proceedings against Bagosora and wishes to interview him and to have access to his personal notes in order to assess his suitability as a prospective witness.

3. In its motion, the Defence has outlined nine specific lines of inquiry it wishes to pursue with Major van Putten[1]. It has made all reasonable efforts to secure the permission of the Netherlands to interview him. On 4 October 2004, Co-Counsel wrote to the Ministry of Defence requesting authorization for an interview. No reply having been received, on 29 November 2004, Co-Counsel wrote a second letter to the Minister of Defence, requesting to meet and interview Major van Putten. On 6 December 2004, the Minister of Defence denied the request. In his letter, he explained that due to a careful balancing of resources, it is the policy of the Netherlands not to comply with non-obligatory requests, such as making individual servicemen available for interviews or as witnesses, "unless so ordered by the Trial Chamber of either Tribunal". The Minister reiterated that

> "should the Trial Chamber, however, be willing to communicate your request into an official order by the Tribunal to supply Major van Putten as a witness, the Netherlands will of course comply with such an order"[2].

[1] The nine areas include : (1) Major van Putten's perception of events in Rwanda; (2) roadblocks; (3) the militias, ie. *the Interahamwe, Impuzamugambi, Abokambozi*, and *Inkuba*; (4) whether he accompanied General Dallaire to meetings with leaders of the *Interahamwe*; (5) his trip to Mulindi where he accompanied the then U.S.A. Undersecretary of State for African Affairs to a meeting with Paul Kagame; (6) a phone call received by General Dallaire from Prime Minister Agathe Uwilingiyimana on the night of 6 April 1994 after the crash of President Habyarimana's aircraft; (7) his trip with General Dallaire and Peter Maggen to the *École Supérieure Militaire* on 7 April; (8) the deaths of ten Belgian UNAMIR soldiers, and Major van Putten's attendance at the morgue where their bodies were kept; and (9) the meetings with General Dallaire and Paul Kagame on 19 and 21 March 1994. Bagosora's Motion, paras. 1-3.

[2] Bagosora's Motion, Annex 5.

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*tional Criminal Tribunal for Rwanda and Rule 54 of the Rules of Procedure and Evidence* », déposée le 19 janvier 2005,

STATUANT sur la requête,

## Introduction

1. La Défense de Bagosora prie la Chambre de demander au Royaume des Pays-Bas d'autoriser et de faciliter la tenue d'une réunion avec le Major Alexander Van Putten, officier militaire hollandais et ancien officier de la Mission d'Assistance des Nations Unies pour le Rwanda (MINUAR) en 1994. Elle la prie également d'ordonner au Major van Putten de fournir toutes les notes personnelles qu'il détient relativement à certains faits et événements qu'elle a indiqués dans sa requête.

## Arguments

2. La Défense soutient que le Major Van Putten possède peut-être des informations concernant la procédure engagée contre Bagosora et souhaite l'interroger et accéder à ses notes personnelles afin de déterminer s'il convient le cas échéant de le citer à comparaître.

3. Dans sa requête, la Défense a indiqué neuf points particuliers qu'elle souhaite aborder avec le Major Van Putten[1]. La Défense a déployé tous les efforts voulus pour obtenir des Pays-Bas la permission de l'entendre. Le 4 octobre 2004, le co-conseil a écrit en ce sens au Ministère de la défense. N'ayant pas obtenu de réponse, le co-conseil a adressé une seconde lettre au Ministre de La défense le 29 novembre 2004, dans laquelle il demandait à rencontrer et à entendre le Major van Putten. Le Ministre de la défense a rejeté la demande le 6 décembre 2004, expliquant dans sa lettre, qu'en raison de la nécessité d'un emploi judicieux des ressources, les Pays-Bas ont pour politique de ne pas donner suite aux requêtes n'ayant pas un caractère contraignant, comme par exemple le fait de demander à ses soldats de se soumettre à des interrogatoires ou de comparaître comme témoins, « à moins que l'ordre n'émane d'une Chambre de première instance de l'un des deux Tribunaux ». Le Ministre a réitéré que

> « [s]i la Chambre de première instance souhaite nous adresser votre requête sous forme d'une ordonnance officielle du Tribunal lui demandant de produire le major Van Putten en qualité de témoin, les Pays-Bas donneront naturellement suite à cette ordonnance »[2].

[1] Ces neuf points sont : 1) L'opinion du Major Van Putten sur les événements du Rwanda; 2) Les barrages routiers; 3) Les milices, c.-à-d. les *Interahamwe*, les *Impuzamugambi*, les *Abokambozi* et les *Inkuba*; 4) Le point de savoir s'il accompagnait le général Dallaire aux réunions avec les dirigeants des *Interahamwe*; 5) Son voyage à Mulindi où il a accompagné l'ancien sous-secrétaire d'État aux Affaires africaines à une réunion avec Paul Kagame; 6) un appel téléphonique du Premier Ministre Agathe Uwilingiyimana au général Dallaire la nuit du 6 avril 1994 aprés l'écrasement de l'avion du Président Habyarimana; 7) son déplacement en compagnie du général Dallaire et de Peter Maggen à l'École supérieure militaire le 7 avril; 8) la mort des dix soldats Belges de la MINUAR et sa présence à la morgue où étaient conservés leurs corps; et 9) les réunions avec le général Dallaire et Paul Kagame les 19 et 21 mars 1994. Requête de Bagosora, paras. 1 à 3.

[2] Requête de Bagosora, annexe 5.

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**Deliberations**

4. Article 28 of the Statute imposes an obligation on States to cooperate with the Tribunal and to comply with any request for assistance or order issued by a Trial Chamber. Article 28 (2) lists types of requests and orders which the Tribunal may issue to a State. The Chamber's power is not limited to requests and orders listed in the provision and may include any request or order whose purpose is to assist the Tribunal in its mandate. Under the Statute, the Chamber also has ancillary jurisdiction over persons. Rule 54 authorizes the Chamber to

> "issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

Acting under these provisions, this Chamber has previously issued requests similar in nature to the request sought by the Defence in the present motion[3].

5. A request for assistance under Article 28 or for an order under Rule 54 must set forth the nature of the evidence sought; the relevance of that evidence to the trial; and the efforts that have been made to obtain the evidence. Requests for assistance under Article 28 should also identify the nature of the assistance requested with particularity[4].

6. The assistance sought from the Netherlands by the Defence is the authorization and facilitation of a meeting with Major van Putten with a view to possibly calling him as a witness. When the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness it is in the interests of justice to allow the Defence to meet the witness and assess his testimony[5].

7. The Defence has listed specific facts and events about which it wishes to interview Major van Putten. His position as an officer attached to the UNAMIR mission in Rwanda in 1994 indicates that he likely had the opportunity to observe the events

[3] *Bagosora et al.*, Request to the Republic of France for Cooperation and Assistance pursuant to Article 28 of the Statute (TC), 22 October 2004; *Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance pursuant to Article 28 of the Statute (TC), 31 August 2004; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004; *Bagosora et al.*, Decision on Request for Subpoenas (TC), 10 June 2004; *Bagosora et al.*, Request to the Government of Belgium for Cooperation and Assistance pursuant to Article 28 of the Statute (TC), 17 September 2003. See also *Kamuhanda*, Decision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54 (TC), 20 August 2002.

[4] *Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance pursuant to Article 28 of the Statute (TC), 31 August 2004, para. 3; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

[5] *Krstic*, Decision on Application for Subpoena (AC), 1 July 2003, paras. 6-8; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

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**Délibérations**

4. L'article 28 du Statut fait obligation aux États de collaborer avec le Tribunal et de répondre à toute demande d'assistance ou ordonnance émanant d'une Chambre de première instance. Le paragraphe 2 de l'article 28 énumère les types de demandes et d'ordonnances que le Tribunal peut adresser à un État. Les pouvoirs de la Chambre ne se limitent pas aux requêtes et demandes qui sont énumérées dans cette disposition, ils peuvent s'étendre à toute demande ou ordonnance pouvant assister le Tribunal dans son mandat. Le Statut confère aussi au Tribunal compétence accessoire sur les personnes. L'article 54 autorise la Chambre à

> « délivrer les ordonnances, citations à comparaître, assignations, injonctions, mandats et ordres de transfert nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès ».

Agissant dans le cadre de ces dispositions, la Chambre de céans a déjà transmis des demandes similaires à celle que sollicite la Défense dans la présente requête[3].

5. Les demandes présentées en vertu de l'article 28 du Statut (demandes d'assistance) ou de l'article 54 du Règlement (demandes d'ordonnance) doivent indiquer la nature des éléments de preuve demandés, la pertinence de ces éléments de preuve pour le procès et les efforts qui ont été faits pour les obtenir. Les demandes d'assistance présentées en vertu de l'article 28 du Statut doivent aussi préciser la nature de l'aide souhaitée[4].

6. La Défense demande aux Pays-Bas d'autoriser et de faciliter une rencontre avec le Major Van Putten afin de le faire comparaître en qualité de témoin le cas échéant. Lorsque la Défense n'est pas certaine de la nature et de la pertinence de la déposition d'un témoin potentiel, il est de l'intérêt de la justice de l'autoriser à le rencontrer pour apprécier son témoignage[5].

7. La Défense a indiqué les faits et événements précis sur lesquels elle souhaite entendre le Major Van Putten. Sa fonction d'officier attaché à la mission de la MINUAR au Rwanda en 1994 porte à croire qu'il ait pu assister aux événements en question. La

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[3] *Bagosora et consorts,* Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut (Chambre de première instance), 22 octobre 2004; Bagosora et consorts, Demande de coopération et d'assistance adressée au Gouvernement du Rwanda en vertu de l'article 28 du Statut du Tribunal (Chambre de première instance), 31 août 2004; *Bagosora et consorts,* décision relative à la requête tendant à obtenir la délivrance d'une injonc-tion de comparaître au général Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004; *Bagosora et consorts,* Décision sur la demande d'injonctions de comparaître (Chambre de première instance), 10 juin 2004; *Bagosora et consorts,* Demande de coopération et d'assistance adressée au Gouvernement belge en vertu de l'article 28 du Statut du Tribunal (Chambre de première instance), 17 septembre 2003. Voir aussi *Kamuhanda,* Décision sur la requête en extrême urgence conformément à l'article 54 du Règlement de procédure et de preuve (Chambre de première instance), 20 août 2002.

[4] *Bagosora et consorts,* Demande de coopération et d'assistance adressée au Gouvernement du Rwanda en vertu de l'article 28 du Statut du Tribunal (Chambre de première instance), 31 août 2004, para. 3; *Bagosora et consorts,* Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au Général Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, para. 4.

[5] *Krstic,* Arrêt relatif à la demande d'injonctions (Chambre d'appel), 1er juillet 2003, paras. 6 à 8; *Bagosora et consorts,* Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, para. 4.

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at issue and the Chamber is satisfied that the Major's observations may be relevant and assist the Defence in the preparation of its case[6].

8. The Defence has outlined its efforts to obtain the permission of the Netherlands to interview Major van Putten and has annexed the Minister's reply denying the Defence's request. The present request is similar to requests that have been granted previously by the Tribunals. Moreover, the Dutch authorities have indicated their willingness to comply with such a request, provided that it is in the form of an official order issued by this Tribunal.

9. The Defence has also requested that this Chamber order Major van Putten to produce any personal notes that he has relating to the facts and events enumerated in its motion. While the Defence has demonstrated its reasonable efforts to obtain the permission of the Netherlands to interview the Major, it has not made any submissions that he has been contacted and is unwilling to provide the requested assistance voluntarily. As such, while the Defence has satisfied the conditions for a request for permission and co-operation from the Netherlands under Article 28, any request under Rule 54 in connection with Major van Putten's personal notes is premature.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

REQUESTS the Kingdom of the Netherlands to grant permission, to the extent necessary, for Major van Putten to be interviewed by the Bagosora Defence with a view to calling him as a witness and to provide any relevant assistance that may be reasonably required to facilitate this meeting;

DIRECTS the Registrar to transmit the present decision to the relevant authorities of the Kingdom of the Netherlands;

DENIES the motion in all other respects.

Arusha, 7 February 2005

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[6] The Chamber also notes that the United Nations has indicated that it has no objection to the Defence interviewing Major van Putten regarding the specified matters. See Bagosora Motion, Annex 2. The Office of Legal Affairs at the United Nations advised that the United Nations had no objection to an interview, provided that the questions "do not concem information the disclosure of which would either (1) endanger the safety or any person or (ii) violate a duty of confidentiality which the Organization owes to a third party or (iii) divulge what happened during closed meetings or informaI consultations of the Security Council". The Office further advised that should the Defence later decide to calI Major van Putten as a witness, "it would be necessary to first obtain from the Secretary-General of the United Nations a waiver of the immunity that he enjoys as a former military observer and expert on mission for the Untied Nations".

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Chambre est par conséquent convaincue que les observations du Major peuvent être pertinentes et de nature à aider la Défense dans la préparation de sa cause[6].

8. La Défense a décrit les efforts qu'elle a déployés pou obtenir des Pays-Bas l'autorisation d'entendre le Major van Putten et a annexé la réponse du Ministre rejetant la demande qu'elle lui avait adressée. La présente demande est du même genre que d'autres auxquelles les Tribunaux ont fait droit précédemment. De plus, les autorités hollandaises se sont déclarées disposées à donner suite à la demande à condition qu'elle lui parvienne sous la forme d'une ordonnance officielle rendue par le Tribunal.

9. La Défense a également prié la Chambre d'ordonner au Major Van Putten de produire les notes personnelles qu'il posséderait relativement aux faits et événements qu'elle a mentionnés dans sa requête. La Défense a démontré qu'elle avait déployé les efforts voulus pour obtenir des Pays-Bas l'autorisation d'entendre le major, mais elle n'a pas indiqué qu'il avait été contacté et qu'il n'était pas disposé à coopérer de son plein gré. La Défense a par conséquent rempli les conditions voulues pour obtenir la coopération des Pays-Bas et leur autorisation pour entendre le major, mais la demande présentée en vertu de l'article 54 du Règlement en vue d'obtenir communication des notes personnelles du major van Putten est prématurée.

ACCUEILLE la Requête en partie

DEMANDE au Royaume des Pays-Bas d'autoriser, dans la mesure requise, la Défense de Bagosora à entendre le Major Van Putten en vue de le citer à comparaître et de fournir toute l'assistance qui pourrait raisonnablement s'imposer pour faciliter la tenue de cette rencontre;

INVITE le Greffier à transmettre la présente décision aux autorités compétentes du Royaume des Pays-Bas;

REJETTE la requête pour le surplus.

Fait à Arusha le 7 février 2005.

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[6] La Chambre note également que les Nations Unies ont indiqué ne pas avoir d'objection à ce que la Défense entende le Major Van Putten sur les questions visées. Voir requête de Bagosora, annexe 2. Le Bureau des affaires juridiques des Nations Unies a fait savoir que celles-ci n'avaient pas d'objection à une interview à condition que les questions «ne portent pas sur des informations dont la communication i) mettrait en danger la sécurité de quiconque, ii) violerait un devoir de confidentialité dont l'organisation est tenue envers un tiers, ou iii) révélerait la teneur de séances huis clos ou de consultations informelles du Conseil de sécurité». Le Bureau a en outre indiqué que si la Défense décidait ultérieurement de faire citer le major van Putten, «il faudrait en premier lieu obtenir du Secrétaire général de l'ONU la levée de l'immunité dont l'intéressé jouit en tant qu'ancien observateur et expert militaire en mission pour le compte des Nations Unies».

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## *Decision on Ntabakuze Motion to Allow Witness DK 52 to Give Testimony by Video-conference 22 February 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Aloys Ntabakuze – Testimony, Video-conference, Interests of Justice, Good reasons – Motion denied*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution Motion for Special Protective Measures for Witness "A" Pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence, 5 June 2002 (ICTR-96-7); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005 (ICTR-2001-76); Trial Chamber, T*he Prosecutor v. Aloys Simba, *Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition, 9 February 2005 (ICTR-2001-76)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dusko Tadic, *Décision relative aux requêtes de la défense aux fins de citer à comparaître et de protéger des témoins à décharge et de présenter des témoignages par vidéoconférence, 25 June 1996 (IT-94-1)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Ntabakuze Motion to Allow Witness DK 52 to Give Testimony by Video-Conferencing", filed on 2 February 2005;

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## *Décision relative à la requête de Ntabakuze demandant qu'il soit permis au témoin DK 50 de déposer par voie de vidéoconférence 22 février 2005 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

*Aloys Ntabakuze – Témoignage, Vidéo-conference, Intérêts de la justice, Raisons valables – Requête rejetée*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Ferdinand Nahimana et consorts, *Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, 14 septembre 2001 (ICTR-99-52); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection du témoin A en vertu des articles 66 (C), 69 (A) et 75 du Règlement de procédure et de preuve, 5 juin 2002 (ICTR-96-7); Chambre de première instance,* Le Procureur c. Thénoneste Bagosora et consorts, *Décision relative à la requête du Procureur en prescription de mesures spéciales de protection des témoins A et BY, 3 octobre 2003 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on Testimony by Video-Confèrence, 20 décembre 2004 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Aloys Simba, *Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJKl by Video-Link, 4 février 2005 (ICTR-2001-76); Chambre de première instance,* Le Procureur c. Aloys Simba, *Décision relative à la requête de la Défense tendant à faire recueillir la déposition du témoin FMPI, 9 février 2005 (ICTR-2001-76).*

*T.P.I.Y. : Chambre de première instance,* Le Procureur c. Dusko Tadić, *Décision relative aux requêtes de la Défense aux fins de citer à comparaître et de protéger les témoins à décharge et de présenter des témoignages par vidéoconférence, 25 juin 1996 (IT-94-1).*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête intitulée Ntabakuze M*otion to Allow Witness DK 52 to Give Testimony by Video-Conferencing*, déposée le 2 février 2005,

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CONSIDERING the Prosecution response, filed on 4 February 2005;
HEREBY DECIDES the motion.

## Introduction

1. The Ntabakuze Defence requests that the testimony of one of its witnesses, DK-52, be heard by video-conference. The Defence is scheduled to commence the presentation of its case on 30 March 2005.

## Submissions

2. The Defence submits that Witness DK-52 is uniquely able to provide exculpatory evidence concerning the Accused Ntabakuze, based on her familiarity with the rules, procedures and functioning of the Rwandan army during the war in 1994, and based on her direct knowledge of the leadership and character of the Accused. The witness is said to be unwilling to give her testimony in Arusha because of the disruption to her family and professional life in Europe, where she currently resides as a refugee, and because of the trauma of her flight from Rwanda in 1994. The Defence submits that it would be unfair to proceed without the benefit of this important testimony and that video-conferencing is necessary and in the interest of justice.

3. The Prosecution argues that the Defence has demonstrated only the witness's unwillingness, not refusal, to testify in Arusha. Further, insufficient information has been given concerning the witness's circumstances, or the possibility of arrangements that might ameliorate her concerns. The Prosecution asserts that the reasons for the witness's refusal to testify amount only to an inconvenience to family or work, which is an insufficient justification for permitting video-conference testimony.

## Deliberations

4. Testimony may be heard by video-conference in lieu of a physical appearance where it is in the interests of justice, based on an assessment of : the importance of the testimony; the inability or unwillingness of the witness to attend; and whether good reason has been adduced for that inability or unwillingness[1]. Past decisions have held that inability to attend (for example, because of ill-health) is not a prerequisite for granting video-conference testimony. On the other hand, the witness must refuse

[1] *Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; *Simba*, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 200[5], para. 4; *Bagosora et al.*, Decision on Testimony by Video-Conference (TC), 20 December 2004; *Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004. Video-conference testimony may also be authorized for witness protection purposes : see *Bagosora et al.*, Decision

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VU la réponse du Procureur déposée le 4 février 2005,
STATUANT sur la requête,

## Introduction

1. La Défense de Ntabakuze demande qu'un de ses témoins, le témoin DK 52, soit autorisé à déposer par voie de vidéoconférence. La présentation des moyens à décharge doit s'ouvrir le 30 mars 2005.

## Conclusions des parties

2. La Défense fait valoir que le témoin DK 52 est tout particulièrement en mesure de présenter des éléments de preuve à la décharge de l'accusé Ntabakuze. L'intéressée était familière des règles et procédures qui régissaient l'armée rwandaise au moment de la guerre en 1994 ainsi que de la façon dont l'armée fonctionnait à l'époque, et elle dispose d'informations de première main sur le commandement et la moralité de l'accusé. Selon la requête, le témoin n'est pas disposé à comparaître à Arusha à cause des perturbations que cela occasionnerait pour sa vie familiale et professionnelle en Europe, où elle réside en tant que réfugiée, et du traumatisme occasionné par sa fuite du Rwanda en 1994. Arguant qu'il serait injuste de mener le procès sans le bénéfice de ce témoignage important, la Défense présente la tenue d'une vidéoconférence comme nécessaire et dans l'intérêt de la justice.

3. Selon le Procureur, la Défense n'a pas démontré que le témoin refusait de comparaître à Arusha, elle a simplement démontré qu'elle n'y était pas disposée. Elle n'a pas non plus fourni d'informations suffisantes sur les circonstances de l'intéressée ni sur les mesures qui pourraient être prises pour répondre à ses préoccupations. Le Procureur affirme que les seules raisons avancées pour justifier le refus de comparaître du témoin sont les désagréments qu'une telle comparution occasionnerait pour sa famille et son travail, et que ces raisons ne suffisent pas à justifier le recueil de sa déposition par voie de vidéoconférence.

## Délibération

4. Lorsque l'intérêt de la justice le commande, un témoin peut être entendu par voie de vidéoconférence plutôt que par voie de comparution personnelle; afin d'apprécier l'opportunité d'une telle mesure, la Chambre considérera l'importance du témoignage en question de même que l'incapacité ou le refus de comparaître du témoin, et elle se demandera si des raisons valables ont été fournies pour justifier cette incapacité ou ce refus [1]. Il ressort de décisions antérieures que l'incapacité de comparaître

[1] *Le Procureur c. Simba*, Chambre de première instance, Décision relative à la requête de la Défense tendant à faire recueillir la déposition du témoin FMPI, 9 février 2005; *ibid.*, *Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJKl by Video-Link*, 4 février 200[5], para. 4; *Le Procureur c. Bagosora et consorts*, Chambre de première instance, *Decision on Testimony by Video-Conference*, 20 décembre 2004; *ibid.*, *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link*, 8 octobre 2004. La déposition par voie de vidéocon-

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to testify on the basis of genuinely-held and well-founded reasons which give the Chamber reason to believe that the testimony would not otherwise be heard[2].

5. The present motion does not adequately establish the witness's refusal to testify before the Chamber, nor the basis of her refusal. The inconveniences to the witness, as recounted in the motion, do not appear to be extraordinary. It is not clear that the witness has refused to testify in person after being informed of her moral and legal obligation to do so, nor that all possible solutions to the difficulties occasioned by her testimony have been explored. Finally, the Defence has not proposed a site from which the video-testimony would be given, which may be relevant in the Chamber's evaluation of the interests of justice.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 22 February 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003; *Bagosora et al.,* Decision on the Prosecution Motion for Special Protective Measures for Witness "A" Pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence (TC), 5 June 2002; *Nahimana et al.*, Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures (TC), 14 September 2001.

[2] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, paras. 10, 13 (witness's repeated refusal to comply with subpoena indicates that subjective fears of intimidation "genuinely and deeply held"); *Tadic*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996, para. 19 (refusal to testify because of fear of arrest in The Hague justifies testimony by video-conference).

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(pour raisons de santé notamment) n'est pas une condition indispensable pour autoriser un témoin à déposer par voie de vidéoconférence. La mesure peut être accordée sur la base d'un refus de comparaître, pourvu que celui-ci soit motivé par des éléments véritablement ressentis et valablement fondés, la Chambre ayant ainsi des raisons de croire qu'à défaut de vidéoconférence, le témoignage ne serait pas produit [2].

5. Le refus de comparaître du témoin DK 52 et les raisons qui le motivent ne sont pas suffisamment établis dans la présente requête. Les désagréments qui, selon celle-ci, sont associés à la comparution effective du témoin ne paraissent pas extraordinaires, et il ne ressort pas clairement des conclusions présentées que l'intéressée a refusé de comparaître après avoir été informée qu'elle en avait l'obligation morale et légale, ni qu'ont été envisagés tous les remèdes possibles aux difficultés qui résulteraient de sa comparution. Enfin, la Défense n'a pas proposé de lieu pour recueillir la déposition du témoin par voie de vidéoconférence, alors qu'une telle information peut avoir une incidence sur l'appréciation que la Chambre fait de l'intérêt de la justice.

PAR CES MOTIFS,

REJETTE la requête.

Arusha, le 22 février 2005.

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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férence peut également être autorisée pour protéger les témoins : voir *Le Procureur c. Bagosora et consorts*, Chambre de première instance, Décision relative à la requête du Procureur en prescription de mesures spéciales de protection des témoins A et BY, 3 octobre 2003; *ibid.*, Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection du témoin A en vertu des articles 66 C), 69 A) et 75 du Règlement de procédure et de preuve, 5 juin 2002; *Le Procureur c. Nahimana et consorts*, Chambre de première instance, Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, 14 septembre 2001.

[2] *Le Procureur c. Bagosora et consorts,* Chambre de première instance, *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link,* 8 octobre 2004, paras. 10 et 13 (le fait que le témoin ait refusé de donner suite aux convocations répétées du Tribunal atteste que le risque de représailles suscite en lui une crainte subjective (( véritablement et profondément ressentie»); *Le Procureur c. Tadić,* Chambre de première instance, *Décision relative aux requêtes de la Défense aux fins de citer* à *comparaître et de protéger les témoins* à *décharge et de présenter des témoignages par vidéoconférence,* 25 juin 1996, para. 19 (le fait que les témoins aient refusé de comparaître à La Haye par crainte d'y être arrêtés justifie que leurs dépositions soient recueillies par voie de vidéoconférence).

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## *Decision on Request for Private Representation of Gratien Kabiligi 4 March 2005 (ICTR-98-41-T)*

(Original : Unknown)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Defence Counsel, Lead Defence Counsel, Directive on the Assignment of Defence Counsel, Fraud by the Defence Counsel, Counsel withdrew, Right of the Accused to defend himself or herself in person or through legal assistance of his or her own choosing, Indigence of the Accused,* Pro-bono *representation, Relationship with the legal team of the Accused, Qualification of the Counsel, authority of Lead Counsel, Duty of the Lead Counsel, Control over the legal aid defence – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 44 and 45* quater*; Statute, art. 20 (4) (d)*

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean Kambanda, *Judgement, 19 October 2000 (ICTR-97-23); Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Vidoje Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team, 7 November 2003 (IT-02-60)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF an offer by Jean Yaovi Degli, at the request of the Accused Gratien Kabiligi, to direct a privately funded defence of the Accused and a request to allow contact between them;

TAKING INTO ACCOUNT the views of the parties expressed on 28 February 2005;

HEREBY DECIDES the request.

### Introduction

1. On 26 October 2004, the Registrar withdrew the assignment of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi and found that he was no longer eligible as

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counsel within the framework of the Tribunal's legal aid program. This action was taken on the basis of, *inter alia*, a report by the Office of Internal Oversight Services of the United Nations, which implicated Mr. Degli in a scheme of fraudulent billing in excess of USD 300,000. Mr. Degli refused an invitation by the Registrar to respond to the results of the investigation before the decision was taken.

2. On 20 December 2004, having heard oral argument, the Chamber denied orally a joint Defence motion for the reinstatement of Mr. Degli as Lead Counsel for Mr. Kabiligi, with reasons to follow. During a status conference the following day, the Accused Kabiligi indicated his intention to file a motion for certification of appeal of the Chamber's decision once written reasons had been given. He also, however, requested that the Chamber order the Registrar to appoint Paul Skolnik, at the time Co-Counsel for Theoneste Bagosora, as his Lead Counsel. Mr. Kabiligi considered Mr. Skolnik's familiarity with the case to be a matter of prime importance, in light of the imminent start of the Defence case, set to commence on 12 January 2005[1]. Mr. Kabiligi conditioned his request on the agreement of both Mr. Bagosora and Mr. Skolnik. Mr. Bagosora, through his Lead Counsel, consented to the representation of Mr. Kabiligi by Mr. Skolnik[2]. The Registry indicated its willingness to ensure the expeditious appointment of Mr. Skolnik[3]. The Chamber did not consider it necessary at that time to order the appointment of Mr. Skolnik as Lead Counsel, but requested the Registrar to look into the matter quickly, with a view to a solution in accordance with the views expressed by the parties[4]. The Chamber also postponed the commencement of the Defence case until 30 March 2005, to accommodate concerns of the Defence that the co-ordinated presentation of their case had been disrupted by the withdrawal of Mr. Degli[5]. A status conference was scheduled for 28 February 2005 to discuss ongoing preparations for the start of the Defence case, in particular, the status of Mr. Kabiligi's defence[6].

3. Written reasons for denial of reinstatement of Mr. Degli were issued on 19 January 2005. The Chamber observed that the Registrar's decision of 26 October 2004 dealt with Mr. Degli's eligibility under the legal aid program and was, therefore, distinguishable from proceedings for disbarment, which in some national jurisdictions might require more elaborate procedural safeguards. In that regard, the Chamber recalled that :

> "Mr. Degli is not being criminally sanctioned, prevented from practicing law in general, nor from appearing before the ICTR as a counsel privately engaged by an Accused"[7].

By that same decision, the Chamber appointed Mr. Skolnik as Lead Counsel for Mr. Kabiligi pursuant to Rule 45 *quater*. The Chamber cited the need for immediate resolution of the representation of the Accused, who had not been adequately represented since 26 October 2004. It was important to ensure that Mr. Kabiligi be adequately represented at this critical juncture of the trial. The judicially ordered assignment was also intended to allay the concerns of Mr. Kabiligi that Mr. Skolnik's

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[1] T. 21 December 2004 p. 2.
[2] *Id.* p. 4.
[3] *Id.* p. 12.
[4] *Id.* p. 26.
[5] *Id.* p. 28.
[6] *Id.* p. 50.
[7] *Bagosora et al.*, Decision on the Defence Motions for Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005, para. 42.

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involvement was conditional upon Mr. Degli not being reinstated as Lead Counsel by subsequent proceedings[8].

## Submissions

4. On 10 February 2005, citing the language in the 19 January 2005 decision, Mr. Kabiligi filed a letter requesting Mr. Degli, in his private capacity, to voluntarily assure his defence until the end of the trial[9]. On 24 February 2005, three days before the scheduled Status Conference, Mr. Degli indicated by letter to the Chamber that he was prepared to undertake the defence of Mr. Kabiligi on this basis. Mr. Degli requested permission to enter into attorney-client communications with Mr. Kabiligi. During a status conference on 28 February 2005, Mr. Kabiligi confirmed his request to be represented by Mr. Degli on a *pro bono* basis[10].

## Deliberations

5. The question before the Chamber is whether to grant Mr. Degli's request to enter into attorney-client communications with Mr. Kabiligi[11]. The broader issue upon which that question depends is whether, and on what basis, Mr. Degli may act as privately engaged counsel for Mr. Kabiligi, unsupported by the Tribunal's legal aid program. Assuming that Mr. Degli may act as a privately engaged counsel, the question also arises as to the limitations on his competencies arising from the Chamber's decision of 19 January 2005 and, in particular, his relationship to the legal team duly constituted under the legal aid program defined in the Rules of Procedure and Evidence ("the Rules") and the Directive on the Assignment of Defence Counsel ("the Directive").

6. Article 20 (4) (d) of the Statute confers upon an accused the right to "defend himself or herself in person or through legal assistance of his or her own choosing". This right is substantially qualified where an accused asks that the costs of legal assistance be paid from the public purse[12]. In such cases, the Tribunal has a legitimate interest to ensure that money is well-spent and to regulate the assignment of counsel. Since

[8] *Id.* paras. 53-54.

[9] "*[J]e vous demande votre intervention urgente, et saisir la Chambre de votre volonté de m'aider et m'accorder votre assistance judiciaire dans un but purement déontologique de mettre les intérêts de votre client avant les vôtres, en m'assurant, vous personnellement, la défense à titre privé bénévolement, jusqu'à la fin de mon procès en première instance*".

[10] T. 28 February 2005, p. 6.

[11] At no time was Mr. Degli prohibited from communicating with Mr. Kabiligi. Indeed, the Chamber has been sent copies of a number of letters between Mr. Degli and Mr. Kabiligi in the period between 26 October 2004 and Mr. Degli's request of 24 February 2005.

[12] The Appeals Chamber has consistently stated that "the right to choose counsel applies only to those accused who can financially bear the costs of counsel" and that "the right to free legal assistance by counsel does not confer the right to choose one's counsel". *Akayesu*, Judgement (AC), 1 June 2001, para. 61; *Kambanda*, Judgement (AC) 19 October 2000, para. 33. See also *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22.

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his arrest by the Tribunal, Mr. Kabiligi has declared that he is indigent and has relied on legal aid for assignment of counsel and to otherwise pay the costs of his defence. By his letter of 9 February 2005, Mr. Kabiligi requested the legal assistance of Mr. Degli, who has agreed to act on the Accused's behalf free of charge. In the present circumstances, the Chamber must assess the relationship between the invocation of the right to choice of counsel and the Tribunal's legitimate interest in administering the legal aid program of which Mr. Kabiligi is, and had long been, a beneficiary.

7. Mr. Kabiligi does not appear to have requested, and Mr. Degli has not agreed, that the entire cost of the defence until the end of trial would be paid by Mr. Degli, so as to take Mr. Kabiligi out of the legal aid program entirely. Such an undertaking would be surprising indeed, particularly in light of the scope of the present trial and the breadth of coverage of legal aid[13]. Substantial costs arise from the transportation and accommodation of witnesses; meeting witnesses in disparate geographic locations; conducting ongoing investigations; and paying the salaries of the legal team on which counsel must necessarily rely in order to provide a competent defence. Even assuming that Mr. Degli were to make such a promise, the Chamber could not rely on such an undertaking. The Registrar found in its decision of 26 October 2004 that Mr. Degli had engaged in serious financial malfeasance. The Chamber could not, under such circumstances, give credence to any assurance that Mr. Degli would adequately fund the Defence through to completion of the trial. In these circumstances, Mr. Degli's letter can only be considered an offer to serve as a *pro bono* attorney, without otherwise disturbing Mr. Kabiligi's entitlement to the assistance of legal aid[14].

8. Rule 44 of the Rules requires that counsel be "admitted to the practice of law in a State, or is a University professor of law". The Chamber has not received any information that Mr. Degli no longer fulfils these conditions and assumes, for present purposes, that this is still the case. The question remains whether Mr. Kabiligi's request for the assistance of Mr. Degli is compatible with the structure of assigned counsel already in place. In accordance with the Chamber's decision of 19 January 2005, Mr. Degli is disqualified from the legal aid program of which Mr. Kabiligi is a beneficiary. Under Article 15 of the Directive, he is also disqualified from being designated as Lead Counsel or as Co-Counsel, both of which are roles created and defined by the legal aid program itself. Lead Counsel has "primary responsibility for the Defence"; "shall sign all the documents submitted to the Tribunal unless he authorizes Co-Counsel, in writing to sign on his behalf"; and "may request the Chamber to authorize the withdrawal of the assignment of Co-Counsel". The authority of Lead Counsel to direct the defence of an accused is a natural corollary of his or her primary responsibility as steward of the financial resources of the Defence team. The consequence of Mr. Degli's disqualification from involvement in the legal aid program

[13] Article 17 of the Directive provides that "the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be met by the Tribunal"; such costs and expenses are said to include "costs relating to investigative and procedural steps, measures taken for the production of evidence to assist or support the Defence, expenses for ascertainment of facts, consultancy and expert opinion, transportation and accommodation of witnesses, postal charges, registration fees, taxes or similar duties, and all remuneration due to Counsel in Accordance with Articles 22 and 27".

[14] This understanding is confirmed by Mr. Kabiligi's representation during the status conference that "I asked for Counsel Degli to represent me on a *pro bono* basis". T. 28 February 2005 p. 6.

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is that he may not assume a directing role in the Defence of an accused who continues to be assisted by legal aid. It would be an unacceptable contradiction to permit a lawyer who has been disqualified from legal aid for serious misconduct to nevertheless direct a defence funded by that program.

9. The letters of Mr. Kabiligi and Mr. Degli suggest that their intention is that Mr. Degli shall be Lead Counsel[15]. No reference is made to the existing legal team. As Mr. Degli cannot legally be appointed Lead Counsel, which would imply control over the legal aid defence provided to Mr. Kabiligi, Mr. Degli's request to enter into contact with Mr. Kabiligi in order to continue his defence is denied.

10. This does not necessarily mean that Mr. Degli is excluded from providing assistance to the existing Defence team operating under the legal aid program. Such participation would have to be at the request of the duly designated Lead Counsel, who has "primary responsibility for the Defence". In such a situation, Lead Counsel would assume responsibility for the conduct of the *pro bono* lawyer. Such an arrangement would have to ensure that the cohesiveness of the Defence team not be undermined.

11. In his decision of 26 October 2004, the Registrar ordered Mr. Degli to transmit all original documents in the file to Mr. Kabiligi or to Co-Counsel within fifteen days. In its 19 January 2005 decision, the Chamber noted that it seemed that Mr. Degli had not fulfilled this obligation[16]. On 2 February 2005, the Chamber authorized Mr. Degli to communicate with Mr. Kabiligi for the purpose of facilitating the transfer of the documents[17]. As of today, the Chamber has no indication that the documents have been transmitted. The continued failure to transfer the documents is a cause of delay at a critical stage in the preparations of the defence. Accordingly, the Chamber considers it necessary to specifically order Mr. Degli to transmit all original documents to Mr. Kabiligi or to his legal team within five days of this decision.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request;

ORDERS Mr. Degli to transmit all original documents in the file to Mr. Kabiligi or to his legal team within five days of this decision.

Arusha, 4 March 2005

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[15] For instance, Mr. Degli's letter of 24 February 2005 contains formulations as "*mon client*"; "*… je puisse continuer d'assurer et de terminer sa défense à titre privé"; "… je m'organise avec lui sur la suite de la procédure en tant que son Conseil…*".

[16] *Bagosora et al.*, Decision on the Defence Motions for Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005, para. 52.

[17] *Bagosora et al.*, Decision on Mr. Degli's Request for Authorization to Communicate with Mr. Kabiligi (TC), 2 February 2005.

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# *Decision on Request for Certification of Appeal concerning Private Representation 24 March 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Lead Counsel, Responsibility of the Lead Counsel, Conditions for appearance of counsel, Right to a fair Trial, Right of the Accused to legal assistance of his own choosing – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 44 (A) and 73 (B)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF a request filed on 14 March 2005 by the Accused Kabiligi for certification of appeal from the Chamber's "Decision on Request for Private Representation of Gratien Kabiligi", filed on 4 March 2005;

HEREBY DECIDES the request.

## Introduction

1. On 10 February 2005, the Accused Gratien Kabiligi filed a letter requesting his former Lead Counsel, Jean Yaovi Degli, to represent him in his private capacity through to the end of the trial [1]. The request followed the disqualification of Mr. Degli from participation in the Tribunal's legal aid program, based on the Registrar's finding that he had engaged in fraudulent billing in excess of USD 300,000 [2]. On 24 February 2005, four days before a scheduled Status Conference, Mr. Degli indicated by letter to the Chamber that he was prepared to continue Mr. Kabiligi's defence in his private capacity, and requested permission to enter into attorney-client communications with Mr. Kabiligi. During the status conference on 28 February 2005, Mr. Kabiligi con-

[1] *"[J]e vous demande votre intervention urgente, et saisir la Chambre de votre volonté de m'aider et m'accorder votre assistance judiciaire dans un but purement déontologique de mettre les interets de votre Client avants les vôtres, en m'assurant, vous personellement, la défense à titre privé bénévolement, jusqu'à la fin de mon procès en première instance".*

[2] Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004.

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firmed his request to be represented by Mr. Degli on a *pro bono* basis[3]. The Chamber also heard submissions from the other parties on the request.

2. On 1 March 2005, the Chamber rendered an oral decision denying the request, with written reasons following on 4 March 2005. The Chamber assumed, for the purposes of the decision, that Mr. Degli continued to satisfy the conditions for appearance of counsel in Rule 44 (A) of the Rules, namely, that he is "admitted to the practice of law in a State, or is a University professor of law"[4]. The Chamber found, however, that he could not assume the position of "Lead Counsel", which would necessarily entail some control or direction over the expenditure of legal aid resources[5]. Nor, in light of the Registrar's findings of fraud, could Mr. Degli provide sufficient guarantees that he would be able to privately assume the entire cost of the Defence of Mr. Kabiligi through to the end of the trial, so as to obviate the need for legal aid assistance[6]. These findings did not exclude Mr. Degli from participating in the defence of the Accused on a *pro bono* basis, but such participation would, accordingly, have to be with the consent and under the direction of the duly appointed Lead Counsel for Mr. Kabiligi[7]. Mr. Kabiligi requested certification to appeal the decision in a letter to the Chamber filed on his own behalf on 14 March 2005.

## Submissions

3. Mr. Kabiligi contends that the Chamber's decision violates his right to counsel of his choosing, prescribed by Article 20 of the Statute. He argues that Mr. Degli is entitled to be accredited to appear before the Tribunal in a private capacity, and that

[3] T. 28 February 2005 p. 6.

[4] Bagosora et al., Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 8.

[5] *Id.* ("The authority of Lead Counsel to direct the defence of an accused is a natural corollary of his or her primary responsibility as steward of the financial resources of the Defence team. The consequence of Mr. Degli's disqualification from involvement in the legal aid program is that he may not assume a directing role in the Defence of an accused who continues to be assisted by legal aid. It would be an unacceptable contradiction to permit a lawyer who has been disqualified from legal aid for serious misconduct to nevertheless direct a defence funded by that program.")

[6] *Id.* para. 7 ("Mr. Kabiligi does not appear to have requested, and Mr. Degli has not agreed, that the entire cost of the defence until the end of trial would be paid by Mr. Degli, so as to take Mr. Kabiligi out of the legal aid program entirely. Such an undertaking would be surprising indeed, particularly in light of the scope of the present trial and the breadth of coverage of legal aid. Substantial costs arise from the transportation and accommodation of witnesses; meeting witnesses in disparate geographic locations; conducting ongoing investigations; and paying the salaries of the legal team on which counsel must necessarily rely in order to provide a competent defence. Even assuming that Mr. Degli were to make such a promise, the Chamber could not rely on such an undertaking. The Registrar found in its decision of 26 October 2004 that Mr. Degli had engaged in serious financial malfeasance. The Chamber could not, under such circumstances, give credence to any assurance that Mr. Degli would adequately fund the Defence through to completion of the trial.")

[7] *Id.* para. 10 ("This does not necessarily mean that Mr. Degli is excluded from providing assistance to the existing Defence team operating under the legal aid program. Such participation would have to be at the request of the duly designated Lead Counsel, who has "primary responsibility for the Defence". In such a situation, Lead Counsel would assume responsibility for the conduct of the *pro bono* lawyer.")

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other attorneys have been permitted to appear before Chambers on a *pro bono* basis, without being accredited under the legal aid scheme or otherwise receiving a salary.

**Deliberations**

4. Rule 73 (B) of the Rules of Procedure and Evidence provides that decisions are without interlocutory appeal unless certified by the Trial Chamber :

> which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Mr. Kabiligi interprets the 4 March 2005 decision as precluding the appearance of Mr. Degli before the Chamber which, he argues, impedes the fair and expeditious conduct of proceedings.

5. Contrary to Mr. Kabiligi's understanding, the Chamber's decision does not state that Mr. Degli is disqualified from appearing before a Chamber of this Tribunal. On the contrary, the decision assumes that he is still so qualified under Rule 44 (A). The questions addressed by the Chamber were : (i) whether Mr. Degli could undertake the defence of the Accused on an entirely private basis, without any support from legal aid; (ii) whether Mr. Degli could assume the position of "Lead Counsel", in title or in fact, following his disqualification from the legal aid program; and (iii) having answered negatively to the first two questions, what role Mr. Degli could play on a *pro bono* basis. The Chamber determined (i) that Mr. Degli could not credibly undertake to defend the Accused using his private resources through to the end of the case, and (ii) that he could not assume control for a defence team funded by the legal aid program, even if he himself acted *pro bono*. Accordingly, the Chamber concluded (iii) that Mr. Degli could only act for the Accused *pro bono* under the direction and at the request of the newly-appointed Lead Counsel, who must necessarily have control over the conduct of the defence.

6. The issue addressed by the Chamber does arguably engage the right of the Accused to legal assistance of his own choosing and, thus, the fair conduct of proceedings. Certification would not, however, "materially advance the proceedings" in the present case. The Chamber has already denied certification of appeal concerning the appointment of new Lead Counsel[8]. The provision of new counsel, combined with adequate adjournments, has mitigated any harm to the progress or fairness of proceedings caused by Mr. Degli's departure. The Chamber will adopt other measures as needed in the conduct of proceedings to ensure that the fair trial rights of the Accused are respected. Furthermore, in light of the Accused's reliance on the pendancy of appeals as a justification for refusing to promptly comply with decisions of the Registrar and the Chamber, it is likely that certification would seriously impede the material advancement of proceedings[9].

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[8] *Bagosora et al.*, Decision on the Defence Requests for Certification of the "Decision on the Defence Requests for Certification of the "Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi" (TC), 2 February 2005.

[9] See e.g. letter of 4 February 2005, addressed to the Chamber, in which Mr. Kabiligi declares that he considers Mr. Degli to still be his Lead Counsel ("Conseil principal").

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FOR THE ABOVE REASONS, THE CHAMBER
DENIES the request.

Arusha, 24 March 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Maître Paul Skolnik's application for reconsideration of the Chamber's decision to instruct the registrar to assign him as lead counsel for Gratien Kabiligi 24 March 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Authority of the Trial Chamber to reconsider its decisions, Power of the Trial Chamber to instruct the Registrar, Power to withdraw the assignment of counsel upon good cause, Unwillingness of the Accused to cooperate, Exceptional circumstances for the withdrawal of a Counsel, Prohibition to an Accused from unilaterally destroying the trust between himself/herself and his/her counsel, Counsel's obligation, Balance between the right to free legal assistance by counsel and the right to choose the counsel, Balance between the interests of Justice and the Accused's preference, Assignment of a Counsel, Condition of agreement, Defence Counsel and Detention Management Section (DCDMS) – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 45 (H) and 45* quater

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision (Prosecution's Motion for Review or Reconsideration), 7 April 2000 (ICTR-97-19); Appeals Chamber,* The Prosecutor v. Jean Kambanda, *Judgement, 19 October 2000 (ICTR-97-23); Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement (AC), 1 June 2001 (ICTR-96-4); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41); Appeals Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 (ICTR-99-52)*

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*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Vidoje Blagojevic, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team, 7 November 2003 (IT-02-60); Appeals Chamber,* The Prosecutor v. Slobodan Milosevic, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (IT-02-54); Trial Chamber,* The Prosecutor v. Slobodan Milosevic, *Decision on Assigned Counsel's Motion for Withdrawal, 7 December 2004 (IT-02-54); ICTY President,* The Prosecutor v. Slobodan Milosevic, *Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw (President), 7 February 2005 (IT-02-54)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Application by Maitre Paul Skolnik for Reconsideration and Modification of the Decision of the Trial Chamber of January 19, 2005", filed on 2 March 2005;

CONSIDERING the Bagosora Defence submissions, filed on 3 March 2005; the Prosecution's response, filed on 3 March 2005; Mr. Skolnik's further application, filed on 8 March 2005; the Prosecution's further reply, filed on 9 March 2005; Mr. Skolnik's reply, filed on 14 March 2005; and the Prosecution second further response, filed on 14 March 2005.

HEREBY DECIDES the application.

## Introduction

1. The Prosecution case against the four Accused concluded on 14 October 2004 after eighty-two witnesses had testified. In a decision of 26 October 2004, the Registrar withdrew the assignment of Mr. Jean Yaovi Degli as Lead Counsel for Mr. Gratien Kabiligi under the framework of the legal aid system. The decision was based on evidence of fraudulent conduct[1]. The Registrar also invited Mr. Kabiligi to submit without delay a list of three individuals who could be assigned as new Lead Counsel. At the time, the Defence case was scheduled to start on 12 January 2005.

2. All Defence teams, as well as Mr. Kabiligi individually, challenged the Registrar's decision before the Trial Chamber and requested Mr. Degli's reinstatement. On 20 December 2004, the Chamber denied the requests to reinstate Mr. Degli, with written reasons to follow[2]. During a status conference on 21 December 2004, Mr. Kabiligi expressed his intention to seek certification to appeal the decision[3].

[1] Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004. The Registrar's decision fully recounts the procedural history of the investigation of Mr. Degli as well as the nature of the allegations against him.

[2] T. 20 December 2004 p. 38.

[3] T. 21 December 2004 p. 2 ("I am going to appeal before the Appeals Chamber as soon as I receive the written decision and after seeking a certification to appeal.").

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3. During the same status conference, Mr. Kabiligi requested the Chamber to order the Registrar to appoint Mr. Skolnik, then Co-Counsel in the Bagosora Defence, to serve as his new Lead Counsel given his familiarity with the case[4]. The Bagosora Defence concurred with this proposed solution. Both suggested that the Chamber act pursuant to Rule 45 quater to facilitate the appointment immediately[5]. The Registry indicated that it was favourable to appointing Mr. Skolnik and that it could do so promptly[6]. The Chamber left it to the Registry to pursue this option[7]. In light of the changed circumstances, the Chamber postponed the commencement of the Defence case until 30 March 2005[8].The Chamber also postponed the date for the filing of Kabiligi's pre-Defence brief and witness list until 28 February 2005, subject to further representations from Mr. Skolnik if named Lead Counsel.

4. The Registry subsequently corresponded with Mr. Kabiligi and Mr. Skolnik to obtain further assurances and information related to the proposed solution prior to making an appointment. On 21 December 2005, the Registry renewed its request for Mr. Kabiligi to formally submit three names for a replacement counsel, including that of Mr. Skolnik if he so desired. In a letter dated 22 December 2004, Mr. Skolnik expressed his willingness to accept the appointment, if certain conditions were met. However, he also indicated concerns that subsequent appeals might lead to his displacement. Mr. Skolnik proposed that he be named interim Lead Counsel until the situation was clarified, if he accepted[9].

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[4] *Id.* ("The President of this Chamber also used wisdom when he said whether there is an alternative solution which could actually clear the impasse in which we are right now. I would like to venture to propose to you a solution which could seem to be the least inconvenient in order to maintain whatever interest there remains in respect of my defence. I would like to respectfully propose to you, Mr. President, that you order the Registrar to appoint a counsel … [T]he name that I would like to propose, Mr. President, is that of Counsel Paul Skolnik, of course, subject to his assent and the assent of Mr. Constant, as well as the agreement of Mr. Constant's client … Mr. Skolnik knows the general context of this trial. He could, therefore, familiarise himself rapidly with the specific points of my case").

[5] *Id.* See also T. 21 December 2004 p. 6 (Mr. Constant : "… and I think it is in the interest of all Defence teams that the Chamber orders the Registrar to appoint Paul Skolnik pursuant to Rule 45 *quater*".).

[6] T. 21 December 2004 p. 12 ("... in the circumstances of this case, we would support and act expeditiously to get Mr. Skolnik ... as counsel in this case, because it eases a lot of problems which we usually encounter when we have to make that decision.").

[7] *Id.* at pp. 12-13.

[8] *Id.* at p. 27.

[9] Skolnik Application, Annex 2, Letter from Paul Skolnik to Dunstain Mwaungulu (DCDMS), 22 December 2004 ("Under the said circumstances it would be an honour to represent General Kabiligi. However I am prepared to accept to undertake being Gen. Kabiligi's Lead Counsel only under the following conditions. a) that DCDMS approve a work program to meet with Gen. Kabiligi in January as soon as possible, to see what the status of the case is. b) After I meet with Gen. Kabiligi, I shall indicate to DCDMS whether I accept the appointment as Lead Counsel. c) If appointed as Lead Counsel I would accept being named on an "ad interim" basis *pending the outcome* of Kabiligi's and Degli's appeals. Also as Me Constant suggested in his email to you of December 22d 2004 that he would not withdraw me as his co counsel until the questions raised herein are resolved. d) Should either Kabiligi or Degli succeed in their appeals I want to be re-integrated into the Bagosora Defence team as Co-Counsel, as per the suggestion to you by Me Constant.").

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5. On 23 December 2004, the Registry sent a further request to Mr. Kabiligi to submit a list of three names, including Mr. Skolnik, and indicated its willingness to facilitate the solution proposed by the Accused at the status conference[10]. In a letter dated 27 December 2004, Mr. Kabiligi withdrew his proposal, stating that it had caused confusion and indicating his need for Lead Counsel to act in his interests exclusively. He asked that the process of assigning a new Lead Counsel be suspended until the various avenues for reinstating Mr. Degli had been exhausted.

6. The Chamber delivered written reasons for denial of reinstatement of Mr. Degli on 19 January 2005. It also instructed the Registrar to appoint Mr. Skolnik as Lead Counsel for the Kabiligi Defence[11]. On 24 January 2005, the Registrar made that appointment and subsequently withdrew the assignment of Mr. Skolnik as Co-Counsel for the Bagosora Defence in a decision of 27 January 2004.

7. All Defence teams, as well as Mr. Kabiligi, individually, filed requests for certification to appeal the Chamber's decision not to reinstate Mr. Degli. The Chamber denied these requests and stated that

> "[t]he denial of these requests for certification definitively closes the issue of Mr. Degli's return as Lead Counsel of the Kabiligi Defence under the legal aid program"[12].

In a decision delivered the same day, the Chamber further noted that the Registrar's appointment of Mr. Skolnik as Lead Counsel for Mr. Kabiligi on 24 January 2005 had concluded Mr. Degli's obligations toward Mr. Kabiligi. The Chamber authorized Mr. Degli

> "to have telephone communication with Mr. Kabiligi in order to facilitate the orderly transfer of the case file to the new Lead Counsel, Mr. Skolnik"[13].

8. By letter dated 4 February 2005, Mr. Kabiligi insisted that Mr. Skolnik was not authorized to act as his counsel, and stated that he considered Mr. Degli to be his Lead Counsel. Mr. Kabiligi indicated that he would be unable to comply with the deadline of 28 February 2005 for filing his pre-Defence brief and would not be in a position to proceed with the trial on 30 March 2005, as had been decided at the status conference on 21 December 2004. On 4 February 2005, Mr. Kabiligi filed a document on his own behalf entitled "Motion for severance of trials".

9. On 6 February 2005, Mr. Skolnik travelled to Arusha and met with Mr. Kabiligi on several occasions, including 7 and 8 February 2005[14]. Mr. Kabiligi refused to meet with Mr. Skolnik at a previously scheduled meeting on 11 February 2005[15].

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[10] *Skolnik* Application, Annex 4, Letter from Dunstain Mwaungulu (DCDMS) to Mr. Kabiligi, 23 December 2005.

[11] *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005, paras. 50-54.

[12] *Bagosora et al.*, Decision on the Defence Requests for Certification of the "Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi" (TC), 2 February 2005, para. 13.

[13] *Bagosora et al.*, Decision on Mr. Degli's Request for Authorization to Communicate with Mr. Kabiligi (TC), 2 February 2005.

[14] *Skolnik* Application, paras. 32-33.

[15] *Id.* at para. 35.

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Mr. Kabiligi subsequently sent a letter of apology to Mr. Skolnik for refusing to meet with him[16].

10. On 10 February 2005, citing the language in the 19 January 2005 decision, Mr. Kabiligi filed a letter requesting Mr. Degli, in his private capacity, to voluntarily undertake his defence until the end of the trial[17]. On 24 February 2005, four days before the scheduled status conference, Mr. Degli indicated by letter to the Chamber that he was prepared to do so, and Mr. Degli requested permission to enter into attorney-client communications with Mr. Kabiligi.

11. Mr. Skolnik appeared as Mr. Kabiligi's Lead Counsel during the status conference on 28 February 2005. The Chamber heard oral submissions from the parties and Mr. Kabiligi concerning a possible role for Mr. Degli in the Kabiligi Defence. Mr. Kabiligi confirmed his request to be represented by Mr. Degli on a *pro bono* basis[18]. At a status conference on 1 March 2005, the Chamber denied the request and stated that a written decision would follow. It noted that Mr. Degli could not legally be appointed Lead Counsel, which would imply control over the legal aid defence provided to Mr. Kabiligi[19]. The Chamber also stated that Mr. Degli was not excluded from providing assistance to the existing Defence team, if so requested by the duly designated Lead Counsel, who has "primary responsibility for the Defence"[20].

12. After the Chamber's oral ruling, Mr. Skolnik, citing constraints placed on him by the Accused, asked that Mr. Kabiligi be allowed to address the Chamber[21]. Mr. Kabiligi expressed his wish to have Mr. Degli complete his case and indicated his intention to request certification of the Chamber's decision concerning Mr. Degli's possible role as part of the Defence on a *pro bono* basis[22]. In addition, Mr. Kabiligi requested severance of his case and six additional months to prepare his Defence[23]. He added that he would not accept having a counsel "imposed" on him, and requested that he be allowed to use the normal process of choosing counsel from the Tribunal's list of potential lawyers[24]. In light of Mr. Kabiligi's statement, Mr. Skolnik informed

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[16] *Id.* at para. 40.

[17] "*[J]e vous demande votre intervention urgente, et saisir la Chambre de votre volonté de m'aider et m'accorder votre assistance judiciaire dans un but purement déontologique de mettre les intérêts de votre client avant les vôtres, en m'assurant, vous personnellement, la défense à titre privé bénévolement, jusqu'à la fin de mon procès en première instance.*"

[18] T. 28 February 2005 p. 6.

[19] T. 1 March 2005 pp. 1-2; *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 9.

[20] T. 1 March 2005 p. 2; *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 10.

[21] T. 1 March 2005 p. 4 ("Mr. Skolnik : The matter is very complex. We met and my position is the following : considering that General Kabiligi wrote a letter to me on 9th of February in which he says, 'From my point of view, you are not my counsel, therefore, you cannot do anything on my behalf', having those constraints or parameters of his letter which constrain me and put me in a position where I really cannot speak on his behalf, I will ask the Trial Chamber to recognise General Kabiligi's request to address the Trial Chamber on the issues that he wishes to raise to the Trial Chamber.").

[22] T. 1 March 2005 p. 4.

[23] *Id.* at p. 5.

[24] *Id.*

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the Chamber of his intention to file the present motion[25]. During the same status conference, the Chamber postponed the commencement of trial until 11 April 2005[26].

13. On 4 March 2005, the Chamber issued its written decision on the request for Mr. Degli to appear as a *pro bono* counsel[27]. Mr. Kabiligi filed a request for certification of appeal on 14 March 2005.

**Submissions**

14. Mr. Skolnik seeks reconsideration and modification of the Chamber's decision of 19 January 2005, instructing the Registrar to assign him as Lead Counsel for Mr. Kabiligi. He requests the Chamber to instruct the Registrar to withdraw his assignment as Lead Counsel for Mr. Kabiligi and to reinstate him as Co-Counsel for Mr. Bagosora. Mr. Skolnik advances three principal reasons in support of his request : (i) his lack of consent to the assignment; (ii) Mr. Kabiligi's refusal to accept Mr. Skolnik as his Lead Counsel which has resulted in a breakdown in trust; and (iii) the potential conflict in which this situation places him with respect to his ethical obligations as a member of the Quebec Bar and under the Tribunal's Code of Professional Conduct for Defence Counsel[28].

15. The Bagosora Defence seeks the return of Mr. Skolnik as Co-Counsel or, in the alternative, a delay of three months in the presentation of its evidence after the nomination of a new Co-Counsel. The Bagosora Defence notes that its reasons for proposing Mr. Skolnik as Lead Counsel for the Kabiligi Defence have disappeared given Mr. Kabiligi's recent positions. Mr. Constant, Lead Counsel, has refrained from selecting a new Co-Counsel given the present uncertainty with respect to Mr. Kabiligi's representation. Any new Co-Counsel would lack Mr. Skolnik's extensive knowledge of the case.

16. The Prosecution opposes Mr. Skolnik's application, but does not oppose the transmission of the present file to the Quebec Bar for their consideration. In addition, the Prosecution requests the Chamber to order Mr. Degli to transmit the case file to either the Accused or Mr. Skolnik[29].

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[25] *Id.* at pp. 12-13.

[26] *Id.* at pp. 15-16.

[27] *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005.

[28] In addition, Mr. Skolnik seeks leave to transmit the present pleadings to the Quebec Bar and to allow the Quebec Bar to intervene if it sees fit to do so. The present application and supporting material were filed confidentially given their relation to attorney-client communications and closed session proceedings. On 16 March 2005, the Chamber informed Mr. Skolnik that it did not consider that any of the information in the pleadings would be subject to non-disclosure to his professional regulatory body by virtue of any rule of the Tribunal. On 23 March 2005, Mr. Skolnik filed a letter dated 22 March 2005 from the *Bâtonnier* of the Quebec Bar concerning the present situation. Consequently, these requests are moot.

[29] This request is moot. See *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 11.

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## Deliberations

17. The Chamber has the authority to reconsider its decisions if satisfied that the underlying factual premise has changed substantially in a way that alters the original outcome[30]. In addition, the Chamber has the authority, pursuant to Rule 45 (H), to instruct the Registrar to withdraw the assignment of counsel upon good cause being shown[31].

18. Mr. Skolnik's application must be considered against the backdrop of the entire proceedings, in particular since 26 October 2004. The Chamber is in the midst of a lengthy and complicated trial, which commenced in April 2002. The Accused, including Mr. Kabiligi, have been in pre-trial detention for nearly eight years. The disqualification of Mr. Degli for serious misconduct as Mr. Kabiligi's Lead Counsel was unforeseen. The Chamber has made every effort to ensure that the Accused's defence and that the difficulties faced by his defence are reasonably accommodated. The Chamber's decision of 19 January 2005 created a workable solution to the present impasse, addressing both Mr. Kabiligi and Mr. Skolnik's concerns with respect to Mr. Kabiligi's own proposal.

### *Mr. Kabiligi's Refusal*

19. Mr. Skolnik argues that it would be in the interests of justice to permit him to withdraw as Lead Counsel because Mr. Kabiligi refuses to work with him and insists on the return of either Mr. Degli or the selection of another counsel. In particular, he points to Mr. Kabiligi's statement that Mr. Skolnik was not his counsel and therefore could not take any act in his name.

20. In reaching its decision of 19 January 2005, the Chamber was mindful that Mr. Kabiligi might resist Mr. Skolnik's representation given his insistence on Mr. Degli's return and the withdrawal on 27 December 2004 of his original proposal for Mr. Skolnik to be his counsel. Thus, this cannot constitute a ground for reconsideration.

21. Appeals Chamber case law has emphasised that an accused does not have the right to unilaterally destroy the trust between himself and his counsel in the hope that

[30] *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, paras. 18, 20. See also *Nahimana et al.,* Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005 (AC), 4 February 2005, p. 2 ("… [T]he Appeals Chamber has an inherent discretionary power to reconsider a previous interlocutory decision, for example, if a clear error of reasoning has been demonstrated or if it is necessary to do so in order to prevent an injustice".); *Barayagwiza*, Decision (Prosecution's Motion for Review or Reconsideration) (AC), 7 April 2000, paras. 37, 41.

[31] Rule 45 (H) states : "Under exceptional circumstance, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings." In addition, the Registrar has this authority independent of the Chamber pursuant to Article 19 (A) of the Directive on the Assignment of Defence Counsel ("the Directive") : "The Registrar may … [i]n exceptional circumstances, at the request of the accused, or his Counsel, withdraw the assignment of Counsel".

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such actions will result in the withdrawal of his counsel by the Registrar[32]. Similarly, Mr. Kabiligi's present unwillingness to cooperate with Mr. Skolnik does not constitute good cause for permitting withdrawal. In the Chamber's view, the obstacle between Mr. Skolnik and Mr. Kabiligi is the Accused's reluctance to cooperate with a counsel that he views as being imposed on him. Mr. Kabiligi is a long-time and willing beneficiary of the Tribunal's legal aid system. The Appeals Chamber has repeatedly emphasized that the right to free legal assistance by counsel does not confer the right to choose one's counsel[33]. The present practice of assigning counsel is simply to accord weight to the Accused's preference, but that preference may always be overridden if it is in the interests of justice to do so[34]. In addition, the Appeals Chamber has confirmed that counsel may be assigned to an accused even against his will[35]. Therefore, Mr. Kabiligi's purported termination of Mr. Skolnik's mandate is not dispositive.

22. Since the removal of Mr. Degli on 26 October 2004, Mr. Kabiligi's own conduct has obstructed the proper and expeditious conduct of trial, despite the Chamber's efforts to accommodate his new circumstances. Mr. Kabiligi was given an opportunity to propose counsel of his choice on three separate occasions from 26 October until 23 December 2004. Furthermore, after the withdrawal of his proposal on 27 December 2004, Mr. Kabiligi made no move to nominate any other Lead Counsel. On the contrary, he asked that the process of naming a new counsel be stayed and continued to insist on the return of Mr. Degli despite the Chamber's decision of 20 December 2004. Consequently, the Chamber was forced to act and to instruct the Registrar to appoint Mr. Skolnik as his Lead Counsel both to advance the trial and to safeguard his rights. At this stage, the introduction of a new Lead Counsel, unfamiliar with the case, would inevitably result in undue delay[36].

23. In the Chamber's view, the reasons for instructing the Registrar to assign Mr. Skolnik remain. Mr. Degli, the former Lead Counsel, has been disqualified from participating in the Tribunal's legal aid system for serious misconduct. Mr. Kabiligi's case is at a critical juncture, and he is in need of immediate additional legal assist-

[32] *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 51.

[33] *Akayesu*, Judgement (AC), 1 June 2001, para. 61; *Kambanda*, Judgement (AC), 19 October 2000, para. 33. See also *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22.

[34] *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22. See also *Nahimana et al.*, Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel (AC), 19 January 2005, p. 3 ("… [A]lthough the choice of an accused regarding his defence counsel should be respected, the Registrar maintains a degree of discretion in assigning counsel to an indigent accused, and may decide not to appoint the accused's first choice of counsel if there are sufficient grounds overriding the accused's preference".).

[35] *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004. See also *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 22 ("[T]he Appellant appears to believe that, if he continues to hold the erroneous view that he has a right to choose his lead Counsel and, as a corollary to that right, a right to choose Co-counsel, that assertion will be eventually recognized as warranting the removal of his assigned Counsel. That belief is mistaken.").

[36] The Chamber is mindful that on Mr. Degli's removal as Lead Counsel, Mr. Saint-Leger who had been following the case for five months, requested a minimum of six additional months to prepare.

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ance. Mr. Skolnik is already familiar with the case in general and, consequently, is uniquely situated to rapidly assimilate into the Kabiligi Defence[37]. Mr. Kabiligi's objections to Mr. Skolnik, after initially proposing him, are unrelated to his competence as a lawyer and his professionalism.

*Counsel's Lack of Consent to Accept Appointment*

24. Mr. Skolnik contends that he never consented to his assignment as Lead Counsel for Mr. Kabiligi. Reference is made to Article 13 (iii) of the Directive which provides that the agreement of counsel is one of the pre-requisites to assignment. In this regard, he points to a number of exchanges in which he expressly conditions his acceptance of any potential assignment on a prior meeting with the Accused.

25. As the decision of 19 January 2005 reflects, the Chamber was already well aware of Mr. Skolnik's preoccupations with respect to representing Mr. Kabiligi[38]. Thus, this cannot constitute a ground for reconsideration. In reaching its decision, the Chamber considered in particular Mr. Skolnik's openness to the possibility of representing Mr. Kabiligi. An order pursuant to Rule 45 *quater* provides a legal basis for appointing a counsel; it does not, in itself, make the particular appointment[39]. On

[37] The Chamber notes that Mr. Skolnik submits that he focused primarily on the evidence concerning his former client Mr. Bagosora during the presentation of the Prosecution case. The Chamber observes that he has nonetheless actively followed the proceedings for nearly three years. In view of the evidence against Mr. Kabiligi, Mr. Skolnik's familiarity with the case in general, as well as his skills as an advocate, the Chamber is satisfied that Mr. Skolnik is best situated to adequately defend Mr. Kabiligi in the context of the ongoing case.

[38] These were expressed in his letter of 27 December 2004 copied to the Chamber and referred to in the Decision. Mr. Skolnik's application simply points to additional correspondence reflecting the same concerns during this time period.

[39] The Appeals Chamber has stated that the Registrar has the "primary responsibility of determining matters relating to the assignment of counsel under the legal aid system". *Mejakic et al.*, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic (AC), 6 October 2004, para. 7. Appeals Chamber case law reflects that a Chamber has the authority to order the Registrar to appoint a counsel and even to recommend a particular counsel. However, the Registrar retains the ultimate authority to make the appointment. *Nahimana et al.*, Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings (AC), 22 October 2004 ("Orders the Registrar to appoint counsel for Appellant Barayagwiza pursuant to Rule 10 *bis* of the Directive …"); *Nahimana et al.*, Order to Appoint Counsel to Jean Bosco Barayagwiza (AC), 3 November 2004 ("Hereby orders the Registrar : (i) to consider reinstating Mr. Richard Harvey on the list of eligible counsel, and, if he is eligible and available, to appoint Mr. Richard Harvey as lead counsel for Appellant Barayagwiza; (ii) If Mr. Richard Harvey is not eligible or available to appoint Mr. Donald Herbert as lead counsel …"); *Nahimana et al.*, Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel (AC), 19 January 2005, p. 3 ("Finding that, in the circumstances of this case, the Registrar has given reasonable explanations why Appellant Barayagwiza's first choice of lead counsel is unsuitable for appointment and has therefore named another lead counsel from the names proposed by the Appellant, as ordered by the Appeals Chamber"); *Nahimana et al.*, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005 (AC), 4 February 2005 (refusing to reconsider decision affirming Registrar's choice of counsel which the Accused characterizes as causing him great prejudice). *See also Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005, para. 53 ("The Chamber is aware that the assignment of a particular counsel is typically within the province of the Registry, but recalls the Registry's

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24 January 2005, the Tribunal's Defence Counsel and Detention Management Section (DCDMS) sent Mr. Skolnik a letter indicating that the Registrar had assigned him as Lead Counsel for Mr. Kabiligi. On 27 January 2005, the Deputy Registrar withdrew Mr. Skolnik's assignment as Co-Counsel for Mr. Bagosora. Mr. Skolnik could have appealed both decisions administratively, but he did not do so. He travelled to Arusha to meet with Mr. Kabiligi mindful that the Accused might resist his representation.

26. In any event, in the Chamber's view, Mr. Skolnik's request for reconsideration is not based on his asserted lack of consent, but rather his concern with respect to Mr. Kabiligi's unilateral conduct after the appointment[40]. As the Appeals Chamber has stated,

> "where an accused unjustifiably resists legal representation from an assigned counsel, the counsel's professional obligations to represent the Accused remain"[41].

Mr. Skolnik has repeatedly emphasized in exchanges with the Accused and before the Tribunal that he has a "positive attitude" about providing Mr. Kabiligi with effective representation[42]. The Chamber is satisfied that Mr. Skolnik is committed to representing Mr. Kabiligi and that the Accused will receive a fair trial with his assistance. The Chamber is sympathetic to Mr. Skolnik's position and recognizes the inherent difficulties in representing an Accused who refuses to fully cooperate. Mr. Skolnik however must continue to extend his best professional efforts on Mr. Kabiligi's behalf.

*Conflict with Codes of Conduct*

27. Mr. Skolnik argues that the present situation places him in conflict with several provisions of the code of ethics of his national bar association as well as the Tribu-

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previously expressed amenability to this solution."); *Nahimana et al.*, Oral Decision (TC), T. 6 February 2001 pp. 6-7 (ordering the Registrar to appoint a counsel without naming a counsel).

[40] T. 1 March 2005 p. 4 ("… Mr. President : But you are his lead counsel. Mr. Skolnik : I understand. But I am a lead counsel with two hands and two legs tied behind me …"); p. 12 ("Mr. President, in light of what General Kabiligi said today, 'I do not accept having imposed counsel in my trial. I request that I be allowed to choose counsel from the list of counsel kept by the registry.' I find myself in an untenable situation as an attorney, and I must tell the Trial Chamber that I'm going to file a motion to ask the Trial Chamber to reconsider and modify the decision of January 19th 2005, in which the Trial Chamber directed registry to name me as the lead counsel of Kabiligi … I had a positive attitude to come here to work with the General, to represent him. I think his situation is very sympathetic in the sense that he has had nothing but problems in his Defence team from the beginning … But on the other hand, I feel that taking into account my obligation as an officer of the Court and taking also into account my dignity as a lawyer does not permit me to stay in this case representing General Kabiligi …").

[41] *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 54. See also *Milosevic*, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw (President), 7 February 2005, para. 9; *Milosevic*, Decision on Assigned Counsel's Motion for Withdrawal (TC), 7 December 2004, para. 17.

[42] T. 1 March 2005 p. 12 ("… all I want to say to the Trial Chamber is, I had a positive attitude to come here to work with the General, to represent him."); Skolnik Application, para. 49 ("The position of Me Skolnik has always been to have a positive attitude and to provide effective counsel to the Defendant Kabiligi, subject to the right to refuse the mandate if circumstances so required.").

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nal's Code of Professional Conduct for Defence Counsel ("the Code of Conduct"), prohibiting him from acting on a client's behalf where the client so demands[43].

28. Article 4 (1) of the Code of Conduct provides that

> "Counsel must advise and represent their client until the client duly terminates the Counsel's position, or the Counsel is otherwise withdrawn with the consent of the Tribunal".

This provision must be interpreted in light of Appeals Chamber case law prohibiting an Accused from unilaterally destroying the trust between himself and counsel as well as authorizing the Chamber to assign counsel in certain circumstances against an Accused's will[44]. Mindful of this jurisprudence and in the present circumstances of this case, the Chamber is satisfied that Mr. Skolnik's continued representation of Mr. Kabiligi is fully consistent with his obligations under the Code of Conduct.

29. The Tribunal has its own Code of Conduct, a Directive on the Assignment of Defence Counsel, as well as a number of Rules governing Defence counsel. The code of conduct of a counsel's national bar association has no direct application before the Tribunal. To a certain extent, however, the Tribunal's Rules have incorporated by reference the standards and qualifications of national jurisdictions[45]. Nevertheless, Article 19 of the Code provides that

> "[i]f there is any inconsistency between this Code and any other code which Counsel is bound to honour, the terms of this Code prevail in respect of Counsel's conduct before the Tribunal".

In determining whether there is such an inconsistency, submissions concerning the content of a national code governing a counsel may be relevant. To this end, the Chamber has considered the letter of 22 March 2003 from the *Bâtonnier* of the Quebec Bar to Mr. Skolnik concerning the present situation.

30. The *Bâtonnier* has not indicated whether, in his opinion, Mr. Skolnik is obliged to withdraw under the code of conduct applicable in Quebec. Nevertheless, he has expressed concern with two aspects of the situation presently faced by Mr. Skolnik. First, Mr. Kabiligi appears to oppose the representation by Mr. Skolnik, and has so far failed to collaborate with him in the preparation of the defence. As discussed above, Appeals Chamber case law reflects that an accused is not permitted to unilaterally sabotage the preparation of a defence by refusing to cooperate. Requests to

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[43] Mr. Skolnik makes reference to Articles 3.00.01, 3.01.03, 3.02.09, 3.03.04, 3.05.01, 3.05.02, 3.06.08 of the Code of Ethics of the Quebec Bar.

[44] *Milosevic*, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw (President), 7 February 2005, para. 9; *Milosevic*, Decision on Assigned Counsel's Motion for Withdrawal (TC), 7 December 2004, para. 17; *Blagojevic*, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team (AC), 7 November 2003, para. 51. *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004.

[45] Rule 44 provides that Counsel must be "admitted to the practice of law in a State" and are subject to, *inter alia*, "the codes of practice and ethics governing their profession". In addition, Article 1 (4) of the Code of Conduct states : "While Counsel is bound by this Code, it is not, and should not be read as if it were a complete or detailed Code of Conduct for Counsel. Other standards and requirements may be imposed on the conduct of Counsel by virtue of the Tribunal's inherent jurisdiction and the code of conduct of any national body to which Counsel belongs."

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withdraw on this basis have been refused in the past without occasioning any breach of the ethical obligations of counsel[46]. The second concern raised by the *Bâtonnier* is that the Chamber's decision concerning Mr. Degli's request to represent Mr. Kabiligi as *pro bono* attorney may intolerably impinge upon Mr. Skolnik's professional independence. However, as the Chamber made clear in its decision, any involvement of Mr. Degli would be at the absolute discretion of Mr. Skolnik[47]. Having considered these submissions, the Chamber does not find that any inconsistency has been established between the ethical obligations under the Quebec Bar and of this Tribunal.

*Bagosora Defence Submissions*

31. The submissions of the Bagosora Defence do not alter the Chamber's position. Once counsel is assigned to an Accused, he may only be withdrawn in exceptional circumstances in accord with Rule 45 (H) and Article 19 (A) of the Directive. In the view of the Registry's decisions of 24 January and 27 January 2005, the Bagosora Defence's decision not to name a Co-Counsel cannot be a basis for postponing the case[48]. The Chamber is mindful, nonetheless, that the withdrawal of Mr. Skolnik as Co-Counsel impacted the preparations of the Bagosora Defence, which will be taken into consideration in witness sequencing.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES Mr. Skolnik's application to withdraw as Lead Counsel for Mr. Kabiligi.

Arusha, 24 March 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[46] *Milosevic*, Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw (President), 7 February 2005; *Milosevic*, Decision on Assigned Counsel's Motion for Withdrawal (TC), 7 December 2004.

[47] *Bagosora et al.*, Decision on Request for Private Representation of Gratien Kabiligi (TC), 4 March 2005, para. 10 ("This does not necessarily mean that Mr. Degli is excluded from providing assistance to the existing Defence team operating under the legal aid system. Such participation would have to be *at the request* of the duly designated Lead Counsel.") (emphasis added).

[48] The Chamber is mindful that DCDMS has accommodated the Bagosora Defence in the interim by authorizing the team's bi-lingual Legal Assistant to bill additional hours each month.

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## *Decision on Request for Severance by accused Kabiligi 24 March 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Severance of Trials, Discretionary power of the Trial Chamber, Conflict of interest between the Accused – Right of the Accused to have adequate time and facilities for the preparation of his/her defence, Absence of suspending effect of an appeal – Interest of judicial economy – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 82*

*International et National Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Arsène Shalom Ntahobali, *Decision on Ntahobali's Motion for Separate Trial, 2 February 2005 (ICTR-98-42)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Zejnil Delalic, *Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996 (IT-96-21); Trial Chamber,* The Prosecutor v. Blagoje Simic et al., *Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999 (IT-95-9); Trial Chamber,* The Prosecutor v. Radoslav Brdanin and Momir Talic, *Decision on Motions By Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000 (IT-99-36); Trial Chamber,* The Prosecutor v. Pavle Strugar, *Decision Rejecting the Motion for Certification to Appeal the 'Decision and Order Relating to Accused's Pavle Strugar Request for Postponement', etc., 5 December 2003 (IT-01-42); Appeals Chamber,* The Prosecutor v. Slobodan Milosevic, *Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (IT-02-54)*

*United States of America : Supreme Court of United States,* Zafiro v. United States, *506 U.S. 534, 25 January 1993*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

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BEING SEIZED OF a request by the Accused Kabiligi for the severance of the hearing of his defence case, filed on 4 February 2005;

CONSIDERING the Prosecution Response of 9 February 2005; the Reply of the Accused Kabiligi, filed on 15 February 2005; and the submissions of the three other co-Accused, all filed on 8 March 2005;

HEREBY DECIDES the request.

## Introduction

1. On 26 October 2004, the Registrar withdrew the assignment of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi and disqualified him from further participation in the Tribunal's legal aid program. On 20 December 2004, having heard oral argument, the Chamber denied orally a joint Defence motion for the reinstatement of Mr. Degli as Lead Counsel for Mr. Kabiligi, with reasons to follow. During a status conference the following day, Mr. Kabiligi indicated his intention to file a motion for certification of appeal of the Chamber's decision once written reasons had been given. He also, however, requested that the Chamber order the Registrar to appoint Paul Skolnik, Co-Counsel for Theoneste Bagosora, as his Lead Counsel. Mr. Kabiligi cited Mr. Skolnik's familiarity with the case to be a qualification of prime importance[1]. Mr. Kabiligi conditioned his request on the agreement of both Mr. Bagosora and Mr. Skolnik and, in addition, sought a six-month adjournment to permit preparation of his case. Mr. Bagosora, through his Lead Counsel, consented to the representation of Mr. Kabiligi by Mr. Skolnik[2]. The Registry indicated its willingness to ensure the expeditious appointment of Mr. Skolnik[3]. The Chamber requested the Registrar to look into the matter promptly, with a view to a rapid solution in accordance with the views expressed by the parties[4]. The Chamber also postponed the commencement of the Defence case until 30 March 2005, to accommodate concerns of the Defence that the co-ordinated presentation of their case had been disrupted by the disqualification of Mr. Degli[5]. A status conference was scheduled for 28 February 2005 to consult further with the parties regarding preparations for the progress of the Defence case.

2. On 22 December 2004, Mr. Skolnik sent an email to the Registry expressing concern that pending appeals might subsequently result in his removal as Lead Counsel for Mr. Kabiligi. Mr. Skolnik requested : (i) authorization to meet with Mr. Kabiligi as soon as possible, after which time he would indicate to the Registry whether he would accept the appointment; (ii) to be nominated as *ad interim* Lead Counsel pending resolution of the appeals, which would mean that he could return as Co-Counsel for Bagosora if removed by virtue of the appeals[6].

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[1] T. 21 December 2004 p. 2.
[2] *Id.* p. 4.
[3] *Id.* p. 12.
[4] *Id.* p. 26.
[5] *Id.* p. 28.
[6] Letter of 22 December 2004, addressed to Mr. Dunstan Mwaungulu, of the Registry, and copied to the President of the Chamber.

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3. On 27 December 2004, Mr. Kabiligi retracted his request for the appointment of Mr. Skolnik as his Lead Counsel and, further, requested that any procedures for the appointment of a new Lead Counsel be suspended pending resolution of the appeals concerning Mr. Degli. Mr. Kabiligi considered Mr. Skolnik's proposed "*ad interim*" appointment to be unacceptable, as he required a Lead Counsel fully and unconditionally dedicated to his defence. Mr. Kabiligi interpreted the "*ad interim*" proposal to mean that Mr. Skolnik would have continuing responsibilities *vis à vis* the Bagosora defence, which would create a conflict of interest to the extent that Mr. Skolnik would have to divide his time between the two defences.

4. On 19 January 2005, the Chamber issued written reasons for its oral decision of 20 December 2004. The decision also ordered the Registrar, pursuant to Rule 45 *quater*, to appoint Mr. Skolnik as Lead Counsel for Mr. Kabiligi[7]. The appointment of a new Lead Counsel had, until that time, been frustrated by Mr. Kabiligi's change of mind concerning Mr. Skolnik and his refusal to propose three names for a new Lead Counsel, as required by Registry procedures. The Chamber observed that the trial was at a "critical juncture", and that the prospect of pending appeals was not a valid justification for further delay by Mr. Kabiligi[8].

5. On 2 February 2005, Defence requests for certification of appeal of the decision not to reinstate Me. Degli were denied. By letter dated 4 February 2005, Mr. Kabiligi insisted that Mr. Skolnik was not authorized to act as his counsel, and stated that he considered Mr. Degli to still be his Lead Counsel. Mr. Kabiligi indicated that he would be unable to comply with the deadline of 28 February 2005 for filing his pre-Defence brief, and would not be in a position to proceed with the trial on 30 March 2005, as had been decided at the status conference on 22 December 2004.

6. On 4 February 2005, Mr. Kabiligi filed a document on his own behalf entitled "Motion for severance of trials", which is the object of the present decision. Other defence teams filed submissions on the motion on 8 March 2005, having been requested to do so by the Chamber during a status conference on 1 March 2005[9].

## Submissions

7. Mr. Kabiligi argues that as a result of the removal of Mr. Degli as his Lead Counsel, he is unable to adequately prepare his defence on the timetable of the joint trial, which is now scheduled to start on 11 April 2005[10]. Whether his new Lead Counsel be Mr. Skolnik or another person, a minimum of six months is required for his defence to be adequately prepared. This situation causes a conflict of interest between Mr. Kabiligi and his co-Accused. On the one hand, Mr. Kabiligi's right to

[7] The order was contained in the written reasons for the 20 December 2004 : Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005, p. 17.

[8] *Id.*, paras. 52-54.

[9] T. 1st March 2005 pp. 15-16.

[10] At the time the motion was filed, the Defence case was scheduled to commence on 30 March 2005, but was further postponed to 11 April 2005 during a status conference on 1 March 2005. T. 1 March 2005, p. 19.

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adequate time and facilities for the preparation of his defence requires a delay; on the other hand, his co-Accused, who have not been affected by the removal of Mr. Degli in the same way, have the right to be tried without undue delay. Mr. Kabiligi does not request the re-hearing of the Prosecution evidence against him, but simply that the hearing of his defence be severed from the joint trial, and that such a hearing be delayed for a minimum of six months.

8. The Prosecution objects that the motion was filed *pro se*, and not through duly assigned counsel. The Prosecution also opposes the motion in substance, arguing that a severed presentation of the defence would occasion delay not only of the Kabiligi defence, but of all the other defence teams as well, who have argued that their defences are highly integrated and rely on one another's witnesses. The loss of the Kabiligi witnesses to the joint defence would, accordingly, lead to delay. Furthermore, the conspiracy charge implicating all four accused is best heard in the course of a single trial.

9. The Ntabakuze Defence agrees that Mr. Kabiligi is not adequately represented and requires additional preparation time, but severance is opposed. Ntabakuze is willing to postpone the presentation of the defence case to accommodate the difficulties faced by Mr. Kabiligi, and to waive any breach of the right to be tried without undue delay arising therefrom. Alternatively, Ntabakuze argues that he should also be severed from the *Bagosora et al*. trial and that the remainder of his trial should be heard jointly with Kabiligi, with whom he is jointly indicted.

10. The Bagosora Defence also agrees that Mr. Kabiligi is not in a position to proceed on the schedule prescribed for the joint trial, in light of the need for the preparations of its new defence team. However, severance is rejected as an inappropriate solution, on several grounds. First, Mr. Kabiligi cannot invoke the rights of other co-defendants as a basis for severance. Second, Mr. Kabiligi ignores the extent to which the other co-defendants have also been disrupted by his lack of preparation. No conflict of interest arises because all the co-Accused have been prejudicially affected in a similar way. Third, Mr. Bagosora objects to being obliged to present his defence against the Prosecution case without knowing the position of the Kabiligi defence and the identity of its witnesses, whether the case is severed or not. Accordingly, the Bagosora Defence agrees with the Kabiligi request for a delay of six months, but insists that the delay apply to all co-Accused in the context of the joint trial.

11. The Nsengiyumva Defence opposes severance. In light of the conspiracy charges in common against the co-Accused, there is a need for each Accused to know, and if necessary respond to, the defences raised by other co-Accused. Thus, if prejudicial or conflicting defences are raised, the co-Accused will know and be able to respond. The timeliness of the motion is also questioned. First, the Defence has not yet started, so the need for severance is questionable given the possibility of alternative measures to mitigate the lack of preparedness of Kabiligi. Second, Kabiligi has known of the relevant facts since 26 October 2004 when his Lead Counsel's commission was withdrawn. Third, the common interests of the Accused have already been established over the course of a long trial, and now outweigh the benefits of severance. Should either of the requests for severance by Kabiligi or Ntabakuze be granted, Nsengiyumva requests that the conspiracy charge against him be dropped or dismissed.

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**Deliberations**

12. As a preliminary matter, the Chamber finds that Mr. Kabiligi's submissions are inadmissible. Following the Chamber's direction, the Registry assigned Mr. Skolnik as Lead Counsel of Mr. Kabiligi on 24 January 2005. As of that date, Mr. Skolnik assumed "primary responsibility for the Defence" under Article 15 (E) of the Directive on the Assignment of Defence Counsel, and was obliged to

> "sign all documents submitted to the Tribunal unless he authorizes Co-Counsel, in writing to sign on his behalf".

This authority is incompatible with *pro se* submissions pertaining to the conduct of the defence of the Accused[11]. In the interest of judicial economy, however, and in light of submissions in proper form from other parties concerning severance or an adjournment of proceedings, the Chamber shall address the merits of the motion.

13. Rule 82 of the Rules of Procedure and Evidence governs the severance of the trial of a co-accused from a joint trial :

(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.

(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Whether to order a separate trial of an accused is within the discretion of the Trial Chamber[12]. The nature of the possible prejudice to an accused, the advantages of a joint trial, and the mechanisms for mitigating the claimed prejudice by means other than severance, must all be weighed in the exercise of this discretion[13]. The advantages of a joint trial, which are not lightly outweighed, include the uniform presentation of evidence and procedure; the guarantee of consistent treatment of evidence, verdicts, sentencing, and other matters; and ensuring that witnesses need not be called repeatedly in separate trials[14].

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[11] *Nahimana et al.*, Order Concerning Filing by Jean-Bosco Barayagwiza (AC), 4 February 2005, p. 2. Submissions concerning the representation of an accused are not, however, precluded by Article 15 (E).

[12] *Bagosora et al.*, Decision (AC), 28 October 2003 p. 5; *Ntahobali*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 32; *Brdanin and Talic*, Decision on Request to Appeal (AC), 16 May 2000.

[13] *Ntahobali*, Decision on Ntahobali's Motion for Separate Trial (TC), 2 February 2005, para. 39 (recognizing that any prejudice from mutually antagonistic defences could be avoided in a joint trial through cross-examination and, where necessary, by permitting rebuttal evidence); *Simic et al.*, Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999 (finding that alleged prejudice arising from testimony, or refusal to testify, of co-accused which would not arise in single trials could be mitigated by the regular rules of admissibility). See also *Zafiro v. United States*, 506 U.S. 34, pp. 538-39 (federal rule of procedure authorizing severance "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion").

[14] *Bagosora et al.*, Decision on Motions By Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses (TC), 9 September 2003, para. 22 ("The

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14. Mr. Kabiligi argues that, at present, he is the only party not adequately represented and that, accordingly, he is disadvantaged relative to his co-Accused. Furthermore, proceeding with his trial at this stage would violate his right to an adequate defence, whereas any postponement would violate the rights of his co-Accused to be tried without undue delay. This is said to create a conflict of interest which can be resolved only through severance and a six-month postponement of his separate trial.

15. The Chamber disagrees that proceeding with trial as presently scheduled would violate the right of the Accused Kabiligi to "have adequate time and facilities for the preparation of his … defence", as prescribed by Article 20 (4) (b) of the Statute. The loss of Lead Counsel on 26 October 2004 undoubtedly constituted a significant setback for the preparation of the defence of Mr. Kabiligi, through no fault of his own. Since that time, the Chamber has taken steps to ameliorate the situation by, *inter alia*, postponing the start of the Defence case from 12 January 2005 until 30 March 2005[15]; directing the Registrar on 21 December 2004 to promptly appoint a new Lead Counsel in accordance with Mr. Kabiligi's wish as expressed during a status conference on that day[16]; directing the Registrar on 19 January 2005 to appoint Mr. Skolnik as Lead Counsel for Mr. Kabiligi[17]; and further postponing the start of the trial from 30 March 2005 until 11 April 2005[18]. During this same period, Mr. Kabiligi has not acted promptly to ensure that his defence is reconstituted as rapidly as possible. Mr. Kabiligi failed to nominate the names of three candidates to assume the role of Lead Counsel of his defence, as requested in the Registrar's decision of 26 October 2004 and in further correspondence from the Registrar dated 21 and 23 December 2004. Neither the request for review of the Registrar's decision, nor the notice of intention to appeal the Chamber's decision of 20 December 2004, justified this failure. An appeal does not suspend the application of the decision appealed unless an injunction or a stay is ordered[19]. Mr. Kabiligi was,

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preference for joint trials of individuals accused of acting in concert in the commission of a crime is not based merely on administrative efficiency. A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing or other matters, that could arise from separate trials"; *Delalic et al.*, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996, para. 7; *Brdanin and Talic*, Decision on Motions By Momir Talic for a Separate Trial and for Leave to File a Reply (TC), 9 March 2000, para. 31; *Simic et al.*, Decision on Defence Motion to Sever Defendants and Counts (TC), 15 March 1999; *R. v. Lake*, 68 Cr App R 172 (CCA), p. 175 : "It has been accepted for a very long time in English practice that there are powerful public reasons for why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatments shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise".

[15] T. 21 December 2004 pp. 31-33.

[16] *Id.* p. 31.

[17] *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005.

[18] T. 1 March 2005 p. 19.

[19] See e.g. *Strugar*, Decision Rejecting the Motion for Certification to Appeal the 'Decision and Order Relating to Accused's Pavle Strugar Request for Postponement', etc. (TC), 5 December 2003; *Simba*, T. 13 May 2004, p. 2.

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of course, entitled to pursue any reviews or appeals provided for under the rules; but this did not excuse or exclude timely co-operation with the Registry for the appointment of a new Lead Counsel.

16. Mr. Kabiligi has been given ample "time and facilities" to prepare for trial commencing on 11 April 2005. He has had since 26 October 2004 to appoint and to instruct a new Lead Counsel. On 21 December 2004, after almost two months' delay, Mr. Kabiligi proposed the appointment of Mr. Skolnik. Shortly therafter, he retracted this proposal, but took no steps to propose any other name. On the contrary, he continued to insist that Mr. Degli was still his counsel, and declined to participate in procedures for his replacement. After another month's delay, and in the absence of any other candidates for Lead Counsel having been proposed by Mr. Kabiligi, the Chamber ordered the appointment of Mr. Skolnik on 19 January 2005. Mr. Kabiligi's ongoing refusal to nominate a replacement counsel, or to collaborate with Mr. Skolnik once he had been assigned, does not infringe his right to adequate time and facilities for the preparation of his defence. The time and facilities have been available, but refused.

17. Furthermore, the Chamber has indicated its willingness to mitigate by alternative remedies the difficulties faced by the Kabiligi Defence. The Chamber is prepared, for example, to postpone the presentation of any Kabiligi witnesses for several months. The deadline for the filing of a pre-Defence brief has twice been postponed, and is now suspended pending further submissions[20]. Witnesses may be recalled if the Kabiligi defence can establish specific prejudice arising from a genuine inability to prepare. Other accommodations may be considered where necessary. The Chamber is well aware of the complexity of the case to be met by Mr. Kabiligi, which includes evidence not only of his specific conduct, but of the responsibility of military leadership for the criminal acts of subordinates and militia. Nevertheless, in light of the alternative remedies at the Chamber's disposal, and the preparation time which has been available, commencing the joint trial on 11 April 2005 will occasion no breach of Mr. Kabiligi's right to have adequate time and facilities for his defence[21].

18. Mr. Kabiligi has, accordingly, not established that he is in a conflict of interest with his co-Accused. On the contrary, the three other co-Accused are unanimous with Mr. Kabiligi in stating their preference for an adjournment, claiming that the lack of preparedness of the Accused Kabiligi has impaired the joint efforts of the Defence to present witnesses of common benefit to all four defendants. Though the Accused Kabiligi may at present be less prepared than the other co-Accused, there is no divergence of interest between them.

19. In their Responses, the Bagosora and Nsengiyumva Defences object to the commencement of the defence case without knowing the position of the Kabiligi defence through its pre-Defence brief, including the identity of all of its witnesses. Mr. Bagosora requests a six-month postponement of the joint trial so that the defence can

[20] T. 1 March p. 11.

[21] *Milosevic*, Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (AC), 20 January 2004, para. 18 ("The authority best placed to determine what time is sufficient for the Accused to finish preparing his defence in this admittedly complex case is the Trial Chamber which has been conducting his trial for over two years").

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be started with all parties knowing one another's witnesses. However, any prejudice that might be caused by positions taken by the Kabiligi defence after the commencement of the joint defence can be obviated by permitting any defence team, upon good cause shown, to amend its pre-Defence briefs and witness list. Furthermore, the Chamber would be amenable to recalling witnesses or granting adjournments should any prejudice arise to another co-Accused from positions taken by the Kabiligi Defence after the start of trial.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 24 March 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Postponement of Defence of Accused Kabiligi 21 April 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Request for a delay, Fairness of the Trial, Request premature – Presence of the Accused at the Trial, Interests of Justice – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 73* ter *(B); Statute, art. 20*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF an oral motion of 11 April 2005 by the Defence for Kabiligi, requesting an interval of four months between the end of presentation of witnesses of other Defence teams, and the start of its own presentation of witnesses;

CONSIDERING the oral submissions of the Defence for Bagosora on 11 April 2005; the Prosecution Response filed on 12 April 2005; the Kabiligi Reply filed on 13 April 2005; and the further oral submissions on 16 April 2005;

HEREBY DECIDES the motion.

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## Introduction

1. On 24 March 2005, the Chamber denied a request by Lead Counsel for the Accused Kabiligi to withdraw; denied a request for severance filed by the Accused Kabiligi on his own behalf; and denied a request for certification of appeal concerning private representation of the Accused Kabiligi by his former Lead Counsel, Jean Yaovi Degli[1]. The effect of these three decisions was to maintain the appointment of Mr. Paul Skolnik as Lead Counsel for Kabiligi. That appointment had been made by the Registrar on 24 January 2005, following an order to do so issued on 19 January 2005 by the Chamber, acting under Rule 45 *quater*[2]. The appointment followed the disqualification of former Lead Counsel, Me Jean Yaovi Degli, from the legal aid programme on the basis of findings of massive fraud and false billing[3]. The present motion concerns the state of preparedness of the legal team under new Lead Counsel.

2. The Defence case began on 11 April 2005. The Accused are interspersing their witnesses as part of a single defence presentation, with the exception of the Defence of Kabiligi, whose obligation to file a pre-defence brief and present witnesses was suspended by the Chamber pending further submissions from his new defence team[4].

## Submissions

3. The Kabiligi Defence requests a declaration that its case shall commence no earlier than four months after the presentation of witnesses for all other Defence teams has concluded[5]. The team is said to be in a state of disarray : a new Co-Counsel and Legal Assistant need to be hired and briefed; seventy prospective witnesses need to be interviewed and summaries of testimony prepared; and the pre-defence brief needs to be written[6]. None of these tasks can be performed during the presentation of other witnesses, during which time Lead Counsel must be in court. Breaks during the course of the trial will not be sufficient to undertake the time-consuming task of interviewing witnesses, and will need to be devoted instead to preparing the new members of the team[7]. The Accused, who has a right under Article 20 of the Statute to adequate time and facilities to prepare his defence, is not at fault for the withdrawal of

[1] *Bagosora et al.*, Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign Him as Lead Counsel for Gratien Kabiligi (TC), 24 March 2005; *Bagosora et al.*, Decision on Request for Severance By Accused Kabiligi (TC), 24 March 2005; *Bagosora et al.*, Decision on Request for Certification of Appeal Concerning Private Representation (TC), 24 March 2005.

[2] *Bagosora et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi (TC), 19 January 2005.

[3] *Bagosora et al.*, Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Defence Counsel for Gratien Kabiligi (Registrar), 26 October 2004.

[4] T. 1 March 2005 p. 9.

[5] As an exception, the Kabiligi Defence has no objection to the presentation of two Bagosora expert witnesses after the Kabiligi witnesses. Reply, p. 7.

[6] Lead Counsel indicates that he is seeking to replace present Co-Counsel who, in any event, is said to have virtually no knowledge of the case. T. 11 April 2005 p. 4; Reply, para. 12.

[7] T. 18 April 2005 pp. 49-50.

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his former Lead Counsel, which is the source of the difficulties now facing the Defence. Furthermore, in light of the protracted period taken by the Prosecution for the preparation and presentation of its case, the doctrine of equality of arms requires an adequate delay. A four-month period would be adequate in the circumstances[8]. A declaration is also sought that witness summaries are to be disclosed thirty days before the start of presentation of its witnesses, and that the opening statement is to be given on the first day of that presentation.

4. The Prosecution opposes the period requested, suggesting that the pre-defence brief should be delayed for six weeks, and the opening statement for a period of eight weeks[9]. Delaying the presentation of Kabiligi witnesses until four months after the presentation of all other defence witnesses is inherently uncertain and could lead to requests by other Accused to recall their witnesses. Further, the inadequate staffing of the team is the fault of the Accused himself and cannot justify the delay requested. The Kabiligi Defence is endowed with a Co-Counsel who can prepare the defence case while Lead Counsel is in court.

5. Though not opposing the motion, the Accused Nsengiyumva and Ntabakuze wish to have the opportunity to testify after the Kabiligi witnesses, so as to be able to address all factual matters raised during the trial[10]. The Bagosora Defence requests that two of its expert witnesses testify after the Kabiligi witnesses, so as to be able to testify on all factual matters raised during the trial. The Kabiligi Defence does not oppose the request.

## Deliberations

6. As the Chamber has recognized in its previous decisions, the request for a delay in the presentation of the Kabiligi Defence is well-founded. At a status conference on 21 December 2004, the commencement of the Defence case as a whole was postponed from 12 January 2005 to 30 March 2005, with a concomitant extension of deadlines for disclosure of witness information and pre-defence briefs[11]. The date for the filing of the Kabiligi pre-defence brief was postponed to 28 February 2005, subject to submissions from Kabiligi's new Lead Counsel, once appointed[12]. At a further status conference on 1 March 2005, whose purpose was precisely to gauge the state of Defence preparedness, the start of the Defence case was postponed by a further two weeks. The deadlines for filings by the Kabiligi Defence, and the start of its case, were suspended indefinitely[13].

7. The question now is the extent of the delay which should be granted to the Defence, and how that delay should be formulated in the context of an ongoing trial of uncertain duration. The proper application of the fair trial principles set forth in Article 20 to the present circumstances depends on a variety of factors including the

[8] *Id.* 1-2.
[9] Response, paras. 4-5. The proposed delay appears to run from the present date.
[10] T. 18 April 2005 pp. 52-53.
[11] T. 21 December 2004 pp. 31-33.
[12] *Id.* p. 32. Other Defence teams were required to file their pre-Defence briefs by 3 January 2005, and unredacted witness information by 7 February 2005.
[13] T. 1 March 2005 pp. 11, 19.

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extent and nature of the Prosecution evidence, the situation of the defence team, and the pace of the ongoing trial.

8. Lead Counsel for Kabiligi argues that the Chamber should not consider breaks between trial sessions as presenting any opportunity for the preparation of the defence case. In particular, he argues that a mission to see witnesses can require a block of several weeks, and that the break after the present trial session must be devoted to training and briefing his new colleagues. The Chamber accepts that Lead Counsel will, in the immediate future, have to spend time preparing his new colleagues to become active members of the Kabiligi Defence team. Taking this and other submissions into consideration, a three-week adjournment will be granted during the present session, probably in late-May and early-June, which was originally scheduled to continue uninterrupted through 15 July 2005. Depending on the availability of Defence witnesses and submissions of the parties, the trial session after that break may continue through to the end of July 2005.

9. The Chamber accepts that during that first adjournment the Kabiligi Defence may not be in a position to make direct progress on the pre-defence brief or the preparation of witnesses. Briefing and training of new colleagues is a necessary and reasonable prerequisite of their ability to contribute to the preparation of the Defence. Once that initial period is over, however, the Chamber is not convinced that the Kabiligi Defence will be unable to undertake preparations in parallel with trial sessions, and during subsequent breaks in the trial. Indeed, in light of past experience, and submissions of Defence counsel as to the expected rhythm of the trial, the accumulated duration of those breaks may constitute a substantial fraction of – or even equal – the four months requested. In these circumstances, the length of the adjournment before the start of the Kabiligi Defence cannot be determined in isolation from the duration and pace of the Defence case.

10. The relief requested in the present motion is, accordingly, premature. The Chamber will remain open to submissions concerning the length of the final adjournment needed by the Kabiligi Defence before the presentation of its witnesses as the schedule for completion of other witnesses becomes more definite.

11. The Kabiligi Defence requests that its pre-defence brief, along with a list of witnesses and summaries of their testimony, be due thirty days prior to the date scheduled for the presentation of its witnesses. This deadline would be more favourable than the deadlines imposed on the other Defence teams[14]. Nevertheless, the deadline requested is reasonable in light of the particular circumstances of the Kabiligi Defence. Furthermore, the burden of preparation on the Prosecution will be substantially lighter than it was when three sets of Defence witnesses were disclosed at once. The brief shall be accompanied by, or include, summaries of the testimony of witnesses. An indication of the initial sequence of witnesses shall also be provided. The Kabiligi Defence shall, as requested, be permitted to deliver an opening statement on the first day of the presentation of its witnesses.

[14] In anticipation of the trial starting on 12 January 2005, the Defence teams were required to file a complete list of witnesses, and the summaries of testimony of those to be called during the first trial segment, on 12 November 2004 (61 days before the defence case); the pre-Defence brief itself was to be filed on 15 December 2005 (28 days before the defence case). T. 14 October 2005 p. 15. When the start of Defence was postponed to 30 March 2005, the Defence was obliged to file its pre-Defence brief by 3 January 2005 (86 days before the defence case), and to disclose all unredacted witness information by 7 February 2005 (51 days before the defence case). T. 21 December 2004 p. 32.

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12. The Accused has absented himself from trial proceedings since the start of the Defence case. This is regrettable. The presence of the Accused in court is in the interest of the most effective Defence case possible and in the interests of justice.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES that the pre-defence brief, as defined in Rule 73 *ter* (B), as well as a sequence of initial witnesses, shall be filed no later than thirty days before the date scheduled for the presentation of the first Kabiligi witness;

DECLARES that the Kabiligi Defence shall deliver its opening statement on the day scheduled for the presentation of its first witness;

DENIES the motion in all other respects.

Arusha, 21 April 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Prosecution motion for sanctions 25 April 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Sanctions against a counsel, Proportionality of the sanction with the breach – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 46 (A)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Prosecution motion for an order directing counsel for Accused Ntabakuze to comply immediately with the Trial Chamber's order of 1 March 2005", filed on 8 March 2005;

CONSIDERING the Response of the Accused Ntabakuze, filed on 15 March 2005; and the Reply of the Prosecution, filed 16 March 2005;

HEREBY DECIDES the motion.

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## Introduction

1. During a status conference on Tuesday 1 March 2005, the Chamber ordered the Defence teams for Bagosora, Nsengiyumva and Ntabakuze to each provide, by the "end of the week", a list of its likely witnesses for the upcoming trial session[1]. Having received no such list by Monday 7 March 2005, the Prosecution sent an email requesting the Ntabakuze Defence to comply with the order. On 8 March 2005, the Prosecution filed the present motion. On that same day, the Defence provided the list in question by email, and apologized for the delay, citing logistical problems and travel of counsel.

### SUBMISSIONS

2. The Prosecution requests four remedies in its motion : (i) an order to counsel for Ntabakuze to comply with the 1 March 2005 order; (ii) postponement of cross-examination of any Ntabakuze witnesses of the same duration as the delay in compliance; (iii) a warning to counsel for Ntabakuze that such delays constitute a violation of Rule 46 of the Rules of Procedure and Evidence ("the Rules"); (iv) denial of costs arising from any response to the present motion. The Prosecution concedes that the requested order is now moot, but insists that the "issue of sanctions" is still before the Chamber because of what it characterizes as "a pattern of non-compliance"[2].

3. The Defence argues that providing the list on 8 March 2005 was in compliance with one reasonable interpretation of the Chamber's order; in the alternative, that even if the list was filed slightly late, that no prejudice has been caused to the Prosecution. The relief requested by the Prosecution is said to be punitive and out of proportion to the actual circumstances.

## Deliberations

4. The only remaining issue raised by the motion relates to the imposition of sanctions. According to Rule 46 (A), a Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. The Chamber finds that the Ntabakuze Defence did not respect the deadline to provide the list of witnesses "within the end of the week". Contrary to what is argued by the Ntabakuze Defence, this formulation was clear, as illustrated by the fact that the other two Defence teams complied with the order within the prescribed time-limit.

5. On the other hand, the non-compliance was cured shortly after the deadline. No adequate showing has been made of a pattern of non-compliance, which would require the Chamber to more carefully scrutinize the explanations and apologies for the delay offered by the Defence.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

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[1] T. 1 March 2005 p. 17.

[2] Motion, para. 5.

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Arusha, 25 April 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Modalities for Examination of Defence Witnesses 26 April 2005 (ICTR98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Right to examine, or have examined, the witnesses against him or her, Right of Co-Accused to ask questions after the examination-in-chief, Cross-examination, Sequence of cross-examination, Purpose of cross-examination, Probative value, Power of appreciation of the Chamber, Control of the Chamber over the mode and order of interrogating witnesses – Interpretation of the Rules of evidence, Best favour to a fair trial, Admissibility of evidence – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 85, 89 (B), 89 (C), 90 (F) and 90 (G); Statute, art. 20 (4) (e)*

*International Covenant on Civil and Political Rights, art. 20 (3) (e)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Decision on the Defence Motion for the Re-examination of Defence Witness DE, 19 August 1998 (ICTR-95-1)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Motion Regarding Co-Accused Cross-Examination of Non-Adverse Defence Witnesses, Pursuant to Rules 73, 89 (B), and 90 (G)", filed on 15 March 2005;

CONSIDERING the Responses thereto of the Defences of Bagosora, Ntabakuze and Nsengiyumva, filed on 22 and 24 March 2005;

HEREBY DECIDES the motion.

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## Submissions

1. The Prosecution requests the Chamber to adopt a series of rules whose purpose is said to be to limit the possibility of improper or duplicative questioning of Defence witnesses by Defence teams other than the one which formally called the witness. The party presenting a witness should be required to examine the witness first. "Subsidiary direct examination" would then be allowed by any Defence party which had formally declared that the witness was a "joint witness", and only through non-leading questions[1]. In the absence of such a declaration, a Defence party would not be permitted to examine a witness unless it could show that testimony had been given which was "adverse", so as to trigger a right of cross-examination[2]. Even if an advance declaration of joint presentation is not required, Defence parties should be precluded from asking leading questions to witnesses unless the testimony is genuinely adverse. The standard that should be applied is that leading questions may be used to challenge, but not to elicit, information. The Prosecution should be permitted to conduct its cross-examination after all the Defence teams have examined or cross-examined the witness.

2. The Defence argues that the motion lacks legal basis, is ambiguous and premature. The Rules of Procedure and Evidence ("the Rules") concerning examination and cross-examination provide sufficient guidance and need not be supplemented by additional rules. In the absence of a concrete controversy between the parties, the Chamber should not attempt to fashion rules to encompass the many different situations which may arise. Furthermore, the Prosecution has failed to adequately define its proposed categories of "favourable" and "adverse" evidence which, in any event, cannot usefully be defined by the Chamber in the abstract. The Chamber is quite capable of discerning and preventing improper questioning as the occasion arises and, accordingly, there is no need to prescribe a set of modalities for the questioning of witnesses. Restricting the right to examine witnesses as suggested by the Prosecution would undermine the right of the accused to a fair trial.

## Deliberations

3. The Prosecution motion was filed on 15 March, whereas the Defence case commenced on 11 April 2005. The Defence has argued that the motion is premature and that the issues raised are best solved on a case by case basis during the presentation of the evidence[3]. The Chamber agrees with the Defence, and has already made oral rulings in connection with objections on this issue, and will continue to do so whenever there is a dispute between the parties[4]. Consequently, there is no need for an order in the terms sought by the Prosecution in its motion. However, the Chamber

[1] Prosecution Motion, paras. 10-14.

[2] Prosecution Motion, paras. 9, 14.

[3] See *Kayishema and Ruzindana*, Decision (TC), 17 April 1997 p. 2; *Bagosora et al.*, Decision on the Defence Motion for Pre-Determination of the Rules of Evidence (TC), 8 July 1997, p. 3.

[4] See e.g. T. 19 April 2005 pp. 28-30, 36-39.

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will make some general observations in view of the submissions of the parties in order to avoid lack of clarity during the remainder of the proceedings.

4. Article 20 (4) (e) of the ICTR Statute provides that the accused has the right to examine, or have examined, the witnesses against him or her. It is based on Article 20 (3) (e) of the International Covenant on Civil and Political Rights, which applies to countries with different legal traditions. These provisions do not address the sequence and purpose of cross-examination in multi-accused trials. The Rules are also silent on these issues. Rule 85 establishes the distinction between examination-in-chief, cross-examination and re-examination. According to Rule 89 (C), a Chamber may admit any relevant evidence which it deems to have probative value. Under Rule 90 (F), the Chamber shall exercise control over the mode and order of interrogating witnesses in order to ascertain the truth and avoid needless consumption of time. Furthermore, Rule 90 (G) allows cross-examination to go beyond the scope of direct examination under certain conditions but does not directly solve the issues raised by the present motion[5]. Finally, Rule 89 (B) directs that, in cases not otherwise provided for by the Rules, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it.

5. There is agreement between the parties that the Defence team or teams calling a witness will conduct examination-in-chief and that the Prosecution will be the last party to cross-examine him or her, followed by re-examination. This is in conformity with established Tribunal practice[6]. The disagreement between the parties relates to the nature of the examination of the other Defence teams before the Prosecution's cross-examination. The Chamber recalls that in previous multi-accused trials, the Trial Chambers have applied the general principles concerning examination of witnesses in determining the scope of questioning permitted to Co-Accused who have not called the witness[7]. Although the terminology adopted by Trial Chambers has varied slightly, they have consistently affirmed the right of Co-Accused to ask questions after the examination-in-chief by the party presenting the witness[8]. No advance declaration that

[5] The requirement in Rule 90 (G) (ii) that cross-examining counsel identify the proposition which is "in contradiction of the evidence given by the witness" is not determinative. Rule 90 (G) (i) does not limit cross-examination to contradictory matters, and authorizes questions "relevant … to the subject-matter of the case" of the cross-examining party.

[6] As, for example, in *Kayishema and Ruzindana*, *Ntakirutimana*, *Nahimana et al.*, *Ntagerura et al.*, and *Nyiramasuhuko et al*.

[7] *Nyiramasuhuko et al*., T. 7 March 2005, pp. 7-8; *Ntagerura et al*., T. 6 March 2002, p. 133 ("When [Counsel for Ntagerura] produces in evidence a witness, that witness has to be examined-in-chief. The order that we have now, is that [Counsel for Imanishimwe] will cross-examine that [witness]. [Counsel for Mr. Bagambiki] will cross-examine that witness and then the Prosecution will cross-examine that witness, and that is the procedure we will go through as the case goes along"); *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-examination of Defence Witness DE (TC), 19 August 1998, para. 15 ("In addition, the Trial Chamber is of the considered opinion that in a joint trial, where a witness is called by one of the accused, other accused persons also have the option to question the witness during the examination in chief").

[8] Chambers have sometimes referred to the questions by other Co-Accused as examination-in-chief (*Nyiramasuhuko et al*., T. 7 March 2005, p. 8; *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-examination of Defence Witness DE (TC), 19 August 1998, para. 15), while others have referred to such questions as cross-examination (*Ntagerura et al*., T. 6 March 2002, p. 133).

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a witness is presented "jointly" has been required, nor has any Trial Chamber narrowly constrained the ambit of such questions to issues that are "adverse", as suggested by the Prosecution[9].

6. In conformity with established practice, this Chamber will apply the principles in Rule 90 (G) when deciding whether a party shall be allowed to go outside the examination-in-chief during cross-examination. To some extent, Defence teams other than the one calling a witness will be allowed to elicit evidence in its favour, even if this is not "cross-examination" in the narrow sense of the word. However, such evidence will only be admitted if it is relevant, contributes to the ascertainment of the truth and does not lead to needless consumption of time, as required by Rule 89 (C) and 90 (F). It is expected that when eliciting such evidence, Defence counsel will avoid asking leading questions to the witness as this will undermine the credibility of such testimony, and avoid repetitive questions. The exact extent and manner of questioning permitted by other Co-Accused will depend on the nature of the testimony which has been given by the witness and the purpose of the questioning. This will be decided on a case-by-case basis.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 26 April 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Motion Requesting Subpoena's to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311, and DM 24 26 April 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

[9] Nor is support for such an approach to be found in national jurisdictions, particularly Canada, Australia and the United Kingdom. In the United States, the jurisdiction upon which the Prosecution relies heavily, the caselaw referred to seems principally to concern cross-examination of the Co-Accused, which may give rise to many issues that are not relevant to other witnesses. Even in that case, the jurisprudence from the United States concerns the application of the constitutional right to cross-examine, and not the proper exercise of the judge's discretion as to whether to permit cross-examination.

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*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Witnesses, Attendance at the Trial, Conditions for a Subpoena – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 54*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Requests for Subpoena, 10 June 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Subpoena for Witness BW, 24 June 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecutor's Request for a Subpoena Regarding Witness BT, 25 August 2004 (ICTR-98-41)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311 and DM 24", filed by the Defence for Ntabakuze on 4 April 2005;

CONSIDERING the Prosecutor's Response, filed on 4 April 2005;

HEREBY DECIDES the motion.

**Submissions**

1. The Ntabakuze Defence requests the issuance of subpoenas to six of its witnesses who refuse to testify before the Chamber, notwithstanding "serious efforts" to secure their voluntary attendance. Four of the witnesses, DK 32, DK 39, DK 51 and DK 311, are said to fear that testifying would jeopardize their security. Witness DM 24 refuses to testify for the next six months because of work obligations. Witness DK 52 relies upon work and child care obligations in refusing to testify, as well as feelings of trauma [1]. The Defence asserts that the appearance of these witnesses would materially assist the Defence case, and summarizes in detail the testimony expected from each witness.

2. The Prosecution takes no position on the request.

[1] The Chamber previously denied a request that the witness be permitted to give her testimony by video-link : *Bagosora et al.*, Decision on Ntabakuze Motion to Allow Witness DK 52 to Give Testimony by Video-Conference (TC), 22 February 2005.

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**Deliberations**

3. Rule 54 permits the issuance of

> "orders, summonses, subpoenas, warrants and transfer orders as may be ne-cessary for the purposes of an investigation or for the preparation or conduct of the trial".

A *subpoena*, which is an order to perform a certain action under threat of penalty, may be issued to compel the attendance of a witness before a Chamber for the purpose of giving testimony[2]. The party requesting the subpoena must demonstrate that reasonable efforts have been made to secure the witness's voluntary attendance, and that the testimony is likely to be relevant to the trial.

4. Based on the representations of the Defence, the Chamber is satisfied that reasonable efforts have been made to secure the voluntary attendance of these witnesses, and that they have been unsuccessful. The expected testimony of each witness, as excerpted from the pre-Defence brief, is material and relevant to the facts at issue in the present trial. Accordingly, the issuance of a subpoena ordering the testimony of the witnesses before the Chamber is necessary and appropriate for the conduct of the trial. The Registry shall prepare a subpoena addressed to each of the six persons, ordering their appearance before the Chamber, at a date and time specified by the Registry, to give evidence in the matter *The Prosecutor v. Bagosora et al.*

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registrar to prepare subpoenas in accordance with this decision, addressed to the witnesses designated by the pseudonyms DK 32, DK 39, DK 51, DK 52, DK 311 and DM 24;

ORDERS the Registrar to communicate the subpoenas to each of the aforementioned witnesses by the most practicable means, which may include communication of the subpoena to the government of the country in which the witness is resident, for the purpose of service on the witness;

REQUESTS each national government that receives a subpoena to serve it on the addressee as soon as practicable, and to provide any other assistance that may be requested by the Registry to facilitate the witness's attendance.

Arusha, 26 April 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[2] *Bagosora et al.,* Decision on Requests for Subpoena (TC), 10 June 2004, paras. 2-3; *Bagosora et al.*, Decision on Request for Subpoena for Witness BW (TC), 24 June 2004; *Bagosora et al.*, Decision on Prosecutor's Request for a Subpoena Regarding Witness BT (TC), 25 August 2004.

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## *Decision on Motion to Order Rwanda to Transfer Witness DO 3 May 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Detained witness, Transfer to the Tribunal, Conditions to order a transfer, Burden to the requesting party – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 90* bis, *90* bis *(A) and 90* bis *(B); Statute, art. 28*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Decision on Defence Motion for the Transfer, Appearance, and Protection of Thirteen Detained Witnesses, 9 March 1998 (ICTR-96-4); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Order for Transfer of Witness AAA, 25 May 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Request to the Government of Rwanda for Co-operation and Assistance pursuant to Article 28 of the Statute, 31 August 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision on the Defence Request for a Subpoena for Witness SHB, 7 February 2005 (ICTR-2001-76); Trial Chamber,* The Prosecutor v. Aloys Simba, *Order for the Transfer of Detained Witnesses, 17 February 2005 (ICTR-2001-76)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Nsengiyumva Defence's "Extremely Urgent Motion Requesting for an Order to the Government of Rwanda to Co-operate in the Transfer of Witness DO to Arusha, Tanzania", filed on 21 April 2005;

NOTING that the Prosecution has not filed a response;

HEREBY DECIDES the motion.

### Introduction

1. The Nsengiyumva Defence requests the Chamber to order Rwanda to transfer Prosecution Witness DO, who is a detainee, to the Tribunal. The witness testified

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before the Chamber from 30 June to 2 July 2003[2]. On 9 July 2004, the Defence requested that he be recalled for further cross-examination on the basis of newly obtained material, allegedly showing contradictions in his testimony. The Chamber granted this request on 14 October 2004[3].

**Deliberations**

2. The Defence request is made pursuant to Article 28 of the Statute, which provides that states shall cooperate with the Tribunal. Recourse to this provision is only necessary where the state or the witness refuse to voluntarily comply with the requested transfer[4]. There is no indication that this is the case.

3. An order to transfer a detained witness is governed by Rule 90 *bis* (A), which provides that :

> "[a]ny detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal".

In addition, Rule 90 *bis* (B) requires that, prior to ordering the transfer, the Chamber must be satisfied that : (i) the witness is not required for any criminal proceedings in the requested state during the relevant period; and (ii) the transfer would not extend his detention.

4. The party seeking a transfer order has the burden of providing specific information that the conditions set out in Rule 90 *bis* (B) are met[5]. The Defence has made no submissions in this respect. The Chamber cannot therefore make any order under Rule 90 *bis* at this stage[6]. The Defence may seek the assistance of the Registry to these ends.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 3 May 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[2] Witness DO was transferred to the Tribunal pursuant to an order issued under Rule 90 *bis*. *See Bagosora et al.*, Decision on the Prosecution's Request for the Transfer of Detained Witnesses (TC), 4 June 2003.

[3] T. 14 October 2004 p. 23, lines 4-5 ("[W]e are now ordering the recall of this Witness DO so that the Defence may further cross-examine the witness on alleged discrepancies").

[4] See, *e.g., Bagosora et al.,* Request to the Government of Rwanda for Co-operation and Assistance pursuant to Article 28 of the Statute (TC), 31 August 2004.

[5] *Bagosora et al.,* Order for Transfer of Witness AAA (TC), 25 May 2004, para. 3; *Simba*, Order for the Transfer of Detained Witnesses (TC), 17 February 2005, para. 3.

[6] *Simba,* Decision on the Defence Request for a Subpoena for Witness SHB (TC), 7 February 2005, para. 5, footnote 4; *See also Akayesu*, Decision on Defence Motion for the Transfer, Appearance, and Protection of Thirteen Detained Witnesses (TC), 9 March 1998 ("the Tribunal is of the view that the conditions stipulated in Rule 90 *bis* are *sine qua non* and that if they are not complied with, the requested transfer order cannot, consequently, be issued").

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## *Decision on Request for Assistance pursuant to Article 28 of the Statute 27 May 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Request for assistance, France, Pre-requisite conditions for order of assistance, Efforts of the requesting party – Motion denied*

*International Instrument cited :*

*Statute, art. 28*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber 1, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF a "Motion Requesting an Order to Compel the Cooperation With the Tribunal of the Republic of France", filed on 5 April2005;

HEREBY DECIDES the request.

1. The Ntabakuze Defence requests the Chamber to order the Republic of France to facilitate a meeting with an officer of its armed forces, Colonel Grégoire de St. Quentin, who is said to have been present in Rwanda during 1994. The Defence also asks that orders be issued to facilitate the appearance of the officer as a witness before the Chamber, should the Defence decide to call him.

2. One of the conditions for granting a request under Article 28 is a showing that reasonable efforts have been made to secure the assistance of the state, and that those efforts have been unsuccessful [1]. The Chamber has received a copy of a letter from the Registry to the Ntabakuze Defence, dated 23 May 2005, which reports that the

[1] *Bagosora et al.,* Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4; *Bagosora et al.,* Decision *on* the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004, para. *6.*

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Government of France is willing to cooperate voluntarily with the Defence request. This being the case, there is at present no need for an order or request to be issued under Article 28.

3. The Defence has not yet decided whether it wishes to call the prospective witness, nor is there any indication that he would not testify voluntarily if so called. The proposed orders compelling the appearance of the prospective witness are, accordingly, premature.

FOR THE ABOVE RIEASONS, THE CHAMBER

DENIES the motion.

Arusha, 27 May 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Motion to Harmonize and Amend Witness Protection Orders and to permit Investigations 1st June 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Standard of review, Jurisdiction of the Chamber, Power of appreciation of the Chamber, Protection measures for witnesses, Protection of the identity of the witnesses, Statement to a national immigration authority, Disclosure Within the Office of the Prosecutor, Restriction to the Prosecution team in the case – Right to obtain the attendance and examination of witnesses under the same conditions as witnesses against him or her – Special protection afforded to lawyer-client communications – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 95 and 97; Statute, art. 20 (4) (e), 21 and 28*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Anatole Nsengiyumva, *Decision on Protective Measures for Defence Witnesses and Their Families and Relatives, 5 November 1997 (ICTR-96-42); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and Their Family Members, 20 March 2001 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, 22 March 2001 (ICTR-99-54A); Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka, *Decision (Defence Motion for Protective Measures for Defence Witnesses), 14 August 2002 (ICTR-96-14); Trial Chamber,* The Prosecutor v. Sylvestre Gacumbitsi, *Decision on Prosecution Motion for Protective Measures for Victims and Witnesses, 20 May 2003 (ICTR-2001-64); Trial Chamber,* The Prosecutor v. Sylvestre Gacumbitsi, *Decision on Defence Motion for Protective Measures for Defence Witnesses, 25 August 2003 (ICTR-2001-64); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Ntabakuze Motion for Protection of Witnesses, 15 March 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Augustin Bizimungu et al., *Decision on Defence Motion for Protective Measures for Defence Witnesses, 8 June 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Mikaeli Muhimana, *Decision on Defence Motion for Protective Measures for Defence Witnesses, 6 July 2004 (ICTR-95-1B); Trial Chamber,*

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## *Décision relative à la Requête du Procureur en Uniformisation et Modification de Mesures de Protection de témoins 1er juin 2005 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Réexamen des décisions, Compétence de la Chambre, Pouvoir d'appréciation de la Chambre, Mesures de protection des témoins, Protection de l'identité des témoins, Déclaration à une autorité nationale d'immigration, Communication au sein du Bureau du Procureur, Limitation à l'équipe du Procureur affectée à l'espèce – Droit d'obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins à charge – Protection spéciale accordée aux communications échangées entre l'avocat et son client – Requête rejetée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 95 et 97; Statut, art. 20 (4) (e), 21 et 28*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Anatole Nsengiyumva, *Décision sur les mesures de protection pour les témoins à décharge, leurs familles et leurs, 5 novembre 1997 (ICTR-96-12); Chambre de première instance,* Le Procureur c. Pauline Nyiramasuhuko et consorts, *Décision relative a la requête de Pauline Nyiramasuhuko aux fins que soient ordonnées des mesures de protection pour les témoins à décharge ainsi que leurs familles, 20 mars 2001 (ICTR-98-42); Chambre de première instance,* Le Procureur c. Jean de Dieu Kamuhanda, *Décision relative a la requête de la Défense en prescription de mesures de protection en faveur des témoins de la Défense, 22 mars 2001 (ICTR-99-54A); Chambre de première instance,* Le Procureur c. Eliézer Niyitegeka, *Décision (Requête de la Défense aux fins de mesures de protection des témoins a décharge, 14 août 2002 (ICTR-96-14); Chambre de première instance,* Le Procureur c. Sylvestre Gacumbitsi, *Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins 20 mai 2003 (ICTR-2001-64); Chambre de première instance,* Le Procureur c. Sylvestre Gacumbitsi, *Décision relative à la requête de la Défense aux fins de mesures de protection en faveur des témoins à décharge, 25 août 2003 (ICTR-2001-64); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à la requête de Kabiligi aux fins de protection de témoins, 1er septembre 2003 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 mars 2004 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à la requête de Ntabakuze aux fins de protection de témoins,*

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The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's 'Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73* bis *(E)', 14 July 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Augustin Bizimungu et al., *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005 (ICTR-99-50)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Zdravko Mucic et al., *Judgement and Sentence Appeal, 8 April 2003 (IT-96-21);* Trial Chamber, The Prosecutor v. Naser Oric, *Decision on Confidential Prosecutor's Motion for Protective Measures and Non-disclosure, 28 July 2003 (IT-03-68); Trial Chamber,* The Prosecutor v. Jovica Stanišić and Franko Simarović, *Decision on Prosecution Motion for Protective Measures, 1 August 2003 (IT-03-69); Trial Chamber,* The Prosecutor v. Vojislav Šešelj, *Decision on "Prosecution's Motion for Non-Disclosure of Materials Provided Pursuant to Rules 66 (A) (ii) and 68 and for Protective Measures for Witnesses During the Pre-Trial Phase", 11 February 2004 (IT-03-67); Trial Chamber,* The Prosecutor v. Ivan Čermak and Mladen Markač, *Decision and Order on Prosecution's Motion for Protective Measures for Victims and Witnesses, 1 April 2004 (IT-06-90); Trial Chamber,* The Prosecutor v. Ljube Boškoski and Johan Tarčulovksi, *Interim Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses, 28 April 2005 (IT-04-82)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber 1, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Motion to Harmonize and Amend Witness Protection Measures", filed on 14 March 2005;

CONSIDERING the Responses of the Defence for Nsengiyumva, Ntabakuze, and Bagosora, filed on 21, 24, and 30 March 2005 respectively; the Submissions of the Registrar, filed on 3 May 2005; the further Response of the Nsengiyumva Defence, filed on 9 May 2005; the Nsengiyumva "Urgent Motion" filed on 24 May 2005; the Prosecution Response thereto, filed on 26 May 2005; and the oral submissions of the parties on 1 March 2005 and on 21,26 and 28 April 2005;

HEREBY DECIDES the motion.

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*15 mars 2004 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Augustin Bizimungu et consorts, *Décision sur la requête de Défense aux fins de mesures de protection des témoins a décharge, 8 juin 2004 (ICTR-2000-56); Chambre de première instance,* Le Procureur c. Mikaeli Muhimana, *Décision relative à la requête de la Défense en prescription de mesures de protection des témoins à décharge, 6 juillet 2004 (ICTR-95-1B); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision concernant la deuxième requête du Procureur en réexamen de la décision de la Chambre de première instance intitulée Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73* bis *(E), 14 juillet 2004 (ICTR-98-41); Chambre de première instance* ***XXX****, Le Procureur c. Augustin Bizimungu et consorts, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 février 2005 (ICTR-2000-56)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Zdravko Mucic et consorts, *Arrêt relatif à la sentence, 8 avril 2003 (IT-96-21); Chambre de première instance,* Le Procureur c. Naser Oric, *Décision relative aux requêtes confidentielles de l'accusation aux fins de mesures de protection et de non-divulgation, 28 juillet 2003 (IT-03-68); Chambre de première instance,* Le Procureur c. Jovica Stanišić et Franko Simatović, *Décision relative à la requête de l'Accusation aux fins de mesures de, 1er août 2003 (IT-03-69); Chambre de première instance,* Le Procureur c. Vojislav Šešelj, *Décision relative à la requête de l'Accusation aux fins de nondivulgation de pièces communiquées en application des articles 66 (A) (ii) et 68 du Règlement et aux fins de mise en place de mesures de protection de témoins pendant la mise en état de l'affaire, 11 février 2004 (IT-03-67); Chambre de première instance,* Le Procureur c. Ivan Čermak et Mladen Markač, *Décision et ordonnance relatives à la requête de l'accusation aux fins de mesures de protection en faveur de victimes et de témoins, 1er avril 2004 (IT-06-90); Chambre de première instance,* Le Procureur c. Ljube Boškoski et Johan Tarčulovksi, *Interim Decision on Prosecution S Motion for Protective Measures for Victims and Witnesses, 28 avril 2005 (IT-04-82)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov (la « Chambre »),

SAISI de la requête du Procureur intitulée *Motion to Harmonize and Amend Witness Protection Measures* qui tend à faire uniformiser et modifier des mesures de protection de témoins, déposée le 14 mars 2005,

VU les réponses des équipes de défense de Nsengiyumva, Ntabakuze et Bagosora déposées respectivement les 21, 24 et 30 mars 2005, les observations du Greffier produites le 3 mai 2005, la réponse complémentaire de la Défense de Nsengiyumva déposée le 9 mai 2005, la «requête urgente» de Nsengiyumva déposée le 24 mai 2005, la réponse du Procureur à ladite requête déposée le 26 mai 2005 et les arguments présentés oralement par les parties le 1er mars et les 2 1, 26 et 28 avril 2005,

STATUE sur la requête.

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## Introduction

1. The Prosecution requests that the orders protecting the identity of Defence witnesses be harmonized and modified in accordance with a model attached to its motion. In particular, four significant changes are proposed :

(i) that the "Prosecution team in this case", to which disclosure of the identity of Defence witnesses is presently limited, be permitted to share that information with any person working on behalf of the Office of the Prosecutor (OTP);

(ii) that the Prosecution be allowed to reveal the identity of protected witnesses to third parties for the purposes of investigation;

(iii) that the prohibition against contacting Defence witnesses apply only to "Prosecution Counsel in this case", and not to any person acting on behalf of the OTP;

(iv) that the Registry be ordered to transmit a letter from the Prosecution to al1 protected witnesses, asking for an interview prior to their testimony.

2. On 26 April 2005, several weeks after the motion had been filed, the Prosecution attempted to introduce a prior statement of Defence Witness LT-1, which it had obtained from the immigration authorities of a State[1]. The Defence objected that the document had been obtained by revealing the witness's identity to a third party, in violation of the witness protection orders and that, accordingly, the statement should not be admitted. The Chamber will therefore determine (i) whether the existing orders prohibit inquiries to third parties, including national immigration authorities, about a Defence witness; and, if so, (ii) whether the orders should be modified to allow such inquiries, as requested in the Prosecution's motion.

## Deliberations

### *Standard of Review*

3. A Chamber has inherent jurisdiction to reverse or revise a previous decision where new material circumstances have arisen that did not exist at the time of the decision, or when convinced that the decision was erroneous and has caused prejudice or injustice to a party[2]. The exercise of this power is discretionary and limited to particular circumstances[3]. As no new material circumstances have been cited by the Pros-

[1] T. 26 April 2005 pp. 63-65; T. 28 April 2005 pp. 86-89. The Chamber adjourned the witness's testimony concerning the document before it was introduced in court, pending further submissions from the parties. T. 26 Apri12005 pp. 63, 80.

[2] *Mucic et al.,* Judgement and Sentence Appeal (AC), 8 April 2003, para. 49.

[3] *Id.*; *Bagosora et al.,* Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 14 July 2004, para. 7.

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## Introduction

1. Le Procureur prie la Chambre d'uniformiser et de modifier, suivant un modèle joint à sa requête, les mesures de protection de l'identité des témoins à décharge qu'elle a prescrites. Il propose en particulier quatre modifications majeures :

i) Que l'«équipe du Procureur affectée à l'espèce» dont les membres sont actuellement les seules personnes à qui l'identité des témoins à décharge peut être révélée soit autorisée à communiquer cette information à toute personne travaillant pour le compte du Bureau du Procureur;

ii) Que le Procureur soit autorisé à révéler l'identité des témoins protégés à des tiers dans le cadre des enquêtes;

iii) Que l'interdiction d'entrer en contact avec les témoins a décharge ne s'applique qu'aux «substituts du Procureur chargés de l'affaire» et non à toute personne agissant pour le compte du Bureau du Procureur;

iv) Que la Chambre ordonne au Greffe de transmettre à tous les témoins protégés une lettre du Procureur les invitant à lui accorder un entretien avant leur comparution.

2. Le 26 avril 2005, plusieurs semaines après le dépôt de sa requête, le Procureur a tenté de verser au dossier une déclaration antérieure du témoin à décharge LT-1 fournie par les services de l'immigration d'un pays[1]. La Défense y a fait objection au motif que le Procureur avait révélé l'identité du témoin à un tiers pour obtenir ce document, en violation des mesures de protection de témoins ordonnées, et que la Chambre ne devrait donc pas admettre ladite déclaration. Cela étant, la Chambre recherchera i) si les mesures en vigueur interdisent de se renseigner sur un témoin à décharge auprès de tiers, notamment des services de l'immigration d'un pays, et, dans l'affirmative, ii) si ces mesures doivent être modifiées pour permettre de demander les renseignements en question comme le Procureur le sollicite dans sa requête.

## Deliberations

### *Principes régissant le réexamen des décisions*

3. Une Chambre est par essence compétente pour annuler ou réviser une de ses décisions antérieures lorsque des circonstances importantes nouvelles surviennent après coup ou si elle est convaincue que la décision visée était entachée d'erreurs et a porté préjudice à une partie ou a été injuste à l'endroit de celle-ci[2]. L'exercice de ce pouvoir est laissé à son appréciation et limité à certaines circonstances bien définies[3]. Le Procureur n'ayant

[1] Compte rendu de l'audience du 26 avril 2005, pp. 64 à 67; compte rendu de l'audience du 28 avril 2005, pp. 85 à 89. La Chambre a suspendu la déposition du témoin concernant ce document avant qu'il ne soit produit à l'audience, pour permettre aux parties de présenter des arguments supplémentaires. Compte rendu de l'audience du 26 avril 2005, pp. 64, 65, 8 1 et 82.

[2] Affaire *Mucić et consorts,* arrêt relatif à la sentence (Chambre d'appel), 8 avril 2003, par. 49.

[3] *Ibid.*; affaire *Bagosora et consorts,* Décision concernant la deuxième requête du Procureur en réexamen de la décision de la Chambre de première instance intitulée *Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73* bis *(E)* (Chambre de première instance), 14 juillet 2004, para. 7.

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ecution, the Chamber shall assess whether its previous decisions were erroneous and, if so, whether they have caused any prejudice or injustice justifying modification of the orders[4].

(i) *Disclosure Within the Office of the Prosecutor*

4. The Defence witness protection orders require the "Prosecution team in this case" to "keep confidential to itself all information identifying any witness subject to this order ..."[5].

The Prosecution argues that the Chamber has mechanically transposed the language used in protective orders applicable to the Defence, which are structured as teams. According to the Prosecution, its trial teams, unlike the Defence, cannot be insulated from the Office of the Prosecutor of which they are an integral part. Disclosure obligations to other Accused, the duty to conduct investigations based on any information received, and professional collegiality amongst Prosecution counsel, require the free dissemination of information within the Office of the Prosecutor, in Arusha and Kigali alike.

5. The Chamber considers that the reference to "team" is not, as suggested, an unthinking repetition of the language used in the Prosecution witness protection orders. Restrictions on dissemination of witness identities are motivated by the need to afford the highest level of protection to prospective witnesses who might otherwise be subject to intimidation, or the justifiable fear of intimidation. The principle that access should be limited to those with a real need for the information, to minimize the possibility of inadvertent or intentional disclosure, applies with equal force to the

[4] The Prosecution asserts that "a considerable period of time has elapsed since the making of the first orders and circumstances have changed, both factually and procedurally in that the trial is now at a different phase". The only change in circumstance identified, however, is that Defence witness disclosure began on 12 November 2004. The existence of disclosure was not a fact material to the decision. Indeed, the decision anticipated the commencement of disclosure.

[5] Three of the Defence witness protection orders are, in substance, identical : *Bagosora et al.,* Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.,* Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003. The Nsengiyumva witness protection decision was rendered long before the start of the present trial, and the joinder of the four accused in a single trial : *Nsengiyumva,* Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 5 November 1997. The latter order does not make any reference to, or distinction between, the Prosecution or the "Prosecution team in this case".

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invoqué aucune circonstance importante nouvelle, la Chambre se bornera à vérifier si ses décisions antérieures visées étaient erronées et, dans l'affirmative, si elles ont causé un préjudice ou une injustice justifiant la modification des mesures qui y ont été prescrites[4].

i) *Communication au sein du Bureau du Procureur*

4. Les décisions prescrivant des mesures de protection en faveur des témoins à décharge font obligation à l'«équipe du Procureur affectée à l'espèce» de «préserve[r] la confidentialité de toute information de nature à révéler l'identité d'un témoin visé par la [...] décision»[5].

Le Procureur fait valoir que la Chambre a machinalement transposé en l'occurrence le libellé des mesures de protection de témoins opposables à la Défense alors que celle-ci est structurée en équipes. Selon le Procureur, les équipes qu'il affecte aux procès, à la différence de celles de la Défense, ne peuvent être isolées des autres membres du Bureau du Procureur dont elles font partie intégrante. L'obligation de communiquer les pièces nécessaires à d'autres accusés, le devoir de s'appuyer sur toute information reçue pour mener des enquêtes et les relations de camaraderie qui doivent exister entre les substituts du Procureur dans l'exercice de leurs fonctions ne peuvent être respectés que si l'information circule librement au sein du Bureau du Procureur à Arusha et à Kigali.

5. La Chambre considère que l'emploi du terme «équipe» n'est pas une reproduction machinale du libellé des décisions prescrivant des mesures de protection en faveur des témoins à charge comme l'estime le Procureur. Les restrictions imposées en matière de divulgation de l'identité des témoins reposent sur la nécessité d'offrir la meilleure protection possible aux témoins potentiels qui, dans le cas contraire, pourraient être intimidés ou craindre à juste titre d'être intimidés. Le principe selon lequel la possibilité d'obtenir des informations doit être réservée aux personnes qui en ont réellement besoin, afin de minimiser le risque d'une communication accidentelle ou

[4] Selon le Procureur, «un grand laps de temps s'est écoulé depuis que la Chambre a rendu les premières décisions et les circonstances ont changé tant sur le plan des faits que sur celui de la procédure en ce que le procès se trouve maintenant à un autre stade» [traduction]. Or le seul changement de circonstances constaté réside dans le fait que la communication des renseignements concernant les témoins à décharge a commencé le 12 novembre 2004. L'existence de cette communication ne jouait pas un rôle important dans les décisions de la Chambre qui en escomptait en fait le démarrage.

[5] Trois des décisions prescrivant des mesures de protection en faveur des témoins à décharge en l'espèce sont identiques quant au fond. Il s'agit des décisions suivantes : affaire *Bagosora et consorts,* Décision relative à la requête de Ntabakuze aux fins de protection de témoins (Chambre de première instance), 15 mars 2004; affaire *Bagosora et consorts,* Décision relative à la requête de Kabiligi aux fins de protection de témoins (Chambre de première instance), 1er septembre 2003; affaire *Bagosora et consorts,* Décision sur la requête de Bagosora en prescription de mesures de protection des témoins (Chambre de première instance), 1er septembre 2003. La décision prescrivant des mesures de protection en faveur des témoins de Nsengiyumva a été rendue bien avant l'ouverture du procès en l'espèce et la jonction des instances engagées contre les quatre accusés. Voir la Décision sur les mesures de protection pour les témoins à décharge, leurs familles et leurs proches (Chambre de première instance), 5 novembre 1997. Dans son dispositif, cette dernière décision ne fait nullement état du Procureur ou de l'«équipe du Procureur affectée à l'espèce» ni ne distingue entre eux.

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Prosecution. Disclosure has frequently been restricted to the "Prosecution team" in previous witness protection orders[6].

6. The Prosecution argues that its mandate to investigate, the practicalities of organization, and disclosure obligations in other trials require dissemination of protected identities to anyone working for the Office of the Prosecutor. The Chamber disagrees. Neither the general duty to investigate crimes nor professional collegiality can supersede the specific obligations of a witness protection order, which is itself authorized under Article 21 of the Statute. Disclosure obligations in other trials do not determine whether the information must be shared. Where, by court order, information is restricted to a single trial team, the Prosecution cannot be bound to disclose the information in another trial[7]. Furthermore, the Prosecution has failed to convincingly explain why information cannot be circumscribed to members of this trial team, as has been required in the past[8].

[6] *Bizimungu et al.,* Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 2 February 2005, p. 5 ("The Prosecution shall designate to the Chamber and the Defence al1 persons working on the immediate Prosecution team who will have access to any information which may reveal or lead to the identification of Defence witnesses"); *Gacumbitsi,* Decision on Defence Motion for Protective Measures for Defence Witnesses (TC), 25 August 2003, para. 8 (h) ("That the Prosecution provide to the Registry a designation of all persons working in the Prosecution tearn who will have access to any identifying information conceming the Protected Defence Witnesses, and that the Prosecution notify the Registry as soon as possible, in writing, of any person leaving its team ..."); *Niyitegeka,* Decision (Defence Motion for Protective Measures for Defence Witnesses) (TC), 14 August 2002, para. 13 (e) ("Prohibits the Prosecution from communicating and revealing to, or discussing with any person other than the immediate members of the Prosecution tearn in the instant case, whether directly or indirectly, any document, or any other information which could reveal or iead to the identification of the persons covered by the present measures"); *Nyiramasuhuko et al.,* Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and Their Family Members (TC), 20 March 2001, p. 3 ("That the Prosecution should notify the Chamber and the Defence of the status of members of the Prosecution team who have access to any [protected] information ...")

[7] Rule 75 (F) (ii), which provides that a protective measures "shall not prevent the Prosecution from discharging any disclosure obligations under the Rules", has no effect unless a disclosure obligation has already arisen. No such obligation could arise unless the Prosecution was, at the least, aware of the information. Furthermore, even actual awareness of a member of the present trial team could not be imputed to the Prosecution in a subsequent trial in which that member was involved, as that person would be bound not to disclose the protected information. Information that is not protected could, of course, be subject to disclosure, even if associated with a protected witness.

[8] The Registry is, of course, independent from the Office of the Prosecutor and has a separate obligation to ensure, for example, that its databases comply with the present order.

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intentionnelle, s'applique de la même manière au Procureur. Dans les décisions antérieures prescrivant des mesures de protection de témoins, la Chambre ordonne souvent de ne communiquer certaines informations qu'à «l'équipe de poursuite»[6].

6. Selon le Procureur, le mandat d'enquêter qui lui est donné, les problèmes pratiques posés par l'organisation de ses activités et l'obligation de communication dont il doit s'acquitter dans d'autres instances commandent de dévoiler les identités protégées à toute personne travaillant pour le Bureau du Procureur. La Chambre n'est pas de cet avis. Ni l'obligation générale d'enquêter sur des crimes ni les relations de camaraderie qui doivent exister entre les gens dans l'exercice de leurs fonctions ne peuvent l'emporter sur les obligations expresses imposées par une décision prescrivant des mesures de protection des témoins qui est du reste autorisée par l'article 21 du Statut. L'obligation de communiquer des pièces dans d'autres instances n'est pas un critère pour décider s'il y a lieu d'échanger des renseignements. Lorsqu'une décision de justice réserve des informations à une seule équipe affectée à tel ou tel procès, le Procureur ne saurait être tenu de les communiquer dans un autre procès[7]. De plus, le Procureur n'a pas expliqué de manière convaincante pourquoi des informations ne peuvent pas circuler uniquement entre les membres de l'équipe affectée au présent procès comme le voulait la règle par le passé[8].

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[6] Affaire *Bizimungu et consorts, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (Chambre de première instance), 2 février 2005, p. 5 « Le Procureur est tenu d'indiquer à la Chambre et à la Défense tous les membres de l'équipe de poursuite immédiate qui auront accès a toute information pouvant révéler ou permettre de découvrir l'identité de témoins à décharge » [traduction]); affaire *Gacumbitsi,* Décision relative à la requête de la Défense aux fins de mesures de protection en faveur des témoins à décharge (Chambre de première instance), 25 août 2003, para. 8 h) («Ordonne au Procureur d'indiquer au Greffe toutes les personnes appartenant a son équipe immédiate qui auront accès à toute information permettant d'identifier les témoins à décharge protégés, et ordonne qu'il informe le Greffe dès que possible, par écrit, du départ de tout membre appelé a quitter son équipe ...»); affaire *Niyitegeka,* Décision (Requête de la Défense aux fins de mesures de protection des témoins a décharge) (Chambre de première instance), 14 août 2002, para. 13 e) («Interdit au Procureur de communiquer ou de révéler à quiconque, ou de discuter avec quiconque, en dehors de l'équipe restreinte du Procureur en l'espèce, de façon directe ou indirecte, tout document, ou toute autre indication susceptible d'identifier ou de contribuer a l'identification des personnes faisant l'objet des présentes mesures»); affaire *Nyiramasuhuko et consorts,* Décision relative à la requête de Pauline Nyiramasuhuko aux fins que soient ordonnées des mesures de protection pour les témoins à décharge ainsi que leurs familles (Chambre de première instance), 20 mars 2001, p. 3 («Que le Procureur indique à la Chambre et à la Défense la qualité des personnes composant l'équipe de la poursuite et qui ont accès à toute information [protégée] ...»).

[7] L'article 75 (F) (ii) du Règlement qui dispose que les mesures de protection «n'empêchent pas le Procureur de s'acquitter des obligations de communication que lui impose le Règlement» ne s'applique que si une obligation de communication existe déjà. Aucune obligation de cette nature ne peut naître si le Procureur n'est pas au moins au courant de l'information a communiquer. En outre, quand bien même un membre de l'équipe affectée au présent procès serait effectivement au courant de telle ou telle information, on ne pourrait pas considérer que le Procureur la connaît dans un procès ultérieur auquel l'intéressé participerait, celui-ci étant tenu de ne pas communiquer l'information protégée en question. Naturellement, toute information non protégée pourrait être communiquée même si elle concerne un témoin protégé.

[8] Bien entendu, le Greffe est indépendant du Bureau du Procureur et a une obligation distincte qui consiste à veiller, par exemple, à ce que ses bases de données cadrent avec la présente décision.

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7. The term "Prosecution team in this case" is neither vague nor impracticable. Operative paragraph 8 of the witness protection orders provides that the Prosecution itself shall designate the members of the team. The Prosecution may designate anyone, including support staff or senior management, who is actively and directly engaged in work pertaining to this trial. No undue burden to the work of the Prosecution has been established.
$$$

8. No error has been established which could require modification of the decision. On the contrary, the Chamber is convinced that in this case limiting disclosure to the Prosecution team strikes the best balance between the needs of trial preparation, and the legitimate needs of witness protection.

(ii) *Disclosure to Third Parties for Investigation*

9. The order proposed by the Prosecution creates an exception to the non-disclosure obligation where

> "necessary for the purposes of investigation into the background of any witness, and only for the purposes of obtaining such information, the individual may be identified by proper name but not by pseudonym or status as a defence witness".

The Prosecution acknowledges that, in particular, it wishes to make such inquiries in order to obtain statements given by Defence witnesses to national immigration authorities[9]. The Prosecution has simultaneously argued, in support of its attempt to tender the purported statement of Witness LT-1 to a national immigration authority, that it is permitted to make such inquiries under the existing orders as long as it does not reveal that the person is a witness.

10. The Defence argues that such inquiries are, and should continue to be, prohibited by the protection orders. Inquiries to immigration authorities, in particular, would have an intimidating effect on Defence witnesses, many of whom are refugee claimants who fear deportation back to Rwanda. Discrepancies between statements to immigration authorities and sworn testimony before the Tribunal might ultimately lead to the witness's expulsion from their country of refuge. The Defence is said to be unequally affected by this concern, as most of its witnesses are refugees, whereas the majority of Prosecution witnesses reside in Rwanda. This unequal impact impairs the right of the Accused in Article 20 (4) (e) "to obtain the attendance and examination of witnesses under the same conditions as witnesses against him or her". The Nsengiyumva Defence also argues, in its lengthy submissions, that admission of statements

[9] Motion, para. 35. The investigations which the Prosecution wishes to undertake were more fully explained during a status conference, T. 1 March 2005 : "The intentions are to obtain prior written statements by the witnesses. And because the majority of the Defence witnesses were Rwandan, and many of those witnesses now reside in other locations, when they enter the country where they now reside, wherever that may be, they will have made a statement about their involvement in the events of Rwanda in 1994. We want that staternent; simple as that".

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7. L'expression «équipe du Procureur affectée à l'espèce» n'est pas vague ni ne pose de difficultés d'ordre pratique. Aux termes du paragraphe 8 du dispositif des décisions de protection de témoins en question, le Procureur désigne personnellement les membres de l'équipe. Il peut désigner toute personne, y compris des membres du personnel d'appui ou des cadres supérieurs, qui participe activement et directement à des activités liés au présent procès. Il n'a pas établi qu'une charge excessive s'était ajoutée en l'occurrence à ses activités.

8. Le Procureur n'a établi l'existence d'aucune erreur commandant la modification de la décision. Bien au contraire, la Chambre est convaincue qu'en l'espèce, le fait d'ordonner que les informations ne soient communiquées qu'aux membres de l'équipe de poursuite concilie au mieux les impératifs de la préparation du procès et la nécessité légitime de protéger les témoins.

ii) *Communication à des tiers dans le cadre des enquêtes*

9. Le projet de décision présenté par le Procureur crée une exception à l'obligation de ne pas divulguer les renseignements permettant d'identifier les témoins dans les cas où cette exception

> «s'impose pour qu'il puisse enquêter sur les antécédents de ces témoins et, à seule fin d'obtenir les informations recherchées, les intéressés peuvent être désignés par leurs vrais noms et non pas par des pseudonymes ni par leur qualité de témoin à décharge».

Le Procureur reconnaît vouloir surtout mener ces enquêtes pour obtenir les déclarations faites par des témoins à décharge devant les autorités des services de l'immigration de tel ou tel pays[9]. Par ailleurs, pour expliquer pourquoi il a tenté de verser au dossier la déclaration que le témoin LT-1 aurait faite devant les autorités des services de l'immigration d'un pays, il soutient que les décisions en vigueur l'autorisent à faire des recherches de cette nature pour autant qu'il ne révèle pas que la personne concernée est un témoin.

10. De l'avis de la Défense, ces recherches sont et doivent continuer d'être interdites par les décisions de protection. Le fait de mener des recherches auprès des services de l'immigration, en particulier, aurait pour effet d'intimider les témoins à décharge qui sont pour la plupart des demandeurs d'asile ayant peur d'être rapatriés au Rwanda. Toute divergence entre les déclarations recueillies par les autorités des services de l'immigration et la déposition faite sous serment devant le Tribunal pourrait en fin de compte conduire à l'expulsion du témoin du pays dans lequel il s'est réfugié. C'est la Défense qui souffrirait le plus de cette situation, ses témoins étant en majorité des réfugiés alors que la plupart des témoins à charge résident au Rwanda. Ce désavantage porte atteinte au droit d'«obtenir la comparution et l'interrogatoire des

[9] Requête, para. 35. Lors d'une conférence de mise en état, le Procureur a donné de plus amples précisions sur les enquêtes qu'il veut mener. Voir le compte rendu de l'audience du 1er mars 2005 : «… nos intentions, c'est d'obtenir des déclarations écrites auprès des témoins. Parce que la majorité des témoins à décharge sont rwandais, et nombre de ces témoins résident maintenant dans d'autres pays. Donc quand ils sont entrés dans ces pays où ils résident, ils ont dû faire des déclarations par rapport à leur implication dans les évènements du Rwanda en 1994. Nous voulons cette déclaration».

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obtained from national immigration authorities would seriously damage the integrity of the proceedings and should, therefore, be excluded under Rule 95. Disclosure of statements to immigration officials would entail a serious breach of confidentiality and privacy, in violation of domestic and international law. If inaccuracies in such statements are subsequently used to justify deportation of a witness back to Rwanda, the Tribunal shall have contributed to a violation of international refugee law.

11. The Chamber recalls that the Bagosora, Ntabakuze and Kabiligi witness protection orders require the Prosecution team to

> "keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss of reveal any such information"[10].

This wording does not, in the Chamber's view, prevent use of the witness's name to make reasonable inquiries. The essence of the prohibition is against disclosure of information that would, directly or indirectly, reveal that the person is a witness. The ultimate purpose of witness protection orders is to prevent partisans from one side or the other from harassing or intimidating witnesses for the other side. That purpose is satisfied if the role of the person in the trial proceedings remains secret. Though an inquiry about a person certainly signals interest, it does not necessarily reveal that the person is a witness. The object of the inquiry may, for instance, be a Prosecution source or prospective witness, whose prior statements the Prosecution is under an obligation to obtain and disclose to the Defence. The inquiring party must scrupulously avoid, expressly or impliedly, suggesting that the person is a witness for, or otherwise associated with, one side or the other[11]. If the third party demands explanations which would require revealing that information, then the investigation must

[10] Para. 7. The relevant provision of the Nsengiyumva Order is worded only slightly differently than the other witness protection orders, providing that "the names, addresses, locations and other identifying information of the defence witnesses... shall not be disclosed to the public or the media". "Identifying information", read in context, necessarily implies information which identifies the person as a witness. This limitation is identical to that imposed in the Bagosora, Ntabakuze and Kabiligi witness protection orders. Clause 6, to which reference is made by the Defence in its Joint Brief, concerns disclosure by the Registry prior to communicating the information to the Prosecution. The provision is not relevant to the requirements of post-disclosure confidentiality.

[11] The Prosecution avers that it has complied with this obligation in its inquiries regarding Witness LT-1. Prosecution Submissions on Defence Objection Raised During Cross-Examination of Defence Witness LT-1 on 26 April 2005, 28 April 2005, paras. 9, 13, 14.

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témoins à décharge dans les mêmes conditions que les témoins à charge» que l'article 20 (4) (e) du Statut accorde aux accusés. Dans une longue argumentation, la Défense de Nsengiyumva soutient en outre que l'admission de déclarations fournies par les autorités des services nationaux de l'immigration porterait gravement atteinte à l'intégrité de la procédure et doit de ce fait être écartée en vertu de l'article 95 du Règlement. La divulgation de déclarations faites devant des responsables des services de l'immigration constituerait une violation grave de la confidentialité et de la vie privée. Or une telle violation est condamnée par le droit interne et le droit international. Si des inexactitudes figurant dans les déclarations en question sont par la suite retenues pour justifier le rapatriement d'un témoin au Rwanda, le Tribunal aura contribué à la violation du droit international applicable aux réfugiés.

11. La Chambre rappelle que les décisions Bagosora, Ntabakuze et Kabiligi tendant à la protection des témoins font obligation à l'équipe de poursuite de

> «préserve[r] la confidentialité de toute information de nature à révéler l'identité d'un témoin visé par la […] décision, et s'abstienne de divulguer, d'évoquer ou de révéler, directement ou indirectement, toute information de cette nature»[10].

De l'avis de la Chambre, cette formulation n'interdit pas d'utiliser le nom du témoin pour mener des enquêtes légitimes. L'interdiction frappe en substance la communication de renseignements qui pourraient, directement ou indirectement, révéler que la personne concernée est un témoin. Le but principal des décisions de protection des témoins est d'empêcher que les partisans d'une des parties tracassent ou intimident les témoins de l'autre. Ce but est atteint si le rôle joué par les intéressés dans le cadre du procès reste secret. Certes, toute recherche menée sur une personne dénote sans conteste un certain intérêt pour cette personne, mais elle ne révèle pas nécessairement que celle-ci est un témoin. La personne sur laquelle portent les recherches peut par exemple être une des sources du Procureur ou un témoin à charge potentiel dont le Procureur est tenu d'obtenir les déclarations antérieures pour les communiquer à la Défense. La partie qui mène ces recherches doit scrupuleusement éviter d'indiquer, explicitement ou implicitement, que la personne concernée est un des témoins de l'une ou l'autre partie ou qu'elle a des liens avec l'une ou l'autre partie[11]. Si le tiers exige des explications qui ne peuvent être données sans révéler ces renseignements, les

[10] Mesure n° 7. La formulation de la disposition pertinente de la décision *Nsengiyumva* n'est que légèrement différente de celle des autres décisions de protection de témoins, cette disposition étant ainsi libellée : «Les noms, adresses et autres indications permettant d'identifier les témoins a décharge [...], ainsi que les lieux ou se trouvent ces témoins, ne seront pas divulgués au public ou aux médias». Rapprochée du contexte, l'expression «indications permettant d'identifier» désigne nécessairement des renseignements qui font savoir que la personne concernée est un témoin. Cette restriction est semblable à celle imposée dans les décisions *Bagosora, Ntabakuze* et *Kabiligi* tendant a la protection des témoins. La mesure n° 6 à laquelle fait état la Défense dans son mémoire commun concerne le cas ou le Greffe aurait à porter des documents à la connaissance du public sans avoir déjà communiqué les renseignements visés au Procureur. Cette disposition n'intéresse pas l'obligation de préserver la confidentialité des renseignements après leur communication.

[11] Le Procureur déclare s'être acquitté de cette obligation lors des recherches menées sur le témoin LT-1. Voir ses écritures intitulées *Prosecution Submissions on Defence Objection Raised During Cross-Examination of Defence Witness LT-1, on 26 April2005,* 28 avril 2005, paras. 9, 13 et 14.

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cease. Inquiries conducted within these parameters do not give rise to a breach of the witness protection order[12].

12. The Defence has itself tendered statements of protected Prosecution witnesses which were obviously obtained by making inquiries to third parties. On at least one occasion, the Defence frankly admitted that it had obtained prior statements of protected witnesses through the efforts of its investigators[13]. In support of a motion for a request for State cooperation under Article 28, the Defence urged the Chamber to order the government of Rwanda to disclose judicial dossiers in relation to a large number of Defence witnesses. While the Defence was concerned that the list should be disclosed in a manner so as not to indicate that these individuals were Prosecution witnesses, there was never any suggestion that disclosure, in and of itself, would violate the witness protection order[14]. In support of that motion, the Bagosora Defence subsequently filed a letter showing that it had made inquiries to the Rwandan government about a protected Prosecution witness[15]. During the cross-examination of

[12] The Defence relies on a recent decision declaring that a Defence counsel had violated a witness protection order by making inquiries to a State about a Prosecution witness. *Karemera el al.,* Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations (TC), 19 April 2005. It is unclear whether the inquiry by Defence counsel in that case disclosed that the person in question was a witness. If so, the decision is distinguishable from the present case.

[13] T. 16 June 2004 pp. 33, 35, Counsel for Kabiligi : ("I asked somebody to conduct investigations and send to me documents concerning the witnesses who are scheduled to appear here. 1 don't want to reveal to you al1 the elements that the Defence has on these proceedings. And these documents were sent to me here in Arusha via DHL, and 1 can even send that evidence about this to this Court. And 1 had to go through al1 the documents to know exactly what it was all about, whether to know whether *to* get some material from it to use or not .. . But actually I received a pile of documents concerning various persons, some of whom appear here for testimony"); *id.* p. 35, Counsel for Ntabakuze : ("Mr. President, we received the documents from the same source, in the same fashion, so that correspondence Mr. Degli has will - in fact, we received ours after that, because we learned the documents came through there, too"); *id.* p. 36, Counsel for Bagosora ("Secondly, when we look at the contacts that we have had with Rwanda, and our contacts have been quite difficult, and in order to be honest with the Trial Chamber, it is impossible for us to obtain official documents. It is obvious that there are other means which are not legal means, so to speak. They are not illegal, but they are not the official channels to obtain the documents. And perhaps we shall have recourse to these means. Nevertheless, what 1 wanted to Say is that -- what is the basis of the problem? If the Defence has to obtain documents from Rwanda, it is because Rwanda -- the office of the prosecutor did not undertake special efforts to obtain the documents from Rwanda").

[14] T. 16 December 2003 pp. 11-12 ("With regard to paragraph 6 the issue of procedure and judgements before Rwandan judiciary, we have serious problems regarding the drafting of this, because we did not know whether to use pseudonyms or whether we could use the names of people. But we did not want both sets of names in a document which could be made public and therefore endanger the witness's identity"). See *Bagosora et al.,* Requête conjointe de la défense aux fins d'obtenir la cooperation de l'état rwandais conformément à l'article 28 du statut du Tribunal (TC), 28 July 2003.

[15] *Bagosora et al.,* Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, Annex B (redacted).

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recherches doivent cesser. Les recherches menées dans ces conditions n'entraînent aucune violation de la décision de protection des témoins[12].

12. La Défense a elle aussi produit des déclarations de témoins à charge protégés qui à l'évidence avaient été obtenues à la faveur de recherches menées auprès de tiers. Au moins une fois, elle a franchement admis avoir obtenu des déclarations antérieures de témoins protégés grâce aux efforts de ses enquêteurs[13]. Dans le cadre d'une requête tendant à faire solliciter la coopération d'un État en vertu de l'article 28 du Statut, la Défense a exhorté la Chambre à ordonner au Gouvernement rwandais de communiquer les dossiers judiciaires d'un grand nombre de témoins à décharge. Elle tenait à ce que la liste de ces personnes soit communiquée sans indiquer qu'elles étaient des témoins à charge, mais il n'a jamais été dit que la simple communication constituerait en soi une violation de la décision de protection de témoins[14]. A l'appui de la requête susvisée, la Défense de Bagosora a déposé par la suite une lettre montrant qu'elle avait demandé des renseignements au Gouvernement rwandais sur un témoin à charge protégé[15]. Lors du

[12] La Défense se fonde sur une décision récente qui déclare qu'un conseil de la Défense a violé une mesure de protection de témoins pour avoir demandé à un État de lui fournir des renseignements sur un témoin à charge. Voir l'affaire *Karemera et consorts, Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations* (Chambre de première instance), 19 avril 2005. On ne sait pas si le conseil de la Défense a révélé que l'intéressé était un témoin lors des recherches menées dans cette affaire. Si tel est le cas, le problème tranché par la décision en question se distingue de celui dont la Chambre est saisie en l'espèce.

[13] Compte rendu de l'audience du 16 juin 2004, pp. 33 et 35, conseil de Kabiligi : «J'ai demandé à quelqu'un de faire des enquêtes et de m'envoyer un certain nombre de documents concernant des témoins éventuels qui doivent intervenir ici – et je ne voudrais pas divulguer tous les éléments que la Défense peut avoir sur cette procédure –, et ces documents m'ont été communiqués ici, a Arusha, par DHL -je peux même en faire la preuve au Tribunal –, et il me fallait passer dans tout le document pour pouvoir savoir exactement de quoi il s'agit, avant de voir s'il y a des documents a utiliser ou pas. ... [Mais j'ai reçu tout un tas de documents concernant différentes personnes dont j'entends appeler certain[e]s en témoignage ici»; *Ibid.*, p. 35, conseil de Ntabakuze : «Monsieur le Président, nous avons reçu ces documents de la même manière et de la même source. En fait, nous avons reçu les nôtres après les leurs»); *Ibid.*, p. 36, conseil de Bagosora : («Deuxième chose : Dans les contacts que nous avons – nous, notre équipe – avec le Rwanda, qui sont des contacts très difficiles, et pour ne rien cacher à la Chambre, pour avoir des documents, en ce qui nous concerne actuellement, au niveau officiel, c'est impossible. Et il est évident que, apparemment, il y a d'autres moyens qui ne sont pas des moyens légaux, j'allais dire ... enfin qui ne sont pas illégaux, mais qui ne sont pas des moyens officiels pour avoir des documents, il est possible que nous soyons peut-être éventuellement obligés de [recourir à ces moyens]. Mais ce que je veux dire, c'est que l'origine du problème, c'est lequel. Si la Défense est obligée d'essayer d'avoir des documents au Rwanda, c'est parce que le Procureur n'a pas fait les efforts pour les obtenir».

[14] Compte rendu de l'audience du 16 décembre 2003, pp. 11 et 12 («Concernant le paragraphe 6, la question des procédures et jugements devant les juridictions rwandaises, nous avons eu une très grosse difficulté pour pouvoir le rédiger. Nous ne savions pas s'il fallait qu'on mette les pseudonymes ou bien s'il fallait qu'on mette le nom des gens, et nous ne voulions pas mettre les deux sur un document qui était susceptible de circuler et de porter atteinte à la préservation de l'identité de ces témoins». Voir l'affaire *Bagosora et consorts,* Requête conjointe de la Défense aux fins d'obtenir la coopération de l'État rwandais conformément a l'article 28 du Statut du Tribunal (Chambre de première instance), 28 juillet 2003.

[15] Affaire *Bagosora et consorts*, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (Chambre de première instance), 10 mars 2004, annexe B (caviardée).

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Prosecution witnesses, the Defence asked questions about other protected witnesses whom it identified by name, again without disclosing their status as protected witnesses[16]. These events indicate that the Defence did not believe that such inquiries would violate the witness protection orders which are, in all material respects, identical to those now under consideration.

13. Some protective orders do expressly authorize reasonable investigations about protected witnesses. The protective orders in the *Gacumbitsi* case, for example, instruct the parties

> "in making [their] legitimate investigations and inquiries, to limit the exposure of witness identifying information and not disclose to any person the fact that the [witness] has testified or will be a witness before the Tribunal"[17].

Virtually all witness protection orders issued at the International Criminal Tribunal for Yugoslavia create a similar exception or qualification[18]. The absence of an express exception in the decision presently under consideration does not reflect a choice to the contrary; rather, it simply reflects which is implied.

14. Though inquiries to immigration authorities may affect more Defence than Prosecution witnesses, this does not establish that investigations in general pose a substantially greater burden on the appearance of Defence witnesses. Prior inconsistent statements of Prosecution witnesses given in the course of proceedings before Rwan-

[16] Such questions were asked, for example, about Witness BC, AE and XBG (T. 14 July 2003 pp. 59-60; other references occurred during open session and are omitted for witness protection reasons).

[17] *Gacumbitsi,* Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, p. 7; *Gacumbitsi,* Decision on Defence Motion for Protective Measures for Defence Witnesses (TC), 25 August 2003, p. 4.

[18] *Boskoski and Tarculovksi,* Interim Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses (TC), 28 April 2005 ("except as may be reasonably necessary to allow them to prepare and participate in these proceedings and present a defence ..."); *Cermak and Markac,* Decision and Order on Prosecution's Motion for Protective Measures for Victims and Witnesses (TC), 1 April 2004 ("except as reasonably necessary to allow them to prepare for and participate in these proceedings and present a defence..."); *Seselj,* Decision on "Prosecution's Motion for Non-Disclosure of Materials Provided Pursuant to Rules 66 (A) (ii) and 68 and for Protective Measures for Witnesses During the Pre-Trial Phase" (TC), 11 February 2004, ("[u]nless directly and specifically necessary for the preparation and presentation of this case, the Accused shall not disclose to the public ..."); *Stanisic and Simarovic,* Decision on Prosecution Motion for Protective Measures (TC), 1 August 2003 ("except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the accused's case ..."; *Oric,* Decision on Confidential Prosecutor's Motion for Protective Measures and Nondisclosure (TC), 28 July 2003.

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contre-interrogatoire des témoins à charge, la Défense a posé des questions sur d'autres témoins protégés qu'elle a désignés par leurs noms, toujours sans révéler qu'ils étaient des témoins protégés[16]. Ces faits indiquent que la Défense n'estimait pas que de telles demandes de renseignements violeraient les décisions de protection de témoins qui sont, sur tous les points essentiels, identiques à celles examinées en ce moment.

13. Certaines décisions de protection accordent expressément l'autorisation de mener des enquêtes légitimes sur les témoins protégés. Celles rendues dans l'affaire *Gacumbitsi*, par exemple, ordonnent qu'

> « au cours de ses enquêtes et recherches légitimes, [chaque partie] limite les possibilités de fuite des informations permettant d'identifier les témoins et ne révèle à personne le fait qu'un témoin [...] a comparu ou comparaîtra devant le Tribunal »[17].

Presque toutes les décisions de protection de témoins rendues par le Tribunal pénal international pour l'ex-Yougoslavie comportent une exception ou une restriction similaire[18]. Loin de signifier que la Chambre a opté pour le contraire, l'absence d'une exception expresse dans les décisions à l'étude traduit simplement une présupposition implicite.

14. Il se peut que les recherches menées auprès des autorités des services de l'immigration nuisent plus aux témoins à décharge qu'aux témoins à charge, mais cela ne prouve pas qu'en général, les enquêtes rendent la comparution des témoins à décharge beaucoup plus difficile. Les déclarations antérieures contradictoires faites par

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[16] Ces questions portaient par exemple sur les témoins BC, AE et XBG (compte rendu de l'audience du 14 juillet 2003, pp. 57 à 59 ; d'autres témoins ont été mentionnés en audience publique, mais la Chambre ne les citera pas pour assurer leur sécurité).

[17] Affaire *Gacumbitsi,* Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins (Chambre de première instance), 20 mai 2003, p. 8 ; Décision relative à la requête de la Défense aux fins de mesures de protection en faveur des témoins à décharge (Chambre de première instance), 25 août 2003, p. 3.

[18] Affaire *Boskoski et Tarculovksi, Interirn Decision on Prosecution S Motion for Protective Measures for Victims and Witnesses,* (Chambre de première instance), 28 avril 2005 « sauf si, dans une mesure raisonnable, cela leur est nécessaire pour se préparer et prendre part aux débats ainsi que pour présenter leurs moyens ... ») [traduction alignée sur la citation suivante, les deux textes étant presque identiques en anglais] ; affaire *Cermak et Markaf,* Décision et ordonnance relatives à la requête de l'accusation aux fins de mesures de protection en faveur de victimes et de témoins (Chambre de première instance), 1er avril 2004 (« ... sauf si, dans une mesure raisonnable, cela leur est nécessaire pour se préparer et prendre part aux débats ainsi que pour présenter leurs moyens » ; affaire *Seielj,* Décision relative à la requête de l'accusation aux fins de non divulgation de pièces communiquées en application des articles 66 A) ii) et 68 du Règlement et aux fins de mise en place de mesures de protection de témoins pendant la mise en état de l'affaire (Chambre de première instance), 11 février 2004 (« A moins que cela ne soit directement et spécifiquement nécessaire à la préparation et à la présentation de sa cause, l'accusé ne communiquera au public... ») ; affaire *Stanišić et Simatović,* Décision relative à la requête de l'accusation aux fins de mesures de protection (Chambre de première instance), 1er août 2003 (« ... excepté lorsque cette divulgation à certains membres du public est [...] directement et spécifiquement nécessaire à la préparation et à la présentation de la cause de l'accusé » ; affaire *Oric,* Décision relative aux requêtes confidentielles de l'accusation aux fins de mesures de protection et de non-divulgation (Chambre de première instance), 28 juillet 2003.

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dan courts, which were introduced during the present trial by the Defence on several occasions, could also (if revealed) have serious consequences under the law of that jurisdiction[19].

15. No showing has been made that the document from the national immigration authorities was obtained by the Prosecution in violation of any law, domestic or international. The claims of confidentiality asserted by the Defence are speculative. At the moment, the Chamber has no knowledge of the manner by which the document was obtained, or its content. The special protection afforded to lawyer-client communications is circumscribed by Rule 97 as "between lawyer and client". Information which has been disclosed to a third party, with the consent of the client, is not governed by the cloak of privilege. Violation of national law might be a consideration in determining whether evidence should be excluded under Rule 95, as having been

> "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

The Chamber cannot consider whether evidence should be excluded under Rule 95 without more concrete information about the content of the document; the means by which it was obtained; and the law which was allegedly broken. The burden to make such a showing would rest with the Defence.

16. The Defence has suggested that the probative value of statements given to immigration authorities is minimal because of the particular vulnerability of asylum seekers, and is greatly outweighed by the alleged intimidating effect of such inquiries on prospective witnesses. Whether an alleged discrepancy in a witness's statement to immigration authorities affects the credibility of testimony is a matter for the Chamber's appreciation based on a variety of factors, including the vulnerability felt by refugee claimants which could lead to inaccurate representations. As long as Prosecution investigations are conducted in scrupulous adherence to the principles set out in this decision, protected witnesses are insulated from any prejudice arising from cooperation with the Tribunal.

17. The Chamber concludes that its prior decisions were correct and that there is no need to modify the existing Defence witness protection orders. Investigations by the Prosecution which do not, directly or indirectly, reveal that the protected person is a witness are permitted. The same rule applies – and did apply during the Prosecution case – to the Defence. If the Defence believes that a witness is in a particularly precarious situation, such that any indication of cooperation with the Tribunal could be a danger to the witness's security, then special protective measures may be sought. In the absence of further submissions, however, the Chamber would expect such cases to be exceptional.

[19] This danger should, however, be obviated for Prosecution and Defence witnesses alike by ensuring that any inconsistencies which could identify the witness are raised only in closed session.

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des témoins à charge devant les juridictions rwandaises, que la Défense a produites à plusieurs reprises au cours de la présente instance, pourraient aussi (si elles étaient révélées) avoir des conséquences graves en droit rwandais[19].

15. Rien ne prouve que le Procureur a violé une règle de droit interne ou international pour obtenir le document visé des services de l'immigration. Le caractère confidentiel invoqué par la Défense relève de la conjecture. En ce moment, la Chambre n'est informée ni de la manière dont le document a été obtenu ni de sa teneur. L'article 97 du Règlement limite le bénéfice de la protection spéciale accordée aux communications échangées entre l'avocat et son client à celles qui sont effectivement «échangées entre un avocat et son client». Des renseignements communiqués à un tiers, avec le consentement du client, ne sont pas couverts par le secret professionnel. La violation du droit interne peut être prise en compte pour décider du rejet d'un élément de preuve en vertu de l'article 95 du Règlement, au motif qu'il s'agit d'un élément

> «obtenu par des procédés qui entament fortement sa fiabilité ou dont l'admission irait à l'encontre de l'intégrité de la procédure et lui porterait gravement atteint».

La Chambre ne saurait rechercher s'il y a lieu de rejeter un élément de preuve en application de l'article 95 du Règlement si elle ne dispose pas de renseignements plus concrets sur la teneur du document, les moyens par lesquels il a été obtenu et la règle de droit qui aurait été violée. Il incomberait à la Défense de fournir ces renseignements.

16. Selon la Défense, la valeur probante des déclarations recueillies par les autorités des services de l'immigration est négligeable du fait de la vulnérabilité singulière des demandeurs d'asile et beaucoup moins importante que l'intimidation des témoins potentiels provoquée par les recherches tendant à l'obtention de ces déclarations. Il revient à la Chambre de décider, à la lumière de divers éléments tels que la vulnérabilité des demandeurs d'asile qui pourrait aboutir à des déclarations inexactes, si une contradiction relevée dans la déclaration faite par un témoin devant ces autorités mine la crédibilité de sa déposition. Tant que le Procureur mène ses enquêtes dans le strict respect des principes énoncées dans la présente décision, les témoins protégés ne peuvent subir aucun préjudice du fait de leur coopération avec le Tribunal.

17. La Chambre en conclut que ses décisions antérieures étaient correctes et qu'il n'y a pas lieu de modifier les mesures de protection des témoins à décharge en vigueur. Le Procureur est autorisé à mener des enquêtes qui ne révèlent ni directement ni indirectement que la personne protégée est un témoin. La même règle s'applique – et s'est appliquée lors de la présentation des moyens à charge – à la Défense. Si la Défense estime qu'un témoin se trouve dans une situation tellement précaire que toute mention de sa coopération avec le Tribunal pourrait compromettre sa sécurité, elle peut solliciter des mesures de protection spéciales. Les parties n'ayant pas présenté d'autres arguments sur ce point, la Chambre pense toutefois qu'il s'agit là de situations exceptionnelles.

[19] Il faut cependant éviter ce danger aux témoins à charge et à décharge en veillant à ce que toute contradiction qui pourrait conduire à l'identification du témoin ne soit évoquée qu'à huis clos.

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(iii) *Transmittal of Prosecution Letter to Defence Witnesses*

18. The Prosecution's proposed witness protection order requests the Registry to transmit a letter to Defence witnesses inviting them to meet with the Prosecution before their testimony. Although the Defence teams, whether out of courtesy or obligation, have already agreed to undertake reasonable efforts to transmit these letters, the Prosecution alleges an absence of good faith based on the small number of positive responses from Defence witnesses[20].

19. The Chamber is satisfied that the Defence teams have conveyed the Prosecution request to their witnesses in good faith[21]. The low rate of favourable responses does not, in itself, demonstrate bad faith. Under these circumstances, there is no need to circumvent the Defence by way of the Registry. Protection orders have in the past consistently required that such requests be funnelled through the Defence, and no precedent to the contrary has been cited by the prosecution[22].

(iv) *Prohibition on Contact With Defence Witnesses Limited to "Prosecution Counsel in this Case"*

20. The Prosecution requests that the prohibition on contact with Defence witnesses be narrowed from "the Prosecution and any representative acting on its behalf" to "Prosecution counsel in this case". The prohibition would then be limited to those who are entitled to know the identity of Defence witnesses, as the protection order is currently formulated.

21. The restriction in the proposed order is unsupported by any precedent, or by argumentation as to why the obligation should be restricted to counsel. The principle of notification to the Defence would be seriously undermined, and could leave witnesses feeling intimidated by unexpected contact by the Prosecution. While coincidental and inadvertent contact with a Defence witness is an unavoidable possibility, the Prosecution can fulfil its obligations simply by asking its interviewees whether they are already a Defence witness. If the witness answers affirmatively, then the interview must terminate and the usual procedure and channels for requesting an interview must be followed.

[20] Motion, para. 53.

[21] See e.g. T. 21 April 2005 pp. 24-26.

[22] *Bizimungu et al.,* Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 2 February 2005, p. 6; *Muhimana,* Decision on Defence Motion for Protective Measures for Defence Witnesses (TC), 6 July 2004, paras. 5, 13; *Bizimungu et al.,* Decision on Defence Motion for Protective Measures for Defence Witnesses (TC), 8 June 2004, p. 5; *Kamuhanda,* Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses (TC), 22 March 2001.

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iii) *Transmission de la lettre du Procureur aux témoins à décharge*

18. Le projet de décision de protection de témoins présenté par le Procureur demande au Greffe de transmettre aux témoins à décharge une lettre les invitant à s'entretenir avec le Procureur avant leur comparution. Les équipes de défense ont déjà accepté, par courtoisie ou par obligation, de s'employer raisonnablement à transmettre ces lettres, mais le Procureur leur reproche de ne pas être de bonne foi compte tenu du petit nombre de réponses positives qu'il a reçues des témoins à décharge[20].

19. La Chambre est convaincue que les équipes de défense transmettent en toute bonne foi la demande du Procureur à leurs témoins[21]. Le simple fait qu'il y ait très peu de réponses favorables ne constitue pas la preuve d'une quelconque mauvaise foi. Dans ces circonstances, il n'est pas nécessaire de se servir du Greffe pour contourner la Défense. Les décisions de protection rendues par le passé ordonnent systématiquement que les demandes de cette nature passent par la Défense et le Procureur n'a cité aucun précédent allant dans le sens contraire[22].

iv) *Limitation de l'interdiction d'entrer en contact avec les témoins à décharge aux « substituts du Procureur chargés de l'affaire »*

20. Le Procureur demande que l'interdiction d'entrer en contact avec les témoins à décharge qui touche actuellement «le Procureur ainsi que tout représentant agissant en son nom» ne s'applique dorénavant qu'aux «substituts du Procureur chargés de l'affaire». L'interdiction serait ainsi limitée aux personnes qui ont le droit de connaître l'identité des témoins à décharge, d'après le libellé de son actuel projet de décision de protection.

21. La restriction prévue dans le projet de décision n'est étayée ni par un précédent ni par des arguments tendant à expliquer pourquoi l'obligation doit être limitée aux substituts du Procureur. Elle porterait gravement atteinte au principe qui veut que la Défense soit préalablement informée de tout contact et pourrait mettre les témoins en état d'intimidation lorsque des membres du Bureau du Procureur prendraient inopinément contact avec eux. Il n'est pas possible d'éviter tout contact accidentel avec un témoin à décharge, mais le Procureur peut s'acquitter de ses obligations en demandant tout simplement aux personnes qu'il interroge si elles sont des témoins à décharge. Si le témoin répond par l'affirmative, le Procureur doit interrompre l'entretien et recourir à la procédure et aux voies communément suivies pour solliciter des entrevues.

[20] Requête, para. 53.

[21] Voir par exemple le compte rendu de l'audience du 21 avril 2005, pp. 25 à 28.

[22] Affaire *Bizimungu et consorts, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (Chambre de première instance), 2 février 2005, p. 6; affaire *Muhimana,* Décision relative à la requête de la Défense en prescription de mesures de protection des témoins à décharge (Chambre de première instance), 6 juillet 2004, paras. 5 et 13; affaire *Bizimungu et consorts,* Décision sur la requête de Défense aux fins de mesures de protection des témoins a décharge (Chambre de première instance), 8 juin 2004, p. 4; affaire *Kamuhanda,* Décision relative à la requête de la Défense en prescription de mesures de protection en faveur des témoins de la Défense (Chambre de première instance), 22 mars 2001.

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(v) *Harmonization of Protective Orders*

22. Aside from the specific modifications proposed, the Prosecution argues compliance with divergent witness protection obligations is burdensome and may create an imbalance between the different Defence teams. The Nsengiyumva Defence expresses similar concerns in its submissions. The Chamber agrees and shall order that the Bagosora, Ntabakuze and Kabiligi orders, which are in all material respects identical, shall apply mutatis mutandis to the Nsengiyumva Defence, thus replacing the previous Nsengiyumva Order. For certainty and precision, the Chamber shall adopt the Ntabakuze Order as henceforth applicable mutatis mutandis to the Nsengiyumva Defence and its witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution motion to amend the Defence witness protection orders;

DENIES the Defence objection to the tendering in court of a prior statement of Witness LT-1 on the ground that, by making inquiries to national immigration authorities, the Prosecution obtained the document in violation of the witness protection orders;

ORDERS that the "Decision on Ntabakuze Motion for Protection of Witnesses", decided on 15 March 2004, is henceforth applicable *mutatis mutandis* to the Nsengiyumva Defence and its witnesses.

Arusha, 1 June 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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v) *Uniformisation des décisions de protection*

22. Outre les modifications concrètes proposées, le Procureur soutient qu'il est difficile de s'acquitter d'obligations divergentes tendant toutes à la protection des témoins et que l'exécution de ces obligations peut créer un déséquilibre entre les différentes équipes de défense. Dans ses conclusions, la Défense de Nsengiyumva exprime les mêmes préoccupations. La Chambre souscrit à cette thèse et ordonne que les décisions Bagosora, Ntabakuze et Kabiligi, qui sont identiques sur tous les points essentiels, s'appliquent *mutatis mutandis* à la Défense de Nsengiyumva en remplacement de la décision Nsengiyumva en vigueur. Par souci de clarté et de précision, elle adopte la décision Ntabakuze pour en faire celle qui s'appliquera dorénavant *mutatis mutandis* à la Défense de Nsengiyumva et à ses témoins.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête du Procureur en modification des mesures de protection des témoins à décharge;

REJETTE l'objection de la Défense à ce qu'une déclaration antérieure du témoin LT-1 soit produite aux débats, qu'elle a émise au motif que le Procureur avait obtenu le document en violation de ces mesures de protection de témoins pour avoir mené à cet effet des recherches auprès des services de l'immigration d'un pays;

ORDONNE que la Décision relative à la requête de Ntabakuze aux fins de protection de témoins, rendue le 15 mars 2004, s'applique dorénavant *mutatis mutandis* à la Défense de Nsengiyumva et à ses témoins.

Arusha, le 1er juin 2005.

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Disclosure of Prosecution Data Base and Map 8 June 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Disclosure obligation of the Prosecutor, Disclosure of a database, Expert Witnesses – Adjournment – Premature motion – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 68*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF a "Motion for Disclosure of Prosecution Data Base and Map", filed by the Defence for Ntabakuze on 24 February 2005;

CONSIDERING the Prosecution Response, filed on 2 March 2005; the Prosecution "Written Submissions", filed on 19 May 2005; and the oral submissions of the parties on 16 May 2005;

HEREBY DECIDES the motion.

1. The Defence asks the Chamber to order the Prosecution to disclose a database, said to include 7,000 statements or case files, to two of its expert witnesses for the purpose of furthering their research. The Defence asserts that the database will confirm a statistical analysis by these experts whose conclusions are exculpatory of the Accused and, therefore, subject to disclosure under Rule 68 of the Rules of Procedure and Evidence. The Defence originally requested disclosure of a map which purportedly shows military emplacements in Rwanda, but later did not dispute the Prosecution's claim that the map in question had been entered as Prosecution Exhibit 323[1].

2. The Prosecution states that, in principle, it has no objection to permitting the Defence to review its database of witness statements "subject to certain limitations"[2]. The Defence agrees that access to the database would satisfy its request. Furthermore, it has indicated its willingness to agree to all of the conditions for access set by the

[1] Response, para. 5 (a); T. 16 May 2005 pp. 19-20.
[2] Written Submissions, para. 5 (d).

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Prosecution, except for a request that the Defence waive the right to ask for an adjournment of proceedings based on alleged late disclosure of the material[3].

3. The remaining issue in dispute between the parties appears to be the Prosecution's condition that the Defence waive any requests to adjourn the proceedings because the experts may need additional time to analyse the voluminous material before submitting their report. In the Chamber's view, it is not reasonable to require a waiver when the Defence is unaware of the contents of the data. Furthermore, the issue of adjournment may not arise. The two experts are not on the Defence witness list during the trial segment from 20 June to 29 July 2005. The subsequent session runs from 12 October to 12 December 2005. Consequently, considerable time may pass until the experts are called to testify. According to Defence Counsel, there is no reason at present to believe that the analysis of the data will delay the court in any way but the Defence may come back to the Chamber if the problem arises[4]. At the present stage, the question of adjournment and submissions concerning the timeliness of access to the material are premature. The Chamber does not have sufficient knowledge of the contents of the database to rule on the issue of disclosure obligations. Consequently, the motion is denied but the parties are at liberty to seek a mutually acceptable solution concerning access to the data base.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 8 June 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[3] T. 16 May 2005 pp. 19-20, Counsel for Ntabakuze : ("The position which we find ourselves, I think, is that we are in agreement with the general principles. There is one position that the OTP has taken, which is that asking for a promise ahead of time that we will agree to waive any delay that might be caused by the analysis, the need to analyse this data … The question of principle that still remains is the question of waiver, of any delays that analysis of this data might take … I don't think that we can agree ahead of time to a decision that the Court will need to make …").

[4] T. 16 May 2005 p. 20.

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## *Decision on Sufficiency of Defence Witness Summaries 5 July 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Sufficiency of Defence Witness Summaries, Level of disclosure obligation for the Defence, Level of disclosure obligation for the Prosecutor, Power of the Trial Chamber to order disclosure of existing statements of Defence witnesses, Information of particular importance, Identifying information of the witnesses – Reliability of evidence, Probative value – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73* ter, *73* ter *(B) (iii) (a) and 73* ter *(B) (iii) (b)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Admissibility of Witness DBQ, 18 November 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Admissibility of Evidence of Witness DP, 18 November 2003 (ICTR-98-41)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Dusko Tadic, *Judgement, 15 July 1999 (IT-94-1)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Urgent Motion Requesting Information on Second Session Defence Witnesses", filed on 2 June 2005;

CONSIDERING the Responses of the Defence for Ntabakuze and Nsengiyumva, filed on 10 and 13 June 2005 respectively; and the Prosecution Reply dated 13 June 2005;

HEREBY DECIDES the motion.

### Introduction

1. The Prosecution requests orders compelling the Defence to provide more detailed summaries of the expected evidence of its witnesses scheduled to appear during the second trial session, and fuller information about their identities. The Prosecution argues that the existing summaries are insufficiently detailed to permit reasonable

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investigations, and violate the Chamber's instructions, pursuant to Rule 73 *ter*, to the Defence to provide a "factual summary and not merely the subject matter on which each witness will testify"[1].

2. The Ntabakuze Defence responds that its summaries are adequately detailed and that it is endeavouring to obtain and disclose the few items of identifying information which are lacking. The level of detail that must be disclosed by the Defence does not mirror Prosecution obligations, which are substantially more onerous under the Rules.

3. The Nsengiyumva Defence states that it has provided all identifying information in its possession, and that it cannot provide information that it does not have. It also asserts that that it owes no legal obligation whatsoever to provide witness summaries, relying on excerpts of proceedings in the *Milosevic* case before the International Criminal Tribunal for Yugoslavia, and from a separate opinion in the *Tadic* Appeals Judgement. Summaries have been provided on a purely voluntary basis[2].

## Deliberations

(i) *Sufficiency of Defence Witness Summaries*

4. On 16 May 2005, during a status conference, the Presiding Judge announced that :

> [The Prosecution] want[s] a statement similar to paragraph 15 where you refer to the presiding judge's utterances in the *Media* case; namely, that what shall be provided is a list from the Defence providing a factual summary and not merely the subject matter on which each witness will testify. That statement is not difficult. That's established practice in this Tribunal, and this Chamber supports that. The remaining issue is exactly what flows from that, and that would lead us to a concrete assessment of the specifics of each summary. And we note that some of the summaries that you have drawn our attention to now and you have stated that they are deficient, that may not necessarily be the case, depending on how you assess the situation, but this is a case-by-case basis.
>
> So our advice now is simply to note that you have obtained most of the relief in your motion, and when it comes to the specific – but at the same time the Chamber notes that a lot of information could now appear a bit outdated in view of subsequent developments. For instance, some of the statements have been provided since this motion was written. So we will invite you then, based on these principles that we have outlined, to come back, if need be. And we note that the Defence has stated, in particular Mr. Erlinder, that if they are deficient in any way, they will be happy to provide additional information. So we expect now, based on these directions, that the parties will be able to sort it out, and, if not, we will then deal with these matters point by point as we approach the witnesses. And a good start would be to concentrate, I think, on the witnesses that are coming in the first segment[3].

The authority to require the Defence to provide an indication as to the expected content of its witnesses' testimony flows from Rule 73 *ter* (B) (iii) (b), which permits the Chamber to

[1] T. 16 May 2005 p. 31.
[2] Nsengiyumva Response, paras. 8, 14, 19.
[3] T. 16 May 2005 pp. 31-32.

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> "order that the Defence … file … [a] list of witness the Defence intends to call with … [a] summary of the facts on which each witness will testify".

The Chamber has clearly exercised this authority by virtue of the direction quoted above, which reiterated directions given to the Defence on 14 October and 21 December 2004[4]. In response, as conceded by the Prosecution, the Defence teams have provided additional details as they have become available.

5. As the Chamber has already made clear, no general formulation can determine whether the Defence summaries are adequately detailed. Even if the Chamber were inclined to closely review each of the summaries challenged by the Prosecution, no determination on their sufficiency would be possible until the witness's actual testimony was known. The summaries cannot be evaluated in the abstract : their sufficiency can only be known in relation to actual testimony[5]. Accordingly, ordering the Defence to provide fuller details of the testimony of its witnesses is not an appropriate remedy.

6. Once testimony is elicited which the Prosecution does not believe has been mentioned in the summaries in sufficient detail, a motion can be made for adjournment of the testimony or exclusion. These are precisely the same remedies as are available to the Defence in similar circumstances[6]. The Chamber hastens to add, however, that the Prosecution's disclosure obligations in the Rules and the Statute are more detailed and specific than for the Defence. The level of information about Prosecution testimony does not necessarily provide useful guidance as to the standard of detail required in Defence witness summaries. Testimony of Defence witnesses, unlike the Prosecution witnesses, can be understood as a response to evidence that has already been presented. Nevertheless, the Chamber is mindful of the general principle, applicable to Prosecution and Defence evidence alike, that "[e]vidence whose reliability cannot adequately be tested cannot have probative value"[7]. The Chamber will be guided by these principles in considering objections to Defence testimony on the basis of the insufficiency of their summaries.

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[4] T. 14 October 2004 p. 15 ; T. 21 December 2004 pp. 25-26.

[5] The sufficiency of Prosecution disclosure is evaluated in relation to the testimony as actually given by the witnesses. *Bagosora et al.*, Decision on Admissibility of Witness DBQ (TC), 18 November 2003, paras. 16-23 ; *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003.

[6] *Bagosora et al.*, Decision on Admissibility of Witness DBQ (TC), 18 November 2003, paras. 24-26 ; *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003 ; *Nyiramasuhuko et al.*, T. 24 February 2003 pp. 5-6 ; *Nyiramasuhuko et al.*, T. 28 May 2002 pp. 106-07 ; *Nahimana et al.*, T. 1 March 2001 pp. 35-38. Although, as discussed below, the disclosure obligations on the Prosecution are not the same as those incumbent on the Defence, the same methodology for determining sufficiency must apply in both cases.

[7] *Bagosora et al.*, Decision on Admissibility of Witness DBQ (TC), 18 November 2003, para. 8. The purpose of Defence witness summaries largely coincides with the purpose of Prosecution disclosure, even if the extent of the obligations may be different : *Nyiramasuhuko et al.*, T. 23 February 2005 ("The importance of timely disclosure, be it in the form of a summary, a will-say statement, is to give the other party time and opportunity to prepare their case. When it is not made in a timely manner, prejudice may certainly arise or could arise in the preparation of the other party's case") ; *Galic*, T. 13177 ("Perhaps this is not the very moment to discuss these kind of matters. I would like as a matter of fact, to sit the parties together in respect of the first witnesses, because we have to develop a practice which is – which enables the Prosecution to cross-examine the witness effectively and not to be with empty hands and be taken by surprise").

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7. The authorities relied upon by the Nsengiyumva Defence to establish that it owes no duty of disclosure whatsoever are inapposite. The proceedings in *Milosevic* show only that the Trial Chamber decided not to order more detailed summaries than had already been provided by the Defence. The comments cited do not assist the Chamber in determining what particular standard of detail is adequate, much less how that standard should be applied[8]. The opinions expressed in the *Tadic* Appeals judgement concern the power of the Trial Chamber to order disclosure of existing statements of Defence witnesses[9]. This question is quite distinct from the level of detail which must be provided by the Defence once the Chamber has exercised its discretion to require summaries of Defence witness testimony. This Chamber expects the Defence to continue to provide reasonably informative witness summaries so as to avoid the prospect of postponement or even exclusion of the testimony.

(ii) *Defence Witness Identities*

8. The Chamber has ruled pursuant to Rule 73 *ter* (B) (iii) (a) that personal information of each Defence witness must be provided in the same format as had been provided by the Prosecution in respect of its witnesses[10]. The information of particular importance is the witness's activities in 1994, parentage and birthplace, and country of present residence. The Chamber accepts that the Defence may not be in possession of all this information in respect of each and every witness, but would expect deficiencies to be rare and remedied quickly. Alleged feelings of insecurity by witnesses provide no justification for withholding their place of residence. Exigent witness protection measures are in place to satisfy those concerns. The Defence cannot rely upon expressions of insecurity by witnesses as a basis for refusing to provide witness identifying information.

FOR THE ABOVE REASONS, THE CHAMBER

[8] T. 32124. Furthermore, the Chamber notes that the Prosecution's argument was based on a significantly narrower footing (the need for the Chamber to manage the presentation of the case) than has been argued by the Prosecution here (its need to conduct reasonable investigations in order to meaningfully test the evidence).

[9] *Tadic*, Judgement (AC), 15 July 1999, para. 306.

[10] T. 21 April 2005 p. 2 ([Prosecution Counsel] : "So the key information that potentially disrupts the cross-examinations, leads to the identification, is with respect to parentage, location, and the location specifically with respect to birth and location in Rwanda in 1994. We are not so concerned about location at the present time; merely a country of origin is satisfactory with respect to that. We don't need addresses or postal codes or phone numbers or anything of that sort. But with respect to 1994 and birth, what we really need is to get information down to at least the *secteur* level, the *préfecture*, *commune*, and *secteur*. And the purpose of that is simply to make sure that we're dealing with the same person. You heard me say this morning that when it came to this other fellow on the spelling list, there were some seven different persons that we know of that that could potentially have been. And this is common. There's a lot of similarity in names, and we need to have that kind of information to determine it. MR. President : Yes. Any problem with this? Should be no problem. So we just decide now that there is a need to provide this to the Prosecution. T. May 2005 p. 30 ([The Presiding Judge reading Prosecution requests] : "Roman II : 'Provide comprehensive witness personal information for all of these witnesses by following the standard for attached'. You have the Chamber's support there as well").

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GRANTS the Prosecution request, insofar as witness identifying information provided by the Defence is deficient;

DENIES the motion in all other respects.

Arusha, 5 July 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses 21 July (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Evidence obtained in violation of national law, Statement to a national immigration authority, Credibility of the Witness, Inquiry about Protected Witnesses – Right of the Accused to a fair trial – Standard for Granting Certification of an Interlocutory Appeal – Interpretation, Distinguishable decision – Official languages of the Tribunal – Motion granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 73 (B) and 95*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY, 2 October 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events, 18 November 2003 (IT-98-41); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Nyiramasuhuko's Motion for Certification to Appeal,, 20 May 2004 (ICTR-98-42); Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42)*

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF Requests for certification of appeal filed by the Ntabakuze and Nsengiyumva Defence on 8 June 2005; and by the Kabiligi and Bagosora Defence on 10 June 2005;

CONSIDERING the three Responses filed by the Prosecution on 13 and 14 June 2005; and the Reply filed by the Ntabakuze Defence on 16 June 2005;

HEREBY DECIDES the request.

## Introduction

1. The Defence seeks leave to appeal the Chamber's decision dated 1 June 2005, to the extent that it denied Defence objections to tendering a document in court on the basis that the document must have been obtained in violation of witness protection orders [1]. The context and timing of the objection are important to understand the scope of the Chamber's decision.

2. During the testimony of Defence Witness LT-1 on 26 April 2005, the Prosecution asked the witness whether she had ever given a statement to a national immigration authority [2]. The Defence objected, arguing that the question was laying a foundation to impeach the witness's credibility by improperly introducing a prior statement given by the witness to a national immigration authority. A document in neither of the official languages of the Tribunal had been disclosed by the Prosecution just before the start of the cross-examination, and the Defence anticipated that it was about to be shown to the witness. The Defence argued that any questions concerning statements to national immigration authorities must be disallowed because the Prosecution must have obtained the document in violation of the witness protection orders. Those orders direct that the Prosecution

> "shall not, directly or indirectly, disclose, discuss or reveal any … information" identifying a protected witness [3].

3. The Prosecution responded that it was permitted to make inquiries to third parties about protected witnesses as long as their status as witnesses before this Tribunal was not revealed. Any inquiries by the Prosecution to obtain the document had complied with this requirement. However, the Prosecution refrained from making specific sub-

[1] *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 3 June 2005 ("Modification Decision").

[2] T. 26 April 2005 p. 63.

[3] Three of the Defence witness protection orders are, in substance, identical : *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003. The Nsengiyumva witness protection decision was rendered long before the joinder of the four accused in a single trial : *Nsengiyumva*, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 5 November 1997.

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missions as to the source or nature of the document concerning Witness LT-1[4]. Furthermore, no such submissions were made in court, as the Defence objection had intervened before the document was shown to the witness.

## Deliberations

(i) *Scope of the Present Decision*

4. In relevant part, the Chamber's decision

> "den[ied] the Defence objection to the tendering in court of a prior statement of Witness LT-1 on the ground that, by making inquiries to national immigration authorities, the Prosecution obtained the document in violation of the witness protection orders"[5].

The decision did not, contrary to the submission of the Kabiligi Defence, determine that the document was admissible[6]. In the absence of any submissions on the record concerning the manner in which the document was obtained, the Chamber specifically deferred consideration of whether the document, or questions arising there from, should be excluded under Rule 95 as having been obtained in violation of national law : The claims of confidentiality asserted by the Defence are speculative. At the moment, the Chamber has no knowledge of the manner in which the document was obtained, or its content Violation of national law might be a consideration in determining whether evidence should be excluded under Rule 95, as having been

> "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

The Chamber cannot consider whether evidence should be excluded under Rule 95 without more concrete information about the content of the document; the means by which it was obtained; and the law which was allegedly broken[7].

5. Certification cannot be granted in respect of an issue which the Trial Chamber has not yet decided. Once information concerning the origin of the document has been given by the Prosecution, then the Defence will be in a position to raise objections concerning violations of national or international law[8]. The only ground of objection which was properly before, and decided by, the Chamber was whether the Prosecution had violated the witness protection orders by making inquiries in the manner it had described.

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[4] *Bagosora et al.*, Prosecution Submissions (TC), 28 April 2005, para. 9 ("any material that the Prosecution may have in its possession regarding defence witnesses' statements to immigration authorities has been retrieved without revealing the status of the person as a defence witness").

[5] Modification Decision, p. 9.

[6] Kabiligi Application, para. 6.

[7] Modification Decision, para. 15.

[8] The Nsengiyumva application suggests that the decision "erroneously places the burden of showing that the documents were irregularly obtained, on the defence". This mischaracterizes the decision, which found only that the issue was premature. The Prosecution will be called upon to describe the origin of the document when it seeks to use the document in court. Once its provenance has been established, the Defence will be in a position to make an application under Rule 95.

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(ii) *Standard for Granting Certification of an Interlocutory Appeal*

6. Leave to appeal may be certified under Rule 73 (B) of the Rules of Procedure and Evidence ("the Rules") where a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

Interlocutory appeals under Rule 73 (B) have been described as exceptional; on the other hand, certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence[9].

(iii) *Effect on Conduct of Proceedings or Outcome of the Trial*

7. The Defence argues that "many potential defence witnesses will decline to present themselves for testimony" as a result of the decision[10]. Most defence witnesses are said to be asylum-seekers who fear being returned to Rwanda. Inquiries by the Prosecution to the immigration authorities of the countries in which they have sought refuge will have an intimidating effect on those witnesses and make them reluctant to testify before the Tribunal. This will interfere with the fair trial rights of the Accused, and cause delays and interruptions in the proceedings while measures to compel the appearance of witnesses are obtained and executed.

8. The Prosecution responds that inquiries conducted within the parameters set forth in the decision will not jeopardize the position of any asylum-seeker. The national immigration authorities will not know that the person about whom they have inquired is a witness, much less whether testimony given under a pseudonym corresponds to any particular person. This being the case, there is little or no danger that discrep-

[9] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5; *Nyiramasuhuko et al.,* Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, para. 15 ("It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73 (B) must be exceptional indeed"); *Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Motion for Certification to Appeal" etc., (TC), 20 May 2004, ("The Chamber recalls the jurisprudence that decisions rendered on Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B)"). *Bagosora et al.*, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY (TC), 2 October 2003, para. 4 ("Immediate resolution by the Appeals Chamber will ensure that a substantial category of potential evidence is being correctly evaluated under the Rules"); *Bagosora et al.*, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 18 November 2003 ("The admissibility of pre-1994 events is a question which … has a bearing on the nature of the case which the Defence must confront; the range of evidence which the Chamber should hear; and the scope of evidence relevant to the crimes charged. Further, the Chamber's authority to ensure focused proceedings in the context of criminal charges of broad scope will be materially advanced by an immediate ruling on this addition pre-1994 event").

[10] Ntabakuze Application, para. 4.

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ancies between statements to national immigration authorities and testimony before the Tribunal would ever be discovered by national authorities.

9. The consequences predicted by the Defence would undoubtedly have a significant effect on the fairness and expeditiousness of proceedings. The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers raised by the Defence to be remote in light of the secrecy of the role of the asylum-seeker in proceedings, and the confidentiality of any testimony which might reveal their identity. Nevertheless, the Chamber recognizes that this is a question which may affect a considerable number of Defence witnesses. If the Chamber's interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound. In these circumstances, the Chamber finds that its decision involves an issue that "would significantly affect the fair and expeditious conduct of the proceedings".

(iii) *Materially Advance the Proceedings*

10. The Chamber must next consider whether "immediate resolution by the Appeals Chamber may materially advance the proceedings". The Defence submits that the Chamber's decision is in "flagrant contradiction" with a decision in the case of *Karemera et al.*, which should be resolved by the Appeals Chamber[11]. The Prosecution argues that there is no contradiction with the *Karemera* decision which, unlike the present case, involved an inquiry that disclosed that a person was a witness for the Prosecution. The Defence counters that the witness's real name was never revealed, and that a code name was used to mask the person's true identity from anyone who did not already know it.

11. The Chamber need not determine whether the *Karemera* decision is distinguishable[12]. Whether that is the case or not, resolution of the present controversy by interlocutory appeal will avoid the serious consequences that could result from proceeding throughout the remainder of the Defence case on an incorrect legal footing. On this basis, the Chamber is of the view that immediate resolution of the present controversy may materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS certification of an interlocutory appeal under Rule 73 (B) from that part of the Chamber's "Decision on Motion to Harmonize and Amend Witness Protection Orders", dated 1 June 2005, which denies the Defence objection to the tendering in court of a prior statement of Witness LT-1 on the ground that, by making inquiries to national immigration authorities, the Prosecution obtained the document in violation of the witness protection orders.

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[11] Ntabakuze Application para 4; Kabiligi Application, para. 11. The conflicting decision is : *Karemera et al.*, Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations (TC), 19 April 2005.

[12] The Chamber notes, however, that the decision concerns the interpretation of a differently-worded witness protection order. The witness protection order in question in that case, according to the Trial Chamber, prohibited disclosure "relating to" the witness, which may be broader that "information identifying any witness". *Karemera et al.*, Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations (TC), 19 April 2005, para. 8.

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Arusha, 21 July 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision on Request for Certification concerning Sufficiency of Defence Witness Summaries 21 July 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Statement to a national immigration authority, Effectiveness of Witness Protection, Identification of the Witnesses, Inquiry about Protected Witnesses, Limitation of Protection measures for Witnesses, Defence Ethical Obligations to the Witnesses, Balance between witness protection and the needs of legitimate investigations, Exceptions for particularly vulnerable witnesses, Blanket policy of non-disclosure – Conditions for Interlocutory Appeals, Function of the Certification Motion, Proprio Motu power of the Trial Chamber – Interests of Justice*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 54, 73 (B) and 73* ter *(B) (iii) (a)*

*International Case cited :*

*I.C.T.R. : Appeals Chamber, T*he Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Joint Defence "Request for Certification to Appeal" the Chamber's decision of 5 July 2005 requiring the Defence to disclose to the Prosecution the country of current residence of its witnesses, filed on 11 July 2005;

CONSIDERING the Prosecution Response, filed on 14 July 2005;

HEREBY DECIDES the motion.

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## Introduction

1. On 5 July 2005, the Chamber granted a Prosecution request that the Defence be ordered to supply certain information concerning its witnesses. In relevant part, the Chamber held :

> The Chamber has ruled pursuant to Rule 73 *ter* (B)(iii)(a) that personal information of each Defence witness must be provided in the same format as had been provided by the Prosecution in respect of its witnesses. The information of particular importance is the witness's activities in 1994, parentage and birthplace, and country of present residence. The Chamber accepts that the Defence may not be in possession of all this information in respect of each and every witness, but would expect deficiencies to be rare and remedied quickly. Alleged feelings of insecurity by witnesses provide no justification for withholding their place of residence. Exigent witness protection measures are in place to satisfy those concerns. The Defence cannot rely upon expressions of insecurity by witnesses as a basis for refusing to provide witness identifying information[1].

The Defence requests certification to appeal this order only to the extent that it requires disclosure to the Prosecution of the country of current residence of its witnesses.

2. The significance of a witness's country of current residence was previously addressed by the Chamber in its *Decision on Motion to Harmonize and Amend Witness Protection Orders*, of 1 June 2005 ("Harmonization Decision")[2]. The decision held that the Defence witness protection orders do not bar the Prosecution from making inquiries to national immigration authorities about prior statements given by Defence witnesses, provided that their role as Defence witnesses is not disclosed. The Defence's request for certification of that decision is today granted by the Chamber in a separate decision[3].

## Deliberations

(i) *Grounds of Certification*

3. The Defence argues that the Chamber is not legally empowered by the Statute or the Rules to make such an order. Rule 73 *ter* (B) (iii) (a) of the Rules of Procedure and Evidence ("the Rules") only authorizes the Chamber to order the Defence to disclose the names or pseudonyms of its witnesses. Although the Defence accepts that this may include "identifying particulars" of the witnesses, the current place of residence "has nothing whatsoever to do with identifying the witnesses", and is instead

[1] *Bagosora et al.*, Decision on Sufficiency of Defence Witness Summaries (TC), 5 July 2005, para. 8 (citations omitted). The Prosecution's other request – that the Defence provide more detailed summaries of the content of the witness's testimony – was denied by the Chamber.

[2] *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 2 June 2005. The motion was originally filed on 2 June 2005, and then with a corrected cover page on 3 June 2005.

[3] *Bagosora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

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designed to facilitate inquiries to national immigration authorities. The Defence also argues that the Chamber erred in characterizing the effectiveness of witness protection measures. Many witnesses justifiably fear being returned to Rwanda in retaliation for testifying as Defence witnesses. In these circumstances, the Defence is under an ethical obligation to warn its witnesses of the limitations of the witness protection measures, including the possible consequences of disclosure that the witness had given incorrect information on statements to national immigration authorities. This warning will deter witnesses from coming to give their testimony. Finally, the Defence argues that the Prosecution can independently discover the country of residence of its witnesses, and that the Defence should not be obliged to cooperate in such investigations.

4. None of these grounds of objection to the decision were raised by the Defence in its responses to the original Prosecution motion. An email appended to the Ntabakuze response did indicate that

> "in light of the stated intention of the OTP to carry out immigration investigations of witnesses, the current location of these and other witnesses in the same situation will not be provided"[4].

No arguments to support this refusal were presented, however. The Nsengiyumva response stated that "the information being sought has been supplied regarding most witnesses", but also claimed that it does not "possess that information" in respect of other witnesses who "fear for their safety and security"[5]. The Nsengiyumva response then argued that the Prosecution's request was :

> an attempt to circumvent the Rules of Procedure and Evidence and to illegally encroach onto the field of information that is only supposed to be disclosed to the WVSS [Witness and Victims Support Section]. The previous attempts by the Prosecutor to infringe on confidentiality of witness information are so far causing difficulties for the Nsengiyumva team which is faced with a situation where witnesses will refuse to testify[6].

5. Leave to appeal may be certified under Rule 73 (B) of the Rules where a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

Interlocutory appeals under Rule 73 (B) have been described as exceptional, and the Appeals Chamber has underscored the primacy of Trial Chamber rulings involving an exercise of discretion[7]. Permitting interlocutory appeals of decisions on the basis of arguments which were not advanced in relation to the original motion would encourage repetitive pleadings and could lead to resolution of issues by the Appeals Chamber without a prior decision on the merits by the Trial Chamber. Even though

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[4] Ntabakuze Response, Annex, para. 5.b.

[5] Nsengiyumva Response, para. 2.

[6] Nsengiyumva Response, para. 22.

[7] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5 ("Consequently, as the matters in the Appeal are clearly for the Trial Chamber, as trier of fact, to determine in the exercise of its discretion, in the view of the Appeals Chamber, it does not justify such an exception and should not have been certified").

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a Trial Chamber may at the certification stage revisit the substance of a decision, it does so only within the context of the criteria set out in Rule 73 (B). A certification motion is not an appropriate venue to advance new grounds of argument. A decision to grant certification on the basis of grounds which had not been previously argued could take the responding party by surprise, and circumvent the usual procedure for assessing motions on the merits.

6. The grounds presented by the Defence were not suitably raised in the original motion. The Defence made no arguments concerning the scope of Rule 73 *ter* (B) (iii) (a) or the irrelevance of present country of residence to witness identification. Neither the alleged inadequacy of witness protection measures nor the ethical obligations of counsel were mentioned[8]. The Nsengiyumva response did make reference to the potential effect of disclosure on its witnesses, but did not present any legal arguments to justify non-disclosure. Under these circumstances, the Defence request for certification cannot be granted. It follows that there is no basis for granting the Defence request for a stay of application of the 5 July decision, pending resolution of the interlocutory appeal.

(ii) *Reconsideration on the Merits*

7. In light of the urgency of the questions raised by the Defence to ongoing trial proceedings, the interests of justice nevertheless favour immediate consideration of the arguments raised. Accordingly, the Chamber shall *proprio motu* evaluate the Defence submissions.

(a) Legal Competence to Issue the Order

8. The Defence argues that the Prosecution seeks to obtain the country of current residence of its witnesses not for the purpose of witness identification, but rather to assist it in obtaining statements given to immigration authorities of the states in which they reside. Accordingly, the order is said to fall outside the scope of Rule 73 *ter* (B) (iii) (a).

9. The dichotomy presented by the Defence is not persuasive. State of current residence is a factor which could significantly assist the Prosecution in properly identifying a witness. Information about current country of residence is generally considered as protected information and placed under seal, illustrating that this element may contribute to identifying witnesses. The fact that the information may also be used to determine whether the witnesses have given prior statements to immigration authorities does not negate its ability to assist with identification.

10. Even if it may be argued that the scope of Rule 73 *ter* (B) (iii) (a) is not quite clear, the Chamber has the authority under the general provision in Rule 54 to define, and require disclosure of, information probative of the witness's identity, as well as information that may be relevant to cross-examination of witnesses. That Rule permits the Chamber to

> "issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

[8] Some of the arguments were raised and considered in the Harmonization Decision, against which certification for appeal has been granted (*see* paras. 2 and 12 of the present decision).

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The 5 July decision falls within the scope of this Rule. Finally, state of current residence was routinely provided by the Prosecution in identifying its own witnesses. Such disclosure in relation to Defence witnesses has also taken place in other trials.

(b) Defence Ethical Obligations and the Effectiveness of Witness Protection

11. The Defence indicates that it is bound by ethical obligations to give a warning to its witnesses about the limitations of the Tribunal's witness protection measures, and the possible consequences of leaks of information. That warning will inevitably dissuade witnesses from testifying, thus impairing the presentation of the Defence.

12. The Chamber has, to a large extent, already addressed the merits of this argument in its Harmonization Decision. In that decision, the Chamber carefully weighed the relative claims of witness protection and the needs of legitimate investigations. The scope of permissible investigations was strictly defined so as to insulate witnesses from discovery and interference :

> The essence of the prohibition [in the witness protection orders] is against disclosure of information that would, directly or indirectly, reveal that the person is a witness. The ultimate purpose of witness protection orders is to prevent partisans from one side or the other from harassing or intimidating witnesses for the other side. That purpose is satisfied if the role of the person in the trial proceedings remains secret. Though an inquiry [by the Prosecution] about a person certainly signals interest, it does not necessarily reveal that the person is a witness. The object of the inquiry may, for instance, be a Prosecution source or prospective witness, whose prior statements the Prosecution is under an obligation to obtain and disclose to the Defence. The inquiring party must scrupulously avoid, expressly or impliedly, suggesting that the person is a witness for, or otherwise associated with, one side or the other. If the third party demands explanations which would require revealing that information, then the investigation must cease. Inquiries conducted within these parameters do not give rise to a breach of the witness protection order[9].

The Chamber also noted that the Defence had made such inquiries during the cross-examination of Prosecution witnesses, without believing that it had thereby violated the Prosecution witness protection orders.

13. The Chamber recognized in the Harmonization Decision that there might be exceptions for particularly vulnerable witnesses and invited the Defence to make individual applications for special protective measures[10]. At least one witness has been relieved of the obligation in response to a Prosecution application[11]. The Defence has yet to make such an application despite the Chamber's specific invitation to do so. Such individual applications would assist the Chamber in calibrating the balance between witness protection and adequate disclosure. The Ntabakuze Defence suggest-

[9] Harmonization Decision, para. 11.

[10] Para. 17 ("If the Defence believes that a witness is in a particularly precarious situation, such that any indication of cooperation with the Tribunal could be a danger to the witness's security, then special protective measures may be sought").

[11] The request was granted on at least on occasion : *Bagosora et al.*, Decision on the Prosecution Motion for Special Protective Measures for Witness "A" Pursuant to Rule 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence (TC), 5 June 2002.

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ed procedure that the country of residence be disclosed to the Bench but not to the Prosecution is not in conformity with the Chamber's decision of 5 July.

14. The Defence also argues that

> "nothing prevents the prosecution from making the necessary inquiries to discover that which is discoverable without the Defence and the Defence witnesses themselves being obliged to assist in their investigations"[12].

This statement acknowledges that, with additional effort, the Prosecution may be able to obtain the very information the disclosure of which the Defence protests, and that the only concrete issue is upon whom rests the burden of discovery or disclosure. If so, disclosure of identity could, in reality, lead to discovery of their country of residence by the Prosecution. In the end, therefore, the effect of requiring disclosure of present country of residence should be only marginally more dissuasive than disclosure of identity. Admittedly, the subjective fears of some witnesses may place undue emphasis on the distinction. Where such witnesses are in a particularly precarious or vulnerable position, then applications for special protective measures can be made. In this manner, the balance of convenience assessment can adapt to the individual circumstances of particular witnesses. The needs of those individuals, and the possibility that they might be dissuaded from testifying, do not, however, justify a blanket policy of non-disclosure of country of current residence for Defence witnesses[13].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request for certification.

Arusha, 21 July 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Certification of Appeal concerning Access to Protected Defence Witness Information 29 July 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Witness protection measures, Protection of the identity of the witnesses, Disclosure*

[12] Joint Defence Motion, para. 22.

[13] The kind of warning to witnesses, which according to the Defence is required (Joint Defence Motion para. 20) is a clear exaggeration of the risks involved.

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*Within the Office of the Prosecutor, Restriction to the Prosecution team in the case, Discretionary power of the Tribunal, Balance between the protection of the witnesses and the rights of the Accused – Disclosure obligations of the Prosecutor – Fairness of the Trial – Conditions for Certification of an appeal, Affection of the "the proceedings" and "the trial" – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 68, 69, 73 (B), 75 and 75 (F); Statute, art. 21*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events, 11 March 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY, 2 October 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision for Disclosure Under Rule 68, 1 March 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Nyiramasuhuko's Motion for Certification to Appeal (TC), 20 May 2004 (ICTR-98-42); Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Tihomir Blaškić, *Judgement, 29 July 2004 (IT-95-14)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution "Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decision on Motion to Harmonize and Amend Witness Protection Orders Dated 1 June 2005", filed on 9 June 2005;

CONSIDERING the Responses of the Defence for Kabiligi and for Ntabakuze, filed on 15 and 16 June 2005, respectively;

HEREBY DECIDES the motion.

## Introduction

1. The Prosecution seeks leave to appeal the Chamber's decision not to modify the Defence witness protection orders insofar as they require

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> "[t]he Prosecution team in this case [to] keep confidential to itself all information identifying any witness"[1].

The Prosecution had proposed that the "Prosecution team" be replaced by the words "the Prosecution", thus permitting dissemination of the identity, or information disclosing the identity, of protected Defence witnesses to any person working for the Office of the Prosecutor.

## Deliberations

(i) *Standard for Granting Certification of an Interlocutory Appeal*

2. Leave to appeal may be certified under Rule 73 (B) of the Rules of Procedure and Evidence ("the Rules") where a decision

> "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

Interlocutory appeals under Rule 73 (B) have been described as exceptional; on the other hand, certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence[2].

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[1] *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 3 June 2005 ("the Modification Decision"). Three of the Defence witness protection orders are, in substance, identical : *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003. The Nsengiyumva witness protection decision was rendered long before the joinder of the four accused in a single trial : *Nsengiyumva*, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 5 November 1997. The latter order does not make any reference to, or distinction between, the Prosecution or the "Prosecution team in this case". The Modification Decision declared that the Ntabakuze witness protection order would henceforth apply to the Nsengiyumva Defence and its witnesses.

[2] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004; *Nyiramasuhuko et al.,* Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, para. 15 ("It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73 (B) must be exceptional indeed"); *Nyiramasuhuko et al.*, Decision on Nyiramasuhuko's Motion for Certification to Appeal", etc., (TC), 20 May 2004, para. 16 ("The Chamber recalls the jurisprudence that decisions rendered on Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B)"); *Bagosora et al.*, Decision on Prosecution Request for Certification of Appeal on Admission of Testimony of Witness DBY (TC), 2 October 2003, para. 4 ("Immediate resolution by the Appeals Chamber will ensure that a substantial category of potential evidence is being correctly evaluated under the Rules"); *Bagosora et al.*, Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events (TC), 11 March 2003, para. 4 ("The admissibility of pre-1994 events is a question which … has a bearing on the nature of the case which the Defence

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(ii) *Effect of the Decision on Other Proceedings, and Reciprocal Effect on this Trial*

3. As a preliminary matter, the Chamber observes that Rule 73 (B) requires the Chamber to assess the significance of the decision in relation to "the proceedings" and "the trial". This would appear to refer to the proceedings and the outcome of the trial in the case in which the impugned decision was made. The arguments advanced by the Prosecution, summarized below, primarily concern the impact of the present decision on other trials and other accused persons – in particular, the Prosecution's ability to disclose exculpatory information to other accused, in accordance with its obligations under Rule 68 of the Rules. The Defence argues that these effects are irrelevant under Rule 73 (B).

4. The Chamber accepts that the effect of the present decision on other trials, and the reciprocal effect of a similar holding by other Trial Chambers on this trial, may be considered in determining whether the criteria in Rule 73 (B) are met. If the interpretation in the Modification Decision is adopted by other Chambers, then the effects described by the Prosecution are equally significant for the present trial. In this sense, the decision does affect the "the proceedings" and "the trial" in this case, albeit indirectly. If such reciprocal effects were ignored, then this would lead to the unreasonable conclusion that important decisions would be immunized from interlocutory appeal as long as their immediate effect was felt only on other trials, even if all Trial Chambers had adopted precisely the same approach and were, therefore, mutually affected by the same approach.

(iii) *Fair and Expeditious Conduct of Proceedings or Outcome of the Trial*

5. The first requirement for certification of an appeal under Rule 73 (B) is that the decision

> "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial".

The Prosecution argues that restricting access to witness identities to "the Prosecution team in this case" prevents this trial team from sharing information which may suggest the innocence or mitigate the guilt of an accused in another case. This is contrary to Rule 68, which is fundamental to the fairness of the proceedings. The Modification Decision is also incompatible with Rule 75 (F), which is designed precisely to permit the Prosecution to comply with its disclosure obligations to Defence teams in other trials. The restriction interferes with the Prosecutor's mandate to investigate and prosecute other accused, and will impair the Prosecution's ability to effectively cross-examine witnesses in other cases. The Prosecution employees act under the authority of the Prosecutor, as part of a single entity. Furthermore, no legitimate witness protection purpose is served : the Prosecution, as with the Registry, should be treated as capable of ensuring that witness identities are kept secret.

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must confront; the range of evidence which the Chamber should hear; and the scope of evidence relevant to the crimes charged. Further, the Chamber's authority to ensure focused proceedings in the context of criminal charges of broad scope will be materially advanced by an immediate ruling on this addition pre-1994 event").

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6. The Chamber observes that the effect of the decision for which certification is sought depends on two factors : the scope of the information which is restricted; and the effect of that restriction on the Prosecution's ability to identify evidence which may be relevant to, or exculpatory of, accused in other trials before the Tribunal. The Modification Decision confirmed the restriction in the witness protection orders that "information identifying any [protected] witness" must be kept confidential by "the Prosecution team in this case". As is customary in witness protection orders, the kind of information which could identify a witness is not further defined. Other operative paragraphs refer to the confidential information as

> "[t]he names, addresses, whereabouts, and other identifying information concerning the protected witnesses".

7. The vast majority of testimony of protected witnesses is given before the Tribunal in open session and is, therefore, accessible to anyone in the Office of the Prosecutor. When testimony is heard in closed session, the Chamber's witness protection orders do not necessarily prevent Prosecution Counsel in other cases from being informed of material that may be exculpatory, provided that the identity of the witness is not revealed. For instance, Prosecution staff in supervisory roles may simultaneously be designated as members of multiple trial teams and assist in identifying evidence which is exculpatory[3]. The burden caused by the Modification Decision is that a party must make an application to the Chamber showing reasonable grounds for disclosure, rather than being automatically entitled to the identities of protected Defence witnesses[4].

8. The Chamber acknowledges that denying automatic access to protected information by all employees of the Office of the Prosecutor may make compliance with Rule 68, and sharing of evidence relevant to other trials, somewhat more burdensome. Extra effort will be required by trial teams who wish to exchange salient information without disclosing protected witness identities. Though the Chamber does not believe that this burden conflicts with Rule 68 or the mandate of the Prosecutor, important interests are affected. The Appeals Chamber has stated that

> "[t]he disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal",

and has described the obligation as equal in significance to the Prosecution's obligation to prosecute[5]. Consequently, the Chamber accepts that the restriction "involves

[3] This is explicitly recognized in the decision at para. 7 of the Modification Decision : "[t]he Prosecution may designate anyone, including support staff or senior management, who is actively and directly engaged in work pertaining to this trial".

[4] The Chamber need not here determine whether Rule 68 obliges the Prosecution to make the application. Material which is "reasonably accessible to the Defence" may "arguably" not be subject to any disclosure obligation under Rule 68, according to the Appeals Chamber. *Blaskic*, Judgement (AC), 29 July 2004, para. 296. Furthermore, there is no need to decide whether the Defence is equally well-placed to make such an application on the basis of access to public transcripts or other information disclosed by the Prosecution. One such application was made by a Defence team in the present case, on the basis of disclosure of a redacted witness statement : *Bagosora et al.*, Decision for Disclosure Under Rule 68 (TC), 1 March 2004.

[5] *Blaskic*, Judgement (AC), 29 July 2004, para. 264; *Kordic and Cerkez*, Judgement (AC), 17 December 2004 para. 183.

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an issue that would significantly affect the fair and expeditious conduct of the proceedings".

(iv) *Would Immediate Resolution Advance the Proceedings?*

9. The Chamber must next consider whether "immediate resolution by the Appeals Chamber may materially advance the proceedings". The Prosecution submits that the issues raised by the present certification request are of such importance that they cannot await the ultimate result of the present trial. Similar restrictive language in other witness protection orders has not been subject to the interpretation it has received in the Modification Decision, and the issues are important to the operations of all of the Trial Chambers and of the Appeals Chamber itself.

10. The Chamber has broad discretion under Article 21 of the Statute and Rules 69 and 75 to fashion effective and fair witness protection measures. The Chamber must exercise its power in accordance with the rights of the accused. Allowing the Prosecution as a whole to have access to protected Defence witness information in this case could have profound witness protection implications. Under Rule 75 (F),

> "protective measures shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules".

If Defence witness identities in this case were disseminated to all Prosecution trial teams, then those identities could, under Rule 75 (F), be disclosed to Defence teams in other cases without any application to this Trial Chamber. The Defence argues that such automatic disclosure could lead to wide distribution of the witness's identity to other accused and, in turn, deter the appearance of Defence witnesses.

11. The Chamber is of the view that the contested part of the Modification Decision raises important questions of principle, including the role of the Prosecution, the need for effective and meaningful witness protection measures, and the necessity to preserve the flow of information that might concern the accused. An interlocutory appeal will ensure that proper procedures are followed in respect of this important and sensitive category of information. Procedures which are subsequently found to be improper could give grounds for appeal at the conclusion of this trial. The legal questions involved affect the proper conduct of every trial before the Tribunal, and the relationship of proceedings to one another. Consequently, the Chamber accepts that an interlocutory resolution of this question "may materially advance the proceedings".

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS certification of an interlocutory appeal under Rule 73 (B) from that part of the Chamber's "Decision on Motion to Harmonize and Amend Witness Protection Orders", dated 1 June 2005, which denies the Prosecution motion to modiS, the Defence witness protection orders so as to permit the dissemination of protected witness information to any person working for the office of the Prosecutor.

Arusha, 29 July 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Order assigning judges to an Interlocutory Appeal before the Appeals Chamber 15 August 2005 (ICTR-98-41-AR73)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Interlocutory Appeal, Assignment of judges*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 73 (C); Statute, art. 13 (4)*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Decision on Motion to Harmonize and Amend Witness Protection Orders", rendered by the Trial Chamber on 1st June 2005 and filed on 3 June 2005, and the "Certificate of Appeal concerning Access to Protected Defence Witness Information", filed on 29 July 2005;

NOTING the "Prosecutor's Interlocutory Appeal, pursuant to Rule 73 (C), respecting the decision of Trial Chamber I on the Prosecutor's Motion to Harmonize and Amend Witness Protection Orders", filed on 4 August 2005;

CONSIDERING Article 13 (4) of the Statute of the Tribunal and Rule 73 (C) of the Rules of Procedure and Evidence;

CONSIDERING the composition of the Appeals Chamber of the Tribunal as set out in Document IT/237, issued on 21 July 2005;

HEREBY ORDER that, in *Prosecutor v. Théoneste Bagosora et al.*, Case n° ICTR-98-41-AR73, the Appeals Chamber shall be composed as follows.

Judge Theodor Meron

Judge Mohamed Shahabuddeen

Judge Florence Mumba

Judge Fausto Pocar

Judge Andrésia Vaz

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

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Done this 15th day of August 2005, The Netherlands.

[Signed] : Theodor Meron

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## *Order assigning Judges to an Interlocutory Appeal before the Appeals Chamber 16 August 2005 (ICTR-98-41-AR73(B))*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Interlocutory Appeal, Assignment of judges*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 73 (C); Statute, art. 13 (4)*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Decision on Motion to Harmonize and Amend Witness Protection Orders", rendered by the Trial Chamber on 1st June 2005 and filed on 3 June 2005, and the "Certification of Appeal concerning Prosecution Investigation of Protected Defence Witness", filed on 21 July 2005;

NOTING the "Joint Defence Appeal under Rule 73 (B) from Part of the Conclusion in the 1st June 2005 Trial Chamber I 'Decision on Motion to Harmonize and Amend Witness Protection Order'", filed on 28 July 2005, as corrected by the Corrigendum filed on 28 July 2005, and the Prosecution's Response, filed on 8 August 2005;

CONSIDERING Article 13 (4) of the Statute of the Tribunal and Rule 73 (C) of the Rules of Procedure and Evidence;

CONSIDERING the composition of the Appeals Chamber of the Tribunal as set out in Document IT/237, issued on 21 July 2005;

HEREBY ORDER that, in *Prosecutor v. Théoneste Bagosora et al.*, Case n° ICTR-98-41-AR73 (B), the Appeals Chamber shall be composed as follows.

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Judge Theodor Meron
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Fausto Pocar
Judge Andrésia Vaz

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

Done this 16th day of August 2005, At the Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Order replacing a Judge on an Interlocutory Appeal before the Appeals Chamber 25 August 2005 (ICTR-98-41-AR73)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva - Interlocutory Appeal, Assignment of judges, Replacement of a judge*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 15 (A)*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Order Assigning Judges to an Interlocutory Appeal before the Appeals Chamber", filed 16 August 2005, assigning Judge Andrésia Vaz to the interlocutory appeal in the case of *Prosecutor v. Théoneste Bagosora, et al.*, ICTR-98-41-AR 73 (B);

NOTING that Judge Vaz has served in the Trial Chamber for the case of *Prosecutor v. Théoneste Bagosora, et al.,* ICTR-98-41-T;

CONSIDERING Rule 15 (A) of the Rules of Procedure and Evidence of the International Tribunal;

CONSIDERING the composition of the Appeals Chamber of the Tribunal as set out in Document IT/237, issued on 21 July 2005;

HEREBY ASSIGN, with immediate effect, Judge Mehmet Güney to replace Judge Andrésia Vaz in the present case;

AND ORDER that the Appeals Chamber in the case of *Prosecutor v. Théoneste Bagosora, et al.*, ICTR-98-41-AR73 (B), shall now be composed as follows :

Judge Theodor Meron
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar

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

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## *Ordonnance portant remplacement d'un juge dans un appel interlocutoire devant la Chambre d'appel 25 août 2005 (ICTR-98-41-AR73)*

(Original : Anglais)

Chambre d'Appel

Juge : Theodor Meron, Président de la Chambre d'Appel

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Appel interlocutoire, Désignation de juges, Remplacement d'un juge*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 15 (A)*

NOUS, THEODOR MERON, Président de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (le «Tribunal international»),

Vu l'Ordonnance portant affectation de juges dans un appel interlocutoire devant la chambre d'appel, déposée le 16 août 2005, et portant affectation de la juge Andrésia Vaz dans l'appel interlocutoire dans l'affaire n° ICTR-98-41-AR73, *Le Procureur c. Théoneste Bagosora et consorts*;

NOTANT que la juge Vaz a siégé à la Chambre de première instance saisie de l'affaire n° ICTR-98-41-T, *Le Procureur c. Théoneste Bagosora et consorts*;

Vu l'article 15 (A) du Règlement de procédure et de preuve du Tribunal international;

VU la composition de la Chambre d'appel du Tribunal énoncée dans le document n° IT/237 en date du 21 juillet 2005;

AFFECTONS avec effet immédiat le juge Mehmet Güney en remplacement de la juge Andrésia Vaz dans cette affaire;

ORDONNONS que dans l'affaire n° ICTR-98-41-AR73, *Le Procureur c. Théoneste Bagosora et consorts*, la Chambre d'appel sera composée des juges suivants :

Theodor Meron
Mohamed Shahabuddeen
Florence Mumba
Mehmet Güney
Fausto Pocar

Fait en français et en anglais, le texte anglais faisant foi.

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Done this 25th day of August 2005, At The Hague, The Netherlands.

[Signed] : Theodor Meron

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Fait le 25 août 2005, à La Haye (Pays-Bas).

[Signé] : Theodor Meron

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## *Order for Transfer of Prosecution Witness DO 15 September 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judge : Erik Møse, Presiding Judge

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Detained Witness, Transfer to the Tribunal, Conditions for the Transfer, Agreement of the Requested State*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A), 90* bis *and 90* bis *(B)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution's Request for the Transfer of Detained Witnesses, 4 June 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Order for Transfer of Defence Witnesses DC, DM, DN, DO and DR, Pursuant to Rule 90* bis*, 2 October 2003 (ICTR-2001-71)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

BEING SEIZED of the Motion filed by the Nsengiyumva Defence on 18 May 2005;

HEREBY DECIDES the motion.

1. On 14 October 2004, The Chamber granted the Nsengiyumva Defence request to recall Prosecution Witness DO, who had testified on behalf of the Prosecution in late-June and early-July 2003[1]. The Nsengiyumva Defence now requests the Chamber to order the transfer of the witness, who is detained in Rwanda, under Rule 90 *bis* of the Rules. Rule 90 *bis* (B) sets two conditions for such an order : first that "the witness is not required for any criminal proceedings in the territory of the requested State during the period the witness is required by the Tribunal; and second, that the "transfer …does not extend the period of his detention as foreseen by the requested State". The Registry has advised the Chamber that the Government of Rwanda has expressed a willingness to transfer the witness to Arusha, which implies that the two conditions

[1] T. 14 October 2004, p. 23. The witness was previously transferred to Arusha under Rule 90 *bis* for that testimony. *Bagosora et al.*, Decision on the Prosecution's Request for the Transfer of Detained Witnesses (TC), 4 June 2003.

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set out in Rule 90 *bis* (B) are satisfied[2]. On this basis, the Chamber finds that the requirements for the witness's transfer under Rule 90 *bis* are met.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, conditional upon the agreement of the Government of Rwanda, that the individual designated by the pseudonym DO shall be temporarily transferred pursuant to Rule 90 *bis* of the Rules to the Detention Unit in Arusha;

REQUESTS the Government of Rwanda to facilitate the transfer in cooperation with the Registrar and the Tanzanian Government;

INSTRUCTS the Registrar to :

– transmit this decision to the Governments of Rwanda and Tanzania;
– ensure the proper conduct of the transfer, including the supervision of the witnesses in the Tribunal's detention facilities;
– remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention, and as soon as possible, inform the Trial Chamber of any such change.

Arusha, 15 September 2005.

[Signed] : Erik Møse

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## *Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination 19 September 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Standard for recalling a witness, Good Cause, Inconsistencies between testimony and statements, Inconsistencies between post-testimony statements and evidence – Right of the Accused to a fair trial, Right of the Accused to examine witnesses testifying against him – Motion denied*

*International Instrument cited :*

[2] *Ndindabahizi*, Order for Transfer of Defence Witnesses DC, DM, DN, DO and DR, Pursuant to Rule 90 *bis* (TC), 2 October 2003, para. 2.

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*Rules of Procedure and Evidence, rule 91 (B)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Decision on the Defence Motion for the Re-examination of Defence Witness DE, 19 August 1998 (ICTR-95-1); Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001 (ICTR-98-44A); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004 (ICTR-98-41)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Defence "Extremely Urgent Motion to Recall Prosecution Witness OAB for Cross-Examination Pursuant to Rules 54, 90 (G), 73 (A), 91 (B) of the Rules of Procedure and Evidence, and Articles 19 and 20 of the Statute", filed by Counsel for Nsengiyumva on 8 July 2005;

CONSIDERING the Response of the Prosecution, filed on 13 July 2005; and the Reply of the Nsengiumva Defence, filed on 3 August 2005.

HEREBY DECIDES the motion.

## Introduction

1. On 24 and 25 June 2003, Prosecution Witness OAB testified in the present trial and was cross-examined by the Defence. Prior to his testimony, the witness had made two statements to Prosecution investigators, which had been duly disclosed to the Defence. After his testimony, Witness OAB made four additional written statements, which were also disclosed to the Defence. According to the Defence motion, contradictions between the statements and the testimony, as well as new allegations against the Accused, show that the witness gave false testimony and must be recalled for further cross-examination.

## Deliberations

2. The Chamber has previously set forth the standard for recalling a witness :

> A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness

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> originally testified. The right to be tried with[out] undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature[1].

3. Similarly, in another decision the Chamber held as follows :

> The Defence may draw the Chamber's attention to inconsistencies between testimony of witnesses before this Chamber and any declarations obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit motions for their recall; if there is no need for the witness's explanation of the inconsistency, because the inconsistency is minor or its nature is self-evident, then the witnesses will not be recalled[2].

4. Based on these principles, the Chamber will consider whether there is good cause to recall Witness OAB. Inconsistencies between testimony and statements form part of this evaluation. In view of the Defence submissions, it is recalled that Rule 91 (B) does not authorize the Chamber to recall a witness who is suspected to have given false testimony but only enables the Chamber to order investigations.

5. The Defence has pointed out several matters that allegedly require further cross-examination[3]. Two events relate primarily to statements OAB-1 and OAB-2, dated 17 January 1999 and 28 January 2000, respectively. The rape and murder of Theresa Longin was mentioned in the first but not in the second statement, whereas a meeting in Gisenyi on 7 April 1994 figured in the second but not in the first document. The Defence did cross-examine Witness OAB about these two alleged discrepancies[4]. The Chamber has also reviewed the four subsequent statements (OAB-3 to OAB-6, dated from 3 September 2003 to 23 May 2005). The fact that they do not contain any reference to these two events is not a sufficient reason to recall the witness.

6. Another incident, involving Prefect Zilimwabagabo and the Director of a printing school (referred to in OAB-2 and OAB-4), was also dealt with during cross-examination of Witness OAB[5]. Therefore, further testimony of the witness is not necessary. The event concerning a woman married to a man named Manu was mentioned in OAB-2 and OAB-3. The differences between these two statements do not require that the witness be recalled.

7. New allegations in the four post-testimony statements do not, in themselves, prejudice the Accused, as they do not constitute evidence against him. Therefore, the witness's accounts (in OAB-3 and OAB-5) concerning a Tutsi husband of a white woman and a man named Innocent do not require further cross-examination. The situation is similar as regards certain meetings with *Interahamwe* members that took place in April and June 1994. The Chamber has not found inconsistencies between post-testi-

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[1] *Bagosora et al.,* Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6 (internal citations omitted). See also *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-examination of Defence Witness DE, August 1998, para. 14.

[2] *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, para. 8.

[3] The Defence has listed "at least eight events" (Defence motion para. 20) but some of them are interrelated.

[4] T. 25 June 2003 pp. 45-46; T. 24 June 2003 pp. 47-50.

[5] The Defence incorrectly states that this incident was included in OAB-3 and OAB-4.

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mony statements and Witness OAB's evidence that justify his recall. In its evaluation, the Chamber has noted that OAB-3, OAB-4 and OAB-6 focus on the alleged role of Joseph Nzirorera, Felicien Kabuga and Hassan Ngeze, respectively.

8. The Defence further argues that information in the latest post-testimony statement (OAB-6) made by the witness indicates that attempts were made to influence his testimony in another case before the Tribunal, and falsely implicate Nsengiyumva in certain crimes. The Chamber notes that the alleged attempts to influence the witness were made about two years after his testimony in the present case. They cannot therefore have affected the evidence. Moreover, according to that written statement, the witness refused to alter his testimony.

9. The Defence motion is denied. In view of the Defence submissions it should be added that this conclusion is in conformity with Articles 19 and 20 of the Statute, according to which the Accused has the right to a fair trial and to examine witnesses testifying against him, as well as case law[6].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 19 September 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[6] This Chamber granted the Defence request to recall Prosecution Witness PB-1 for further cross-examination (T. 18 May 2005, p.7), bearing in mind that the Prosecution did not object. The Defence has also referred to *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001 (TC). That decision is in several respects distinguishable from the present decision.

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## *Decision on Kabiligi Request for Particulars of the Amended Indictment 27 September 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Discretionary power of the Chamber to examine late-filed submissions – Defects in the Indictment, Cure of the defects of the Indictment, Factual allegations in the Indictment, Qualification of the facts, Degree of specificity of the facts, Factors for evaluating the facts, Cumulative charges, Multiple Counts Based on the Same Material Facts – Mode of individual participation to the crimes, Specification in the Indictment, Responsibility of the Superior, Conditions for the Responsibility of the Superior, Effective control, Influence on the pleadings – Right of the Accused to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her, Reasonable notice to the Defence – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 47 (C) and 73 (E); Statute, art. 6 (1), 6 (3) and 20 (4) (a)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Aloys Ntabakuze et al., *Decision on the Defence Preliminary Motions Relating to Defects in the Form and Substance of the Indictment, 5 October 1998 (ICTR-97-30); Appeals Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 16 November 2001 (ICTR-96-13); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Sylvestre Gacumbitsi, *Judgement, 17 June 2004 (ICTR-2001-64); Appeals Chamber,* The Prosecutor v. Eliézer Niyitegeka, *Judgement, 9 July 2004 (ICTR-96-14); Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Judgement, 15 July 2004 (ICTR-2001-71); Appeals Chamber,* The Prosecutor v. Gérard et Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17); Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, 14 February 2005 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Laurent Semanza, *Judgement, 20 May 2005 (ICTR-97-20); Appeals Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Judgement, 19 September 2005 (ICTR-99-54)*

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# *Décision relative à la demande de Kabiligi tendant à obtenir des précisions au sujet de l'acte d'accusation modifié 27 septembre 2005 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Pouvoir d'appréciation de la Chambre d'examiner des mémoires déposés hors délais – Vices dans l'acte d'accusation, Remède aux vices dans l'acte d'accusation, Faits essentiels dans l'acte d'accusation, Qualification des faits, Degré de précision des faits, Facteurs pour l'évaluation des faits; Cumul de qualifications, Mêmes allégations factuelles pour différents chefs d'accusation – Mode de participation individuelle aux crimes, Précision dans l'acte d'accusation, Responsabilité du supérieur, Conditions pour la responsabilité du supérieur, Contrôle effectif, Influence sur les plaidoiries – Droit d'être informé dans le plus court délai dans une langue qu'il/elle comprend et de façon détaillée de la nature et des motifs de l'accusation portée contre lui/elle, Information suffisante de la défense – Requête rejetée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 47 (C) et 73 (E); Statut, art. 6 (1), 6 (3) et 20 (4) (a)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Aloys Ntabakuze et consorts, *Decision on the Defence Preliminary Motions Relating to Defects in the Form and Substance of the Indictment, 5 octobre 1998 (ICTR-97-30); Chambre d'Appel,* Le Procureur c. Alfred Musema, *Jugement, 16 novembre 2001 (ICTR-96-13); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à l'admissibilité de la déposition du témoin DBQ, Chambre de première instance, 18 novembre 2003 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Sylvestre Gacumbitsi, *Jugement, 17 juin 2004 (ICTR-2001-64); Chambre d'appel,* Le Procureur c. Eliézer Niyitegeka, *Jugement, 9 juillet 2004 (ICTR-96-14); Chambre de première instance,* Le Procureur c. Emmanuel Ndindabahizi, *Jugement, 15 juillet 2004 (ICTR-2001-71); Chambre d'appel,* Le Procureur c. Gérard et Elizaphan Ntakirutimana, *Arrêt, 13 décembre 2004 (ICTR-96-10 et ICTR-96-17); Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts, *Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Laurent Semanza, *Jugement, 20 mai 2005 (ICTR-97-20); Chambre d'appel,* Le Procureur c. Jean de Dieu Kamuhanda, *Arrêt, 19 septembre 2005 (ICTR-99-54)*

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*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo ("Celebici"), *Judgement, 20 February 2001 (IT-96-21); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić et al., *Judgment, 23 October 2001 (IT-95-16); Trial Chamber,* The Prosecutor v. Mitar Rašević, *Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004 (IT-97-25/1); Appeals Chamber,* The Prosecutor v. Tihomir Blaškić, *Judgement, 29 July 2004 (IT-95-14)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi "Motion Requesting Particulars of the Amended Indictment", filed on 27 June 2005;

CONSIDERING the Prosecution "Response to Kabiligi Defence Motion Requesting Particulars of the Amended Indictment", filed on 12 July 2005; the Kabiligi "Motion to Preclude the Prosecution from Replying to Its 'Motion Requesting Particulars of the Amended Indictment' Filed 27 June 2005", filed on 11 July 2005; and the Kabiligi "Exception to 'Prosecutor's Response to Kabiligi Defence Motion Requesting Particulars of the Amended Indictment'", filed on 14 July 2005;

HEREBY DECIDES the motion.

## Introduction

1. The Kabiligi Defence argues that the Amended Indictment of 13 August 1999 is deficient for failing to plead the factual allegations against the Accused with sufficient specificity and requests an order compelling the Prosecution to provide particulars of the Amended Indictment against Gratien Kabiligi.

## Procedural Issues

2. The motion was filed on 27 June 2005. Pursuant to Rule 73 (E), the Prosecution had five days from the date on which it received the motion to respond. On 1 July 2005, the Chamber granted a Prosecution request for a one-week extension of time, thereby giving the Prosecution until 8 July 2005. The Prosecution did not file its Response until 12 July 2005 and gave no explanation for the delay. The Kabiligi Defence has filed two submissions asking the Trial Chamber to disregard the Prosecution Response.

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*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Zejnil Delalić, Zdravko Mucić, Hazim Delić et Esad Landžo («Čelebići»), *Arrêt, 20 février 2001 (IT-96-21); Chambre d'appel,* Le Procureur c. Zoran Kupreškić et consorts, *Arrêt, 23 octobre 2001 (IT-95-16); Chambre de première instance,* Le Procureur c. Mitar Rašević, *Decision Regarding Defence Preliminary Motion on the Form of the Indictment, Chambre de première instance, 28 avril 2004 (IT-97-25/1); Chambre d'appel,* Le Procureur c. Tihomir Blaškić, *Jugement, 29 juillet 2004 (IT-95-14)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov;

SAISI de la requête intitulée *Motion Requesting Particulars of the Amended Indictment*, formée par Kabiligi et déposée le 27 juin 2005;

VU la réponse du Procureur intitulée «*Response to Kabiligi Defence Motion Requesting Particulars of the Amended Indictment,* déposée le 12 juillet 2005; la requête de Kabiligi intitulée *Motion to Preclude the Prosecution from Replying to Its 'Motion Requesting Particulars of the Amended Indictment' Filed June 2005*», déposée le 11 juillet 2005; et l'exception intitulée *Exception to 'Prosecutor's Response to Kabiligi Defence Motion Requesting Particulars of the Amended Indictment,* déposée le 14 juillet 2005;

STATUE À PRÉSENT SUR LA REQUÊTE.

## Introduction

1. La Défense de Kabiligi soutient que l'acte d'accusation modifié du 13 août 1999 est entaché de vices en ce qu'il n'expose pas avec suffisamment de précision les faits allégués contre l'accusé, et demande donc à la Chambre d'enjoindre au Procureur de préciser l'acte d'accusation modifié établi contre Gratien Kabiligi.

## Questions de procédure

2. La requête a été déposée le 27 juin 2005. Conformément à l'article 73 (E) du Règlement de procédure et de preuve (le «Règlement»), le Procureur disposait de cinq jours pour y répondre, à compter de la date à laquelle il l'avait reçue. Le 1er juillet 2005, la Chambre a fait droit à la requête du Procureur en prorogation d'une semaine du délai pour répondre à la requête, portant ainsi celui-ci au 8 juillet 2005. Le Procureur n'a déposé sa réponse que le 12 juillet 2005 et il n'a donné aucune explication pour le retard. La Défense de Kabiligi a déposé deux mémoires demandant à la Chambre de ne pas tenir compte de la réponse du Procureur.

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3. The Trial Chamber has discretion to consider late-filed submissions and, in the present instance, chooses to do so[1].

## Deliberations

4. Article 20 (4) (a) of the Statute guarantees an accused the right "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her". In addition, Rule 47 (C) of the Rules of Procedure and Evidence ("the Rules") provides that

> "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged".

The Appeals Chamber has interpreted this provision to require that the Prosecution plead all material facts underpinning the charges in the indictment but not the evidence by which such material facts are to be proven at trial[2]. The determination of whether a particular fact is material and whether that fact has been pleaded with the requisite degree of specificity must be made on case-by-case basis[3]. In cases where the Prosecution alleges personal physical commission of specific criminal acts, such as murder of a named individual, the Prosecution's burden in setting forth the material facts is greater than instances where the sheer scale of the alleged crimes makes it impracticable to require the same degree of specificity[4].

5. Defects in the indictment may be cured where the Prosecution provides the accused with timely, clear and consistent information underpinning the charges against him or her[5]. The Appeals Chamber has expressly found that certain defects in an indictment may be cured through the Prosecution's Pre-trial Brief, during disclosure of evidence or through proceedings at trial[6]. Whether vagueness in the indictment has been cured by subsequent disclosure involves consideration of the following factors : the consistency, clarity and specificity with which the material fact is communicated to the Accused[7]; the novelty and incriminating nature of the

[1] See *Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005 para. 1.

[2] *Kupreskic et al.*, Judgment (AC), 23 October 2001, paras. 88-90. See also *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 24.

[3] *Kupreskic*, Judgement (AC), paras. 89-90. *Ntakirutimana*, Judgement (AC), para. 25.

[4] *Kupreskic*, Judgement (AC), para. 89, *Ntakirutimana*, Judgement (AC), para. 25.

[5] *Kupreskic*, Judgement (AC), para. 114.

[6] *Ntakirutimana*, Judgement (AC), para. 27.

[7] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 221-222 (disclosure in a witness statement of an allegation not mentioned in the pre-trial brief did not provide the "timely, clear and consistent" notice required to cure a defect in the indictment because "the [Accused] could well have concluded from the failure to mention Kivumu in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe"); *Ntakirutimana*, Judgement (AC), para. 111 (Trial Chamber erred in basing conviction on a particular incident where it was alleged that the Accused was present during an attack, but without precisely specifying the location, date, or his conduct : "the information available to [the Accused] before trial, however, provided no notice of the location of the event, contained a date

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3. En vertu de son pouvoir d'appréciation, la Chambre de première instance peut décider d'examiner des mémoires déposés hors délais, et elle choisit de le faire en l'espèce[1].

**Délibération**

4. L'article 20 (4) (a) du Statut du Tribunal (le «Statut») garantit à l'accusé le droit d'«être informé, dans le plus court délai, dans une langue qu'[il] comprend et de façon détaillée, de la nature et des motifs de l'accusation portée contre [lui]». De plus, l'article 47 (C) du Règlement prévoit que

> «[l]'acte d'accusation indique le nom du suspect et les renseignements personnels le concernant, ainsi qu'un exposé concis des faits de l'affaire et du crime dont le suspect est accusé».

Selon l'interprétation de cette disposition donnée par la Chambre d'appel, le Procureur doit présenter les faits essentiels qui fondent les accusations portées dans l'acte d'accusation, mais non les éléments de preuve destinés à établir ces faits[2]. La question de savoir si un fait est essentiel ou non et s'il a été exposé avec le degré de précision exigé est appréciée au cas par cas[3]. Lorsque le Procureur reproche à un accusé d'avoir personnellement commis des actes criminels, tel le meurtre d'une personne nommément désignée, l'obligation du Procureur d'exposer les faits essentiels avec précision est plus contraignante que lorsque l'ampleur même des crimes exclut que l'on puisse exiger un degré de précision aussi élevé[4].

5. L'acte d'accusation peut être purgé des vices dont il est entaché si le Procureur fournit en temps voulu à l'accusé des informations claires et cohérentes propres à étayer les accusations portées contre lui[5]. La Chambre d'appel a expressément conclu que le Procureur pouvait remédier à certains vices de l'acte d'accusation dans le mémoire préalable au procès, au moment de la communication des moyens de preuve ou pendant le procès[6]. Les facteurs suivants permettent de déterminer si les communications ultérieures ont remédié à l'imprécision de l'acte d'accusation : la cohérence, la clarté et la précision avec lesquelles le fait essentiel est communiqué à l'accusé[7]; la nouveauté et la nature incriminante

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[1] Voir affaire *Mpambara*, Décision relative à la requête de la Défense en exception préjudicielle pour vices de forme de l'acte d'accusation, Chambre de première instance, 30 mai 2005 para. 1.

[2] *Kupreškić et consorts*, arrêt, 23 octobre 2001, paras. 88 à 90. Voir aussi arrêt *Ntakirutimana*, 13 décembre 2004, para. 24.

[3] Arrêt *Kupreškić*, paras. 89 et 90; arrêt *Ntakirutimana*, para. 25.

[4] Arrêt *Kupreškić,* para. 89; arrêt *Ntakirutimana*, para. 25.

[5] Arrêt *Kupreškić*, para. 114.

[6] Arrêt *Ntakirutimana*, para. 27.

[7] Arrêt *Niyitegeka*, 9 juillet 2004, paras. 221 et 222 (la divulgation dans une déclaration de témoin d'une allégation non mentionnée dans le mémoire préalable au procès ne constitue pas une «communication en temps opportun d'informations claires et cohérentes» de nature à purger l'acte d'accusation du vice dont il était entaché puisque «l'[accusé] aurait fort bien pu conclure que le fait de n'avoir pas mentionné Kivumu dans le mémoire préalable au procès signifiait que le Procureur n'avait pas l'intention de produire des éléments de preuve au sujet d'une attaque à cet endroit ou au cours de cette période» [traduction]; arrêt *Ntakirutimana*, para. 111 (La Chambre de première instance a commis une erreur en fondant sa condamnation sur un fait précis, en l'occurrence une allégation selon laquelle l'accusé aurait été présent lors d'une attaque, sans préciser ni l'endroit, ni la date ni le

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new material fact[8]; and the period of notice given to the Accused[9]. Mention of a material fact in a witness statement does not necessarily constitute adequate notice : the Prosecution must convey that the material allegation is part of the case against the Accused[10]. The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case[11].

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that the Trial Chamber found was inaccurate, and did not allege that [the Accused] had pointed out refugees to attackers during the event"); *id*., para. 57 (a single, somewhat ambiguous reference in a pre-trial brief provided inadequate notice of a new material fact when the testimony of five other witnesses was also used at trial to prove the material fact); *Kamuhanda*, Judgement (AC), 19 September 2005, paras. 25-26 (disclosure in witness statement and pre-trial brief of precise commune in which weapons had allegedly been distributed provided sufficient information to the Accused, even though the Indictment itself identified only the prefecture).

[8] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 95-98 (Trial Chamber erred in considering allegation of killing by the Accused of a specific named individual where only the general attack in which the killing took place had been mentioned in the pre-trial brief and witness statement); *id*., para. 75; *Bagosora et al*., Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 20 ("The Defence cannot be considered to be on notice of any and all possible orders to a witness in a specific location merely because there is notice that the witness is alleged to have been under the command of the Accused and was at that location. Here, the Defence for Ntabakuze has no notice of the killings of the fifty civilians in hiding in Remera; no notice that he gave the order that they be killed; and, indeed, no notice that he issued any particular order at all at that location. The nature of the criminal conduct alleged is at least arguably changed from one of superior responsibility for killings at roadblocks by subordinates, to a direct order to kill fifty individuals. The Defence's need to rebut the charge is substantial; and its ability to do so is seriously impaired in the absence of meaningful advance notice").

[9] Disclosure four days before trial, and eleven days before the testimony, that an accused had been armed and fired upon victims during an attack, was not timely, particularly because the Prosecution had the statement in its possession two months prior to the disclosure. Previous disclosure in the pre-trial brief of the Accused's participation in the attack, but without mentioning his specific involvement in the violence, provided insufficient notice. *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 82-84; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 29.

[10] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 27 ("'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial") (citations omitted); *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197.

[11] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 196 ("[A] Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response"). This does not, however, foreclose the Trial Chamber's discretion to reject allegations which radically alter the indictment, even if the Defence has a reasonable opportunity to investigate the charge. *Gacumbitsi*, Judgement (TC), 17 June 2004, para. 188 ("Consequently, the Chamber finds that the Indictment does not contain any specific allegation about the murder of Kanyogote and his children. That the Prosecutor mentioned the murder of Kanyogote and his children in his Pre-Trial Brief is not such as to cure the vagueness in the Indictment, especially as such brief does not establish a link between the new allegation and paragraph 33 of the Indictment. The Pre-Trial Brief does not seek to render the Indictment more specific, but rather alters the Indictment substantially by either changing the identity of the victims referred to in paragraph 33 or including a new allegation of murder. The Pre-Trial Brief cannot be used as an instrument to amend the Indictment substantially").

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du fait essentiel[8] et le moment où la notification a été faite[9]. La mention d'un fait essentiel dans une déclaration de témoin ne constitue pas nécessairement une notification suffisante : le Procureur doit clairement indiquer que cette allégation importante fait partie des chefs retenus contre l'accusé[10]. La principale question est celle de savoir si la Défense a suffisamment été informée et s'il lui était raisonnablement possible de mener des enquêtes lui permettant de réfuter la thèse du Procureur[11].

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comportement qui lui était reproché : «toutefois, les informations communiquées à l'accusé avant le procès ne donnaient aucune indication sur l'endroit où s'est produit l'incident, elles indiquaient une date que la Chambre de première instance a jugé inexacte et ne précisaient pas si l'accusé avait livré les réfugiés aux assaillants au cours de cet incident» [traduction]); *ibid*., para. 57 (une référence unique et quelque peu ambiguë dans un mémoire préalable au procès ne constitue pas une information suffisante au sujet d'un fait nouveau alors que cinq autres témoins ont déposé au procès à l'appui de ce fait essentiel); arrêt *Kamuhanda*, 19 septembre 2005, paras. 25 et 26 (la communication dans une déclaration de témoin et le mémoire préalable au procès de la commune précise dans laquelle des armes auraient été distribuées renseignait suffisamment l'accusé, même si l'acte d'accusation ne mentionnait que la préfecture).

[8] Arrêt *Ntakirutimana*, 13 décembre 2004, paras. 95 à 98 (La Chambre de première instance a commis une erreur en tenant compte de l'allégation du meurtre imputé à l'accusé d'une personne nommément désignée, alors que le mémoire préalable au procès et la déclaration de témoin ne mentionnaient que l'attaque générale au cours de laquelle le meurtre a eu lieu); *ibid*., par. 75; affaire *Bagosora et consorts*, Décision relative à l'admissibilité de la déposition du témoin DBQ, Chambre de première instance, 18 novembre 2003, para. 20 («La Défense n'est pas censée être au courant du moindre ordre possible donné à un témoin à un endroit précis, simplement parce que le Bureau du Procureur l'a informée que ledit témoin est présumé avoir été sous les ordres de l'accusé et avoir été présent à l'endroit en question. En l'espèce, la Défense de Ntabakuze n'a pas été informée du massacre des cinquante civils cachés à Remera; elle n'a pas été informée que l'accusé avait donné l'ordre de les tuer et, en fait, elle n'a pas été informée du tout qu'il avait donné un quelconque ordre particulier à cet endroit. La nature du comportement criminel présumé de l'accusé est au moins modifiée en ce sens qu'elle passe de la responsabilité du supérieur hiérarchique devant les crimes perpétrés aux barrages routiers par des subordonnés à celle de la personne qui a donné directement l'ordre de tuer cinquante personnes. Le droit de la défense de réfuter l'allégation est avéré, mais celui-ci est sérieusement affaibli par l'absence d'une véritable notification préalable»).

[9] La divulgation, quatre jours avant le procès et onze jours avant la déposition, du fait qu'un accusé était armé et qu'il a tiré sur les victimes pendant l'attaque n'a pas été faite en temps voulu, étant donné en particulier que le Procureur était en possession de la déclaration deux mois avant la communication. La divulgation antérieure dans le mémoire préalable au procès de la participation de l'accusé à l'attaque, sans mentionner sa participation spécifique aux actes de violence, n'était pas une information suffisante. Arrêt *Ntakirutimana*, 13 décembre 2004, paras. 82 à 84; jugement *Ndindabahizi*, 15 juillet 2004, para. 29.

[10] Arrêt *Ntakirutimana*, 13 décembre 2004, para. 27 («la simple notification des déclarations des témoins à la Défense par le Procureur en exécution des obligations de communication que lui impose le Règlement ne constitue pas une information suffisante au sujet des faits essentiels que le Procureur entend établir au procès» [traduction]) (citations omises); arrêt *Niyitegeka*, 9 juillet 2004, para. 197.

[11] Arrêt *Niyitegeka*, 9 juillet 2004, para. 196 («Naturellement, une Chambre de première instance devrait se demander si le Procureur a préalablement informé de façon claire et en temps voulu la Défense de l'allégation, de sorte qu'elle ait raisonnablement la possibilité d'enquêter et de préparer sa réponse» [traduction]). Cela n'empêche toutefois pas la Chambre de première instance d'exercer son pouvoir souverain d'appréciation en rejetant les allégations qui altèrent fondamentalement l'acte d'accusation, même si la Défense avait une possibilité raisonnable d'enquêter sur la charge retenue. Jugement *Gacumbitsi*, 17 juin 2004, para. 188 («La Chambre conclut dès lors que l'Acte d'accusation, ne contient aucune allégation spécifique relative au meurtre de

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6. Having considered the three issues raised by the Kabiligi Defence, the Trial Chamber will address each argument separately :

(i) *Multiple Counts Based on the Same Material Facts*

7. The Kabiligi Defence argues that the Amended Indictment is defective because the same factual allegations are cited as support for each of the ten counts. The Prosecution is not barred from cumulative charging on the basis of the same factual allegations. Cumulative charging has been standard practice at both the ICTR and ICTY[12]. Moreover, the Trial Chamber rejected the same argument in this very case as to the initial indictment filed against the Accused and concluded that "no difficulties arise from the use of overlapping facts"[13]. The request for particulars on this ground is denied.

(ii) *Identification of the Modes of Participation under Article 6 (1)*

8. Under Article 6 (1) of the ICTR Statute, an accused may bear individual criminal responsibility for planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime. The Defence argues that the Amended Indictment is deficient in that it does not specify the mode of individual participation alleged against the Accused.

9. While early ICTR jurisprudence did not seem to require that such information be expressly pleaded in the indictment, the Appeals Chamber has articulated a clear standard and now requires that the mode of participation of the Accused be specified in the indictment[14]. Blanket references to Article 6 (1) are insufficient[15]. Rather, the form or forms of liability within Article 6 (1) must be specifically identified[16].

[12] *Semanza*, Judgement (AC), 20 May 2005, para. 309; *Musema*, Judgement (AC), 16 November 2001, para. 370. See also *Delalic, Mucic, Delic, and Landzo ("Celebici")*, Judgement (AC), 20 February 2001, para. 400 ("Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence").

[13] *Ntabakuze et al.*, Decision on the Defence Preliminary Motions Relating to Defects in the Form and Substance of the Indictment (TC), 5 October 1998, para. 14.

[14] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 473 (referring to *Prosecutor v. Aleksovski*, 24 March 2000, Judgement (AC), n° 319).

[15] *Ntakirutimana*, Judgement (AC), para. 473.

[16] *Ntakirutimana*, Judgement (AC), para. 475 (citing *Prosecutor v. Krnojelac*, Judgement (AC), 17 September 2003, paras. 138-144).

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6. Ayant examiné les trois questions soulevées par la Défense de Kabiligi, la Chambre de première instance se penchera sur chaque argument séparément.

i) *Cumul de qualifications fondées sur les mêmes faits essentiels*

7. La Défense de Kabiligi soutient que l'acte d'accusation modifié est entaché de vices parce que les mêmes allégations factuelles sont citées à l'appui de chacun des dix chefs. Il n'est pas interdit au Procureur de procéder à un cumul de qualifications en se fondant sur les mêmes allégations factuelles. Le cumul de qualifications constitue une pratique normale, tant au TPIR qu'au TPIY[12]. Par ailleurs, la Chambre de première instance a rejeté le même argument dans cette même affaire au sujet de l'acte d'accusation initial dressé contre l'accusé et a conclu que «l'utilisation de faits qui se recoupent ne soulève aucune difficulté»[13] [traduction]. La demande de précision fondée sur ce moyen est rejetée.

ii) *Identification des modes de participation prévus à l'article 6.1 du Statut*

8. En vertu de l'article 6 (1) du Statut du TPIR, un accusé peut engager sa responsabilité pénale individuelle pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter un crime. La Défense affirme que l'acte d'accusation modifié est entaché de vice en ce qu'il ne précise pas le mode de participation individuelle reproché à l'accusé.

9. Dans sa jurisprudence initiale, le TPIR ne semblait pas exiger qu'une telle information soit expressément indiquée dans l'acte d'accusation, mais la Chambre d'appel a énoncé une norme claire et elle exige à présent que le mode de participation de l'accusé soit précisé dans l'acte d'accusation[14]. Une référence globale à l'article 6 (1)[15] ne suffit plus, il faut identifier précisément la ou les formes de responsabilité qui en découlent[16].

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Kanyogote et de ses enfants. Le fait que le Procureur a, en son Mémoire préalable au procès, évoqué le meurtre de Kanyogote et de ses enfants ne suffit pas à corriger le défaut de précision de l'Acte d'accusation; d'autant plus que ledit Mémoire n'a établi aucun lien entre cette allégation nouvelle et le paragraphe 33 précité. En l'espèce, le Mémoire préalable ne se borne pas à rendre l'Acte d'accusation plus précis, mais il en altère substantiellement le contenu, soit en changeant l'identité des victimes visées au paragraphe 33, soit en ajoutant une allégation de meurtre qui en était absente. Le Mémoire préalable ne peut servir d'instrument à une modification de l'Acte d'accusation [...]»).

[12] Arrêt *Semanza*, 20 mai 2005, para. 309; arrêt *Musema*, 16 novembre 2001, para. 370. Voir aussi *Delalić, Mucić, Delić, et Landžo («Čelebići»)*, arrêt, 20 février 2001, para. 400 («Le cumul de qualifications est autorisé parce que, avant la présentation de l'ensemble des moyens de preuve, on ne peut déterminer avec certitude laquelle des accusations portées contre l'accusé sera prouvée. Une fois que les parties ont présenté leurs éléments de preuve, la Chambre de première instance est mieux à même, si ceux-ci sont suffisants, d'apprécier quelles qualifications peuvent être retenues»).

[13] Affaire *Ntabakuze et consorts*, *Decision on the Defence Preliminary Motions Relating to Defects in the Form and Substance of the Indictment,* Chambre de première instance, 5 octobre 1998, para. 14.

[14] Arrêt *Ntakirutimana*, 13 décembre 2004, par. 473 (invoquant l'arrêt *Aleksovski*, 24 mars 2000, note de bas de page 319).

[15] Arrêt *Ntakirutimana*, para. 473.

[16] *Ibid*., par. 475 (citant l'arrêt *Krnojelac*), 17 septembre 2003, paras. 138 à 144).

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10. Although such information should generally be contained in the indictment, the Appeals Chamber made clear that, in certain circumstances, a failure to set forth the precise mode of participation in the indictment could be cured by a later submission from the Prosecution, even up to the start of trial[17].

11. Although the Amended Indictment does not expressly set forth the mode of liability under Article 6 (1), the Pre-trial Brief includes a detailed summary of intended Prosecution witnesses and exhibits. The summary of Prosecution witnesses specifically sets forth the topics to which each witness will testify and the allegations that will be made against the Accused in terms of his actual statements and actions, thereby informing the Accused of the particular mode of participation alleged by the Prosecution. The Pre-trial Brief was filed on 21 January 2002, which was more than seven months before the first hearing of evidence (2 September 2002). This gave sufficient notice to the Accused. Consequently, the Chamber finds that whatever defect existed in the Indictment as to alleging criminal responsibility under Article 6 (1) has been cured through the Pre-trial Brief and denies the Accused's request for such particulars.

(iii) I*dentification of Specific Subordinates and Other Related Information under Article 6 (3)*

12. The Kabiligi Defence argues that the Amended Indictment is deficient because it fails to plead certain required information under Article 6 (3) of the Statute. According to this provision, criminal responsibility as a superior occurs if certain conditions are met, namely (i) that the accused is a superior of subordinates who are sufficiently identified and over whom he had effective control; (ii) that the accused knew or had reason to know that crimes had been or were about to be committed by his subordinates; and (iii) that the accused failed to take action either to prevent such acts or to punish the perpetrators of these acts[18]. The level of detail that is required in making allegations under Article 6 (3) is not meaningfully different from the standard for pleading other types of allegations[19]. An essential element in pleading criminal responsibility under this provision is the identity of the subordinates over whom the accused had effective control and for whose acts he is alleged to be responsible[20]. The specificity required may vary depending on the number of subordinates over whom the accused is alleged to have had control[21].

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[17] *Ntakirutimana*, Judgement (AC), para. 475 (adopting the *Krnojelac* approach), and *Ntakirutimana*, Judgement (AC), para. 471 (referring *Prosecutor v. Rutaganda* Judgement (AC), 26 May 2003, para. 303).

[18] *Blaskic*, Judgement (AC), 29 July 2004, para. 218.

[19] See *supra*, para. 4.

[20] *Karemera et al.*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, 14 February 2005, para. 52.

[21] See, *e.g., Rasevic*, Decision Regarding Defence Preliminary Motion on the Form of the Indictment (TC), 28 April 2004, para. 63. The Trial Chamber found the allegation that the accused was "commander of the prison guards" (numbering at least thirty-seven) sufficient for purposes of pleading criminal responsibility as a superior.

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10. Bien qu'une telle information doive normalement figurer dans l'acte d'accusation, la Chambre d'appel a clairement indiqué que dans certaines circonstances, lorsque le mode de participation n'est pas précisé dans l'acte d'accusation, le Procureur peut combler cette lacune en communicant ultérieurement cette information et ce, jusqu'à l'ouverture du procès[17].

11. Bien que l'acte d'accusation modifié n'indique pas expressément le mode de responsabilité retenue au titre de l'article 6 (1), le mémoire préalable au procès comprend un résumé détaillé des témoignages et des pièces que le Procureur entend produire. Le résumé des déclarations des témoins expose précisément les sujets sur lesquels chacun d'eux déposera et les allégations qui seront portées contre l'accusé sur la base de ses déclarations et de ses agissements, l'accusé étant ainsi informé du mode de participation précis allégué par le Procureur. Le mémoire préalable au procès, qui a été déposé le 21 janvier 2002, soit plus de sept mois avant la première audience consacrée à l'examen des éléments de preuve (2 septembre 2002), informait donc suffisamment l'accusé des accusations portées contre lui. Par conséquent, la Chambre conclut que, quel qu'ait été le vice dont était entaché l'acte d'accusation en ne précisant pas la responsabilité pénale de l'accusé au titre de l'article 6 (1), ce vice a été purgé par le mémoire préalable au procès, et elle rejette la demande de précisions présentée par l'accusé.

iii) *Identification de certains subordonnés et autres informations connexes prévues à l'article 6 (3)*

12. La Défense de Kabiligi soutient que l'acte d'accusation modifié est entaché de vices en ce qu'il n'expose pas certaines informations requises par l'article 6 (3) du Statut. Selon cet article, il y a responsabilité du supérieur hiérarchique lorsque certaines conditions sont remplies, à savoir i) l'accusé est le supérieur hiérarchique de subordonnés bien identifiés et sur lesquels il exerce un contrôle effectif; ii) l'accusé savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre des crimes ou les avaient commis et iii) l'accusé n'a pas pris de mesures pour empêcher que ces actes ne soient commis ou pour en punir les auteurs[18]. Le degré de précision exigé lorsque des allégations sont portées en application de l'article 6 (3) ne diffère pas sensiblement de celui qui est exigé pour les autres types d'allégations[19]. L'élément essentiel, lorsqu'est invoquée la responsabilité pénale prévue par cet article, c'est l'identité des subordonnés sur lesquels l'accusé exerçait un contrôle effectif et dont les actes relevaient de sa responsabilité[20]. La précision requise peut varier en fonction du nombre de subordonnés sur lesquels l'accusé était censé exercer un contrôle[21].

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[17] Arrêt *Ntakirutimana*, para. 475 (suivant l'approche adoptée dans *Krnojelac*), et l'arrêt *Ntakirutimana*, para. 471 (invoquant l'arrêt *Rutaganda*), 26 mai 2003, par. 303).

[18] Arrêt *Blaškić*, 29 juillet 2004, para. 218.

[19] Voir *supra*, para. 4.

[20] Affaire *Karemera et consorts,* Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005, para. 52.

[21] Voir par exemple affaire *Rašević*, *Decision Regarding Defence Preliminary Motion on the Form of the Indictmen,* Chambre de première instance, 28 avril 2004, para. 63. La Chambre de première instance a conclu que l'allégation selon laquelle l'accusé était le «commandant des gardiens de prison» (au nombre de 37 au moins) était suffisante aux fins d'imputation de la responsabilité en tant que supérieur hiérarchique.

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13. The Amended Indictment sufficiently pleads the material facts for criminal responsibility as a superior under Article 6 (3). Paragraphs 4.2 to 4.4 allege that, between April and July 1994, the Accused held the position of Commander of Military Operations (G-3) in the High Command of the Rwandan Army. Moreover, the Amended Indictment specifically alleges that the Accused had command over

> "the units of the sectors of Byumba, Ruhengeri, Mutara and Kigali, as well as the elite units such as the Presidential Guard and the Para-Commando Battalion and the Reconnaissance Battalion"[22].

Given his high rank in the Rwandan Army, it is neither realistic nor necessary for the Prosecution to plead the identity of the Accused's subordinates in any further detail. The Prosecution has set forth his precise title within the Rwandan Army and has specifically identified the units over which the Accused had control.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 27 September 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[22] Amended Indictment, 13 August 1999, para. 4.4.

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13. L'acte d'accusation modifié expose de façon suffisante les faits essentiels en ce qui concerne la responsabilité pénale du supérieur hiérarchique prévue à l'article 6 (3). Aux paragraphes 4.2 à 4.4, il est indiqué qu'entre avril et juillet 1994, l'accusé exerçait les fonctions de commandant des opérations militaires (G-3) à l'état-major de l'armée rwandaise. En outre, il y est aussi précisé que l'accusé avait sous son commandement

> «les unités des secteurs de Byumba, Ruhengeri, Mutara et Kigali, ainsi que les unités d'élite telles que la garde présidentielle, le bataillon paracommando et le bataillon de reconnaissance»[22].

Vu le rang élevé que l'accusé occupait dans la hiérarchie de l'armée rwandaise, le Procureur n'était pas tenu d'indiquer avec précision l'identité de ses subordonnés. Le Procureur a indiqué son titre exact au sein de l'armée et identifié précisément les unités sur lesquelles il exerçait un contrôle.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, 27 septembre 2005.

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[22] Acte d'accusation modifié, 13 août 1999, para. 4.4.

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## *Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses 27 September 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Disclosure at the time of cross-examination, Disclosure Obligations by the Prosecutor, Categories of materials to disclose, Exculpatory information, Statement to a national immigration authority, Disclosure of the immigration statements to the Defence, Disclosure of any documents concerning the immigration status of Defence witnesses and correspondence, Precise definition of the materials requested for disclosure – Case-law Interpretation, Distinguishable case, Interpretation of the Rules of Procedure and Evidence, Context – Right of the Accused – Motion denied*

*International and National Instruments cited :*

*Rules of Procedure and Evidence, rules 66, 66 (A), 66 (A) (i), 66 (A) (ii), 66 (B), 66 (C), 68, 68 (A), 68 (B) and 70; Statute, art. 19 and 20*

*United States Federal Rules of Criminal Procedure*

*International and National Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect, 18 September 2001 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Elie Ndayambaje, *Decision on the Defence Motion for Disclosure, 25 September 2001 (ICTR-96-8); Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Witness GAO, 2 November 2001 (ICTR-98-44A); Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor, 29 August 2002 (ICTR-99-54); Trial Chamber,* The Prosecutor v. Georges Rutaganda, *Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002 (ICTR-96-3); Trial Chamber,* The Prosecutor v. Augustin Prosecutor v. Bizimungu et al., *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material, 1 December 2004 (ICTR-99-50)*

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# *Décision concernant la communication de pièces relatives aux déclarations des témoins à décharge recueillies par les services d'immigration 27 septembre 2005 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Communication avant le contre-interrogatoire, Obligation de communication du Procureur, Catégories de documents à communiquer, Information disculpatoire, Déclaration à une autorité nationale d'immigration, Communication des déclarations aux autorités nationales d'immigration, Communication de tout document relatif au dossier d'immigration des témoins à décharge et la correspondance, Précision de la nature des éléments dont la communication est requise, – Interpretation de la jurisprudence, Précédent distinct, Interprétation du Règlement de Procédure et de preuve, Contexte – Droits de l'accusé – Requête rejetée*

*Instruments internationaux et nationaux cités :*

*Règlement de Procédure et de preuve, art. 66, 66 (A), 66 (A) (i), 66 (A) (ii), 66 (B), 66 (C), 68, 68 (A), 68 (B) and 70; Statut, art. 19 et 20*

*Règlement fédéral de procédure pénale des Etats-Unis*

*Jurisprudence internationale et nationale citée :*

*T.P.I.R. Chambre d'appel,* Le Procureur c. Jean-Paul Akayesu, *Arrêt, 1er juin 2001 (ICTR-96-4); Chambre de première instance,* Le Procureur c. Pauline Nyiramasuhuko et consorts, *Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect, 18 septembre 2001 (ICTR-98-42); Chambre de première instance,* Le Procureur c. Elie Ndayambaje, *Decision on the Defence Motion for Disclosure, 25 septembre 2001 (ICTR-96-8); Chambre de première instance,* Le Procureur c. Juvénal Kajelijeli, *Décision sur la requête de Juvénal Kajelijeli aux fins d'obtenir le rappel du témoin à charge GAO, 2 novembre 2001 (ICTR-98-44A); Chambre de première instance,* Le Procureur c. Jean de Dieu Kamuhanda, *Décision relative à la requête de la Défense demandant communication de déclarations de témoins, ainsi que des sanctions à l'encontre du Procureur, 29 août 2002 (ICTR-99-54); Chambre de première instance,* Le Procureur c. Georges Rutaganda, *Décision relative à la requête urgente de la Défense en communication et admission de moyens de preuve supplémentaires et ordonnance portant calendrier, 12 décembre 2002 (ICTR-96-3); Chambre de première instance,* Le Procureur c. Augustin Bizimungu et consorts, *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material, 1er décembre 2004 (ICTR-99-50)*

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*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Zejnil Delalić, *Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996 (IT-96-21); Trial Chamber,* The Prosecutor v. Tihomir Blaškić, *Decision on the production of discovery materials, 27 January 1997 (IT-95-14); Trial Chamber,* The Prosecutor v. Zejnil Delalić et al., *Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, 24 June 1997 (IT-96-21); Appeals Chamber,* The Prosecutor v. Tihomir Blaškić, *Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (IT-95-14); Trial Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordic and Cerkez Case, 19 July 2002 (IT-95-14/2); Trial Chamber,* The Prosecutor v. Radoslav Brđanin, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36)*

*Canada : Supreme Court of Canada,* R. v. Stinchcombe, *[1991] 3 S.C.R. 326, 7 November 1991*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Nsengiyumva Defence "Extremely Urgent Motion Requesting Disclosure of Documents and/or Materials Relating to Immigration, Refugee or Asylum Status of Defence Witnesses", filed on 16 May 2005 ("Defence Motion");

CONSIDERING the Prosecution Response, filed on 20 May 2005; and the Reply of the Defence for Nsengiyumva, filed on 1 June 2005;

HEREBY DECIDES the motion.

## Introduction

1. In the course of the present trial, the Prosecution has confirmed that it has obtained statements by some Defence witnesses to immigration authorities of the States in which they have sought refuge. The Defence has unsuccessfully argued in a separate motion, now pending before the Appeals Chamber, that this practice violates the Defence witness protection orders[1]. The Chamber has ordered the Defence to disclose to the Prosecution the country of current residence of Defence witnesses[2].

[1] *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005, paras. 9 to 17; *Bagosora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

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*T.P.I.Y. : Chambre de première instance,* Le Procureur c. Zejnil Delalić, *Décision relative aux exceptions préjudicielles aux fins de disjonction d'instances soulevées par les accusés Zejnil Delalic et Zdravko Mucic, 25 septembre 1996 (IT-96-21); Chambre de première instance,* Le Procureur c. Tihomir Blaškić, *Décision sur la production forcée de moyens de preuve, 27 janvier 1997 (IT-95-14); Chambre de première instance,* Le Procureur c. Zejnil Delalić et consorts, *Décision relative à la requête de l'accusé Hazim Delic aux fins de la communication d'informations à décharge en application de l'article 68 du Règlement, 24 juin 1997 (IT-96-21); Chambre d'appel,* Le Procureur c. Tihomir Blaškić, *Arrêt relatif aux requêtes de l'appelant aux fins de production de documents, de suspension ou de prorogation du délai de dépôt du mémoire et autres, 26 septembre 2000 (IT-95-14); Chambre de première instance,* Le Procureur c. Dario Kordić and Mario Cerkez, *Ordonnance relative à la requête de Paško Ljubičić aux fins d'avoir accès à des documents confidentiels – pièces jointes, comptes rendus d'audience et pièces à conviction – dans l'affaire* Kordić et Cerkez, *19 juillet 2002 (IT-95-14/2); Chambre de première instance,* Le Procureur c. Radoslav Brđanin, *Décision relative aux requêtes par lesquelles l'appelant demande que l'Accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents, 7 décembre 2004 (IT-99-36)*

*Canada : Cour Suprême du Canada,* R. c. Stinchcombe, *[1991] 3 S.C.R. 326, 7 novembre 1991*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête de la Défense de Nsengiyumva intitulée «*Extremely Urgent Motion Requesting Disclosure of Documents and/or Materials Relating to Immigration, Refugee or Asylum Status of Defence Witnesses*», déposée le 16 mai 2005 (la «Requête de la Défense»),

VU la Réponse du Procureur, déposée le 20 mai 2005, et la Réplique de la Défense de Nsengiyumva, déposée le 1er juin 2005,

STATUE À PRÉSENT SUR la requête.

## Introduction

1. Au cours du procès, le Procureur a confirmé avoir obtenu copie de déclarations que certains témoins à décharge ont faites aux services de l'immigration des États dans lesquels ils se sont réfugiés. Dans une requête distincte qui est à présent devant la Chambre d'appel, la Défense a fait valoir sans succès que cette pratique viole les mesures de protection prises en ce qui concerne les témoins à décharge[1]. La Chambre a ordonné à la Défense de divulguer au Procureur le pays où résident actuellement les témoins à décharge[2].

[1] Affaire *Bagosora et consorts*, Décision relative à la requête du Procureur en uniformisation et modification de mesures de protection de témoins, Chambre de première instance, 1er juin 2005, paras. 9 à 17; affaire *Bagosora et consorts*, *Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses*, Chambre de première instance, 21 juillet 2005.

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2. By the present motion, the Nsengiyumva Defence requests the Prosecution to disclose the immigration statements of Witnesses LIG-2 and LT-1, who have testified, and of any other Defence witness. It also requests disclosure of any documents concerning the immigration status of Defence witnesses and correspondence to or from the authorities concerned. Reference is made primarily to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence ("the Rules"). In the alternative, the Defence requests that the Prosecution be ordered to permit the Defence to inspect any materials regarding Defence witnesses' immigration status which are in the Prosecution's possession, custody or control. The Prosecution argues that it is under no obligation to disclose or allow the inspection of such materials.

## Deliberations

(i) *Identification of Requested Materials*

3. Case law has established that a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request[3]. The Chamber considers that the Defence's identification of the requested materials relating to Witnesses LIG-2 and LT-1 meets these requirements. The conclusion is the same in respect of the request for materials concerning other Defence witnesses. Although of a general nature, the category of documents is defined precisely, and the Prosecution has admitted that it possesses immigration documents relating to such witnesses[4].

(ii) *Disclosure under Rule 66 (B)*

4. Rule 66 (B) provides that :

[2] *Bagosora et al.*, Decision on Sufficiency of Defence Witness Summaries (TC), 5 July 2005. The Chamber denied the Defence request for certification, see Decision on Request for Certification Concerning Defence Witness Summaries (TC), 21 July 2005.

[3] *Prosecutor v. Blaskić*, Appeals Chamber Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 40 (with references); *Prosecutor v. Kordic and Cerkez*, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordic and Cerkez Case, 19 July 2002.

[4] The Defence motion describes the requested materials as materials, documents, correspondence and any papers in [the Prosecution's] possession, control and/or custody that relate to immigration status and/or records of (i) Witnesses LIG-2; (ii) Defence witness LT-1; (iii) any other Defence witnesses on the Nsengiyumva defence list in respect of whom inquiries into immigration, asylum and or refugee status may have been made; and (iv) any potential defence witnesses. According to the motion, such materials include, but are not limited to, any enquiry or correspondence from the Prosecution to any host country; any response from a host country thereto; documents forwarded in such correspondence; and documents relating to immigration, refugee status or record of proceedings relating thereto as disclosed by the host country, UNHCR or any other organization.

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2. Par sa requête, la Défense de Nsengiyumva demande au Procureur de communiquer les déclarations que les témoins LIG-2 et LT-1, qui ont déjà déposé, ont faites aux services d'immigration et celles de tout autre témoin à décharge. Elle demande également la communication de tout document relatif au dossier d'immigration des témoins à décharge et la correspondance échangée avec les services compétents. Elle invoque essentiellement le paragraphe (B) de l'article 66 et l'article 68 du Règlement de procédure et de preuve (le «Règlement»). À titre subsidiaire, la Défense demande qu'il soit ordonné au Procureur de lui permettre d'examiner les documents relatifs à la procédure d'immigration des témoins à décharge qui se trouvent en sa possession ou sous son contrôle. Le Procureur soutient qu'il n'est pas tenu de communiquer lesdits documents ni de permettre qu'ils soient examinés.

## Délibération

(i) *Les documents demandés*

3. Il est de jurisprudence établie qu'une demande de production de documents doit indiquer avec suffisamment de précision la nature de l'élément de preuve recherché qui doit être en la possession de la personne à qui s'adresse la requête[3]. La Chambre estime que la Défense l'a fait pour les documents relatifs aux témoins LIG-2 et LT-1 et que les conditions susmentionnées sont donc remplies. Il en va de même pour la demande relative aux autres témoins à décharge. Bien que générale, la catégorie de documents est bien circonscrite et le Procureur a admis être en possession de documents relatifs à la procédure d'immigration engagée par lesdits témoins[4].

(ii) *Communication en vertu du paragraphe (B) de l'article 66 du Règlement*

4. Le paragraphe (B) de l'article 66 du Règlement est ainsi libellé :

[2] Affaire *Bagosora et consorts*, *Decision on Sufficiency of Defence Witness Summaries*, Chambre de première instance, 5 juillet 2005. La Chambre a rejeté la demande de certification de la Défense, voir *Decision on Request for Certification Concerning Defence Witness Summaries*, Chambre de première instance, 21 juillet 2005.

[3] *Le Procureur c. Blaskić*, Arrêt relatif aux requêtes de l'appelant aux fins de production de documents, de suspension ou de prorogation du délai de dépôt du mémoire et autres, 26 septembre 2000, para. 40 (avec références); *Le Procureur c. Kordic et Cerkez*, Ordonnance relative à la requête de Paško Ljubičić aux fins d'avoir accès à des documents confidentiels – pièces jointes, comptes rendus d'audience et pièces à conviction – dans l'affaire *Kordić et Cerkez*, 19 juillet 2002.

[4] La Défense décrit les éléments requis comme étant des pièces, des documents, de la correspondance et tout document se trouvant en la possession [du Procureur] ou sous son contrôle, qui se rapportent à la procédure ou au dossier d'immigration i) du témoin LIG-2; ii) du témoin à décharge LT-1; iii) de tous autres témoins à décharge dont le nom figure sur la liste de témoins de Nsengiyumva sur qui des enquêtes ont pu être menées quant à leur statut d'immigrant, de demandeur d'asile ou de réfugié; et iv) de tous autres témoins à décharge potentiels. La requête précise qu'il peut notamment s'agir de demandes de renseignements adressées par le Procureur à un pays hôte, des réponses du pays hôte, des documents transmis à la faveur de cette correspondance des documents relatifs au statut d'immigrant ou de réfugié ou du dossier d'immigration tel que communiqué par le pays hôte, le HCR ou toute autre organisation.

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> At the request of the Defence, the Prosecutor shall permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

The Defence argues that the immigration documents are indeed "material to the preparation of the defence" because they may be used by the Prosecution to impeach the credibility of Defence witnesses by showing that their testimony is inconsistent with the prior statements. Furthermore, since the Prosecution has openly declared its intention to use these documents, they must be disclosed under Rule 66 (B) as "intended for use by the Prosecutor as evidence at trial".

5. The Chamber recalls that Rule 66 is entitled "Disclosure Obligations by the Prosecutor". According to Rule 66 (A) (i), the Prosecution shall, within 30 days of the initial appearance, disclose to the Defence copies of supporting material which accompanied the indictment when confirmation was sought as well as all prior statements of the accused. Rule 66 (A) (ii) requires the Prosecution, no later than 60 days before the date set for trial, to disclose copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial. Rule 66 (A) is clearly limited to disclosure of documents relating to the Prosecution case. Furthermore, Rule 66 appears in the Rules under Part Five, "Pre-Trial Proceedings", in Section 3 "Production of Evidence". Although some of the Rules in this section entail obligations throughout the trial, the Chamber considers that Rule 66 (B) requires that the Prosecution must make available all materials which will assist the Defence in countering the evidence to be presented by the Prosecution. The immigration documents requested by the present motion are not material to the Defence preparations to meet the Prosecution case, which is closed.

6. Rule 66 (B) requires the Prosecution to allow Defence inspection of three categories of documents. The third category (material which has been "obtained from or belonged to the accused") is not applicable in the present context. The second category ("intended for use by the Prosecutor as evidence at trial") must be read as referring to evidence being presented during the Prosecution case. A prior inconsistent immigration statement put to a witness, and possibly tendered as an exhibit, is not evidence in the sense of being presented to prove the truth of the content thereof[5].

[5] T. 13 July 2004 p. 2; *Akayesu*, Judgement (AC), para. 134 : ("In the opinion of the Appeals Chamber prior statement of witnesses who appear in court are as a rule relevant only insofar as they are necessary to a Trial Chamber in its assessment of the credibility of a witness. It is not the case, as appears to be suggested by Akayesu, that they should or could generally in and of themselves constitute evidence that the content thereof is truthful"). See also *Delalic et al.*, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence (TC), 26 September 1996, paras. 6-8, where a Trial Chamber found that Rule 16 (a) (1) (C) of the United States Federal Rules of Criminal Procedure provides some guidance in analyzing Rule 66. Rule 16 (a) (1) (C) pro-

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> À la demande de la défense, le Procureur doit [...] permettre à celle-ci d'examiner tous livres, documents, photographies et autres objets se trouvant en sa possession ou sous son contrôle qui sont nécessaires à la défense de l'accusé, ou seront utilisés par le Procureur comme moyens de preuve au procès, ou ont été obtenus de l'accusé ou lui appartiennent.

La Défense fait valoir que les documents relatifs aux demandes d'immigration sont effectivement «nécessaires à la défense de l'accusé» au motif qu'ils peuvent être utilisés par le Procureur pour entamer la crédibilité des témoins à décharge en montrant que leurs dépositions sont contredites par leurs déclarations antérieures. En outre, le Procureur ayant publiquement fait connaître son intention de les utiliser, lesdits documents doivent être communiqués en vertu du paragraphe (B) de l'article 66 du Règlement comme pièces qui «seront utilisé[e]s par le Procureur comme moyens de preuve au procès».

5. La Chambre rappelle que l'article 66 du Règlement est intitulé «Communication des pièces à décharge et autres éléments pertinents». Aux termes de l'alinéa (i) du paragraphe A de cette disposition, le Procureur communique à la Défense, dans les trente jours suivant la comparution initiale de l'accusé, copie de toutes les pièces justificatives jointes à l'acte d'accusation lors de la demande de confirmation ainsi que de toutes les déclarations antérieures de l'accusé. L'alinéa (ii) du même paragraphe fait obligation au Procureur de communiquer à la Défense, au plus tard soixante jours avant la date fixée pour le début du procès, copie des déclarations de tous les témoins qu'il entend appeler à la barre. De toute évidence, le paragraphe (A) ne porte que sur la communication de pièces relatives aux moyens du Procureur. Il convient de noter en outre que l'article 66 fait partie de la troisième section (La production des éléments de preuve) du cinquième chapitre du Règlement intitulé «Mise en accusation». Certains des articles de ladite section prévoient certes des obligations pendant toute la durée du procès, mais la Chambre estime que le paragraphe (B) de l'article 66 impose au Procureur l'obligation de mettre à la disposition de la Défense toutes les pièces qui aideront celle-ci à attaquer les éléments de preuve que le Procureur entend présenter. Les documents relatifs aux procédures d'immigration demandés dans la requête à l'examen ne sont pas des pièces nécessaires à la défense de l'accusé pour répondre aux allégations du Procureur dont la présentation des moyens est terminée.

6. Selon le paragraphe (B) de l'article 66, le Procureur doit permettre à la Défense d'examiner trois catégories de documents. La troisième catégorie (les documents qui ont été «obtenus de l'accusé ou lui appartiennent») ne s'applique pas en l'occurrence. La deuxième catégorie, (les documents qui «seront utilisés par le Procureur comme moyens de preuve au procès»), s'entend des pièces utilisées par le Procureur lors de la présentation de ses moyens. Une déclaration antérieure aux services de l'immigration, qui contredit la déposition d'un témoin, et qui lui est soumise, quand bien même elle aurait été versée au dossier, ne constitue pas un moyen de preuve en ce sens qu'elle n'est pas produite pour établir la véracité de son contenu[5]. La dernière caté-

[5] Compte rendu de l'audience du 13 juillet 2004, pp. 1 et 2; arrêt *Akayesu*, para. 134 : («La Chambre d'appel considère que les déclarations antérieures des témoins qui comparaissent à l'audience ne sont généralement pertinentes que dans la mesure où elles sont nécessaires à la Chambre dans son appréciation de la crédibilité d'un témoin. Contrairement à ce que semble prétendre Akayesu, ces déclarations antérieures ne devraient ni ne pourraient, d'une manière générale, constituer, en elles-mêmes, des preuves de la véracité de leur contenu»). Voir également

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The final category prescribed by Rule 66 (B) ("material to the preparation of the defence") must also be understood as referring to the Defence preparations to meet the Prosecution case. The requested immigration documents are not part of the Prosecution case in the sense described above, but may be used during the Prosecution's cross-examination of Defence witnesses with a view to their impeachment. In the Chamber's view, Rule 66 (B) cannot be interpreted as laying down a blanket obligation for the Prosecution to disclose documents pertinent to its cross-examination of Defence witnesses. In relation to the requested immigration documents, the Chamber observes that the Defence is aware of the identity and country of residence of its witnesses and may make inquiries as to whether they have been interviewed by immigration authorities. The Defence is therefore in a position to carry out the necessary investigations to prepare its case and, on this basis, select its witnesses.

7. The *Kamuhanda* decision referred to by the Defence is distinguishable from the present question. In that case, Prosecution investigators had taken statements from witnesses after the Prosecution had received notice that they were Defence witnesses, in violation of the Chamber's witness protection order concerning the procedure for contacting of Defence witnesses. In the circumstances, the Chamber allowed the Defence to inspect the statements pursuant to Rule 66 (C)[6]. Finally, the *Kajelijeli* decision, also referred to by the Defence, is not relevant as it related to disclosure of a statement of a Prosecution witness[7]. The Chamber concludes that none of the three alternatives in Rule 66 (B) requires disclosure or inspection of the immigration materials requested by the Defence.

8. This approach does not violate the rights of the Accused as set forth in Articles 19 and 20 of the Statute, as suggested by the Defence. There is no ICTR or ICTY case law supporting this view. The Defence has referred to legislation and jurisprudence of national jurisdictions invoked to the effect that comprehensive and ongoing disclosure obligations are essential for the fair trial of an Accused. No widespread practice of requiring disclosure of such statements in advance of cross-examination has been established. On the contrary, disclosure at the time of cross-

vides that : "Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence *in chief* at the trial, or were obtained from or belonged to the defendant" (emphasis added).

[6] *Kamuhanda*, Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor (TC), 29 August 2002, in particular paras. 20, and 24-27. The Prosecution even received a warning under Rule 46 (A) of the Rules.

[7] *Kajelijeli*, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Witness GAO (TC), 2 November 2001.

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gorie (les documents «nécessaires à la défense de l'accusé»), est constituée des pièces dont la Défense a besoin pour combattre les moyens à charge. Or, comme on le dit plus haut, les documents demandés ne font pas partie de ces moyens, mais pourraient être utilisés par le Procureur pour ébranler la crédibilité des témoins à décharge lors du contre–interrogatoire. De l'avis de la Chambre, le paragraphe (B) de l'article 66 du Règlement ne saurait être interprété comme prescrivant au Procureur une obligation générale de communication s'étendant à des documents qu'il compte utiliser lors du contre-interrogatoire des témoins à décharge. En ce qui concerne les documents demandés, elle fait observer que la Défense a connaissance de l'identité de ses témoins et du pays où ils résident et peut chercher à savoir s'ils ont été interrogés ou non par les services de l'immigration. La Défense est donc en mesure de mener les enquêtes nécessaires pour préparer sa cause et choisir ses témoins en conséquence.

7. La décision *Kamuhanda* à laquelle la Défense renvoie diffère du cas d'espèce. Dans cette affaire, les enquêteurs du Procureur avaient recueilli des déclarations de témoins après que celui-ci eut été informé de leur qualité de témoins à décharge, en violation de la décision de la Chambre relative à la protection de témoins, et notamment de la procédure à suivre pour entrer en contact avec eux. La Chambre a donc autorisé la Défense à examiner les déclarations en application du paragraphe (C) de l'article 66 du Règlement[6]. Quant à la décision *Kajelijeli*, à laquelle la Défense renvoie également, elle n'est pas pertinente puisqu'elle se rapportait à la communication de la déclaration d'un témoin à charge[7]. La Chambre conclut qu'aucun des trois cas de figure prévus au paragraphe (B) de l'article 66 du Règlement n'exige la communication ou l'examen des documents relatifs à des procédures d'immigration que demande la Défense.

8. Contrairement à ce que prétend la Défense, une telle conclusion ne viole pas les droits de l'accusé consacrés aux articles 19 et 20 du Statut, ce que confirme la jurisprudence du TPIR et du TPIY. Pour étayer sa thèse, la Défense renvoie à la législation et à la jurisprudence de juridictions nationales pour essayer de montrer que l'obligation de communication doit être complète et continue pour que le procès soit équitable. Or, elle n'a pas établi qu'il existait une pratique généralisée concernant la communication de telles déclarations avant le contre-interrogatoire. En revanche, leur

affaire *Delalic et consorts*, Décision relative à la requête de l'accusé Zejnil Delalic aux fins de divulgation d'éléments de preuve, 26 septembre 1996, paras. 6 à 8, où la Chambre de première instance a conclu que l'article 16 a) 1) C) du *Federal Rules of Criminal Procedure* (Règlement fédéral de procédure pénale) des États-Unis, qui stipule : «À la demande de la Défense, le Ministère public permet à celle-ci de prendre connaissance et de copier ou de photographier les livres, rapports, documents, photographies, pièces à conviction, bâtiments ou lieux, ou copies ou parties de ces éléments, qui se trouvent en sa possession, à sa charge ou sous son contrôle, et qui sont nécessaires à la défense de l'accusé ou que le Ministère public entend produire comme élément de preuve principal au procès, ou qui ont été obtenus de l'accusé ou lui appartiennent» (non souligné dans l'original).

[6] Affaire *Kamuhanda*, Décision relative à la requête de la Défense demandant communication de déclarations de témoins, ainsi que des sanctions à l'encontre du Procureur, 29 août 2002, notamment les paragraphes 20 et 24 à 27. Le Procureur a même reçu un avertissement conformément au paragraphe A) de l'article 46 du Règlement.

[7] Affaire *Kajelijeli*, Décision sur la requête de Juvénal Kajelijeli aux fins d'obtenir le rappel du témoin à charge GAO, Chambre de première instance, 2 novembre 2001.

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examination appears to be a common procedure, and does not amount to "trial by ambush"[8].

(iii) *Disclosure under Rule 68*

9. Rule 68 (A) requires the Prosecution to

> "as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor, may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence".

The initial determination of whether information is exculpatory is to be made by the Prosecution[9]. If the Defence contests this determination it must present *prima facie* evidence that the material sought is exculpatory in nature[10]. No such showing has been made by the Defence, nor would it seem likely that any such information would appear in an immigration statement which, at best, could merely serve to bolster the testimony of a witness.

10. Rule 68 (B), also relied upon by the Defence, does not create any independent or additional obligation, but simply provides that, where possible, the materials covered by sub-section (A) should be made available "in electronic form". This means only that the Prosecution may, with the agreement of the Defence, fulfill its disclosure obligations by using modern technology[11].

[8] See e.g. Rule 16 (a) (1) (C) of the United States Federal Rules of Criminal Procedure, cited above; Mueller & Kirkpatrick, Evidence (New York : Aspen, 2003), p. 523; Cross & Tapper, Evidence (London : Butterworth's, 1995), p. 322. *R. v. Stinchcombe* (1991), which has been referred to by the parties, does not address the issue at hand. The Chamber notes that the *Stinchcombe* case, relied on by the Defence, is distinghuishable from the present situation in at least two respects : first, that the disclosure obligation imposed on the Crown concerned statements derived from interviews conducted by the police or the Prosecution; and second, that there was no statutory regime of pre-trial disclosure whatsoever.

[9] *Prosecutor* v. *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, para. 9; *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002, para. 18; *Prosecutor v. Blaskić*, Decision on the Production of Discovery Materials, 27 January 1997 ("*Blaskić* Decision of 27 January 1997"), para. 47.

[10] *Blaskić* Decision of 27 January 1997, para. 50; *Prosecutor v. Delalic et al.*, Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, 24 June 1997, para. 13; *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect, 18 September 2001, para. 17; *Prosecutor v. Ndayambaje*, Decision on the Defence Motion for Disclosure, Case No. ICTR-96-8-T, 25 September 2001 ("*Ndayambaje* Decision of 25 September 2001"), para. 5.

[11] *Prosecutor* v. *Bizimungu et al.*, Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material, 1 December 2004, para. 9.

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communication au moment du contre-interrogatoire semble être une procédure habituelle et ne constitue en aucune façon un «traquenard[8]» [traduction].

(iii) *Communication en vertu de l'article 68 du Règlement*

9. L'article 68 (A) du Règlement exige du Procureur qu'il

> «communique aussitôt que possible à la Défense tous les éléments dont il sait effectivement qu'ils sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité de ses éléments de preuve à charge».

C'est au Procureur qu'il revient de déterminer quels éléments sont de nature à disculper l'accusé[9]. En cas de désaccord, la Défense doit présenter des éléments de preuve tendant à établir d'emblée que les documents qu'elle demande sont effectivement de nature à disculper l'accusé[10]. Or, la Défense n'a produit aucun élément de cette nature. De plus, il serait improbable que de telles informations figurent dans une déclaration aux services de l'immigration, qui, au mieux, ne pourrait servir qu'à étayer la déposition d'un témoin.

10. Le paragraphe (B) de l'article 68 du Règlement, sur lequel se fonde également la Défense, n'emporte aucune obligation distincte ou supplémentaire, mais précise que, dans la mesure du possible, les documents visés au paragraphe (A) doivent être mis à disposition «sous forme électronique». Cela signifie simplement que le Procureur peut, avec l'accord de la Défense, s'acquitter de ses obligations de communication en ayant recours à la technologie moderne[11].

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[8] Voir, par exemple, l'article 16 a) 1) C) du Règlement fédéral de procédure pénale des États-Unis, cité ci-dessus; Mueller & Kirkpatrick, *Evidence* (New York : Aspen, 2003), p. 523; Cross & Tapper, *Evidence* (London : Butterworth's, 1995), p. 322. *R. v. Stinchcombe* (1991), affaire citée par les parties, ne traite pas de la question qui ici fait débat. La Chambre constate que l'affaire *Stinchcombe,* sur laquelle se fonde la Défense, se distingue de l'espèce sous au moins deux aspects : premièrement, que l'obligation de communication imposée à la Couronne se rapportait à des déclarations tirées d'entretiens menés par la police ou le Procureur; et deuxièmement, qu'il n'existait absolument pas de régime statutaire de communication préalable au procès.

[9] *Le Procureur c. Brđanin*, Décision relative aux requêtes par lesquelles l'appelant demande que l'Accusation s'acquitte de ses obligations de communication en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer certains documents, 7 décembre 2004, para. 9; *Le Procureur c. Rutaganda*, Décision relative à la requête urgente de la Défense en communication et admission de moyens de preuve supplémentaires et ordonnance portant calendrier, 12 décembre 2002, para. 18; *Le Procureur c. Blaskić*, Décision sur la production forcée de moyens de preuve, 27 janvier 1997 («Décision *Blaskić* du 27 janvier 1997»), para. 47.

[10] Décision *Blaskić* du 27 janvier 1997, para. 50; *Le Procureur c. Delalic et consorts*, Décision relative à la requête de l'accusé Hazim Delic aux fins de la communication d'informations à décharge en application de l'article 68 du Règlement, 24 juin 1997, para. 13; *Le Procureur c. Nyiramasuhuko et consorts, Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect*, 18 septembre 2001, para. 17; *Le Procureur c. Ndayambaje*, *Decision on the Defence Motion for Disclosure*, affaire n° ICTR-96-8-T, 25 septembre 2001 («Décision *Ndayambaje* du 25 septembre 2001»), para. 5.

[11] *Le Procureur c. Bizimungu et consorts*, *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material*, 1er décembre 2004, para. 9.

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(iv) *Rule 70*

11. Having decided that there is no disclosure obligation in the Rules or elsewhere which requires disclosure by the Defence, there is no need to address whether Rule 70 does, or does not, provide an exception in respect of the documents under discussion.

(v) *Modalities*

12. In order to ensure the smooth running of the trial, this Chamber has encouraged the parties to inform the other side, before a witness takes the stand, of documents they intend to use during examination of witnesses. These guidelines were, for instance, formulated during a Status Conference in June 2003, while the Prosecution was presenting its case[12]. At the same time, the Chamber has also acknowledged that there may be instances where such notification may only take place once cross-examination of a witness commences, in order to maintain the element of surprise[13]. The Chamber will continue to follow these practices. Consequently, the Defence will be entitled to see immigration statements at the time of cross-examination, which is in conformity with established practice in national jurisdictions[14].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 27 September 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[12] T. 13 June 2003, pp. 24-25 (closed session).

[13] *Id*. An example where the Defence did not disclose a document until the middle of cross-examination was T. 16 June 2004 pp. 33-37.

[14] Mueller & Kirkpatrick, Evidence (New York : Aspen, 2003), p. 523; Cross & Tapper, Evidence (London : Butterworth's, 1995), p. 322.

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(iv) *Article 70 du Règlement*

11. Ayant conclu qu'il n'existe dans le Règlement ni ailleurs, aucune obligation de communication liant la Défense, il n'y a pas lieu de se pencher sur la question de savoir si l'article 70 du Règlement prévoit ou pas une exception en ce qui concerne les documents visés.

(v) *Modalités*

12. Pour garantir le bon déroulement du procès, la présente Chambre a encouragé les parties à informer la partie adverse, avant la déposition d'un témoin, des documents qu'elles entendent utiliser durant l'interrogatoire. Elle l'a notamment demandé pendant la conférence de mise en état de juin 2003, alors que le Procureur présentait ses moyens[12]. Elle a toutefois indiqué qu'il pourrait exister des cas où une telle communication ne pourrait intervenir qu'au moment du contre-interrogatoire, pour ménager l'effet de surprise[13]. Elle s'en tiendra à cette pratique. En conséquence, elle décide que la Défense pourra examiner les déclarations recueillies par les services de l'immigration au moment du contre-interrogatoire, ce qui est conforme à la pratique établie dans les juridictions nationales[14].

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense.

Arusha, le 27 septembre 2005.

[Signé] : Erik Møse, Président; Jai Ram Reddy; Sergei Alekseevich Egorov

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[12] Compte rendu de l'audience du 13 juin 2003, pp. 26 et 27 (huis clos).

[13] *Id.* Voir compte rendu de l'audience du 16 juin 2004, pp. 33 à 38, pour un exemple où la Défense n'a pas communiqué de document jusqu'au milieu du contre-interrogatoire.

[14] MUELLER & KIRKPATRICK, *Evidence* (New York : Aspen, 2003), p. 523; CROSS & TAPPER, *Evidence* (London : Butterworth's, 1995), p. 322.

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## *Decision on Exclusion of Testimony outside the Scope of the Indictment 27 September 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Obligation of the Prosecution to state the material facts in the Indictment, Lack of notice of a material allegation, Cure of the defects of the Indictment, Factual allegations in the Indictment, Degree of specificity of the facts, Factors for evaluating the facts – Testimony, Relevance of the evidence, Probative value of the evidence, Admissibility of evidence, Moment of admission of evidence, Power of appreciation of the Chamber – Rights of the Accused, Reasonable notice to the Defence, Adequacy of notice of charges, Prejudice to the Accused – Burden of the proof – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 89 (C) and 98* bis*; Statute, art. 20*

*Arusha Accords*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Proposed Testimony of Witness DBY, 18 September 2003; Trial Chamber,* The Prosecutor v. Sylvestre Gacumbitsi, *Judgement, 17 June 2004 (ICTR-2001-64); Appeals Chamber,* The Prosecutor v. Augustin Bizimungu et al., *Decision on Prosecution Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004 (ICTR-99-50); Appeals Chamber,* The Prosecutor v. Eliézer Niyitegeka, *Judgement, 9 July 2004 (ICTR-96-14); Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Judgement, 15 July 2004 (ICTR-2001-71); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17); Appeals Chamber,* The Prosecutor v. Laurent Semanza, *Judgement 20 May 2005 (ICTR-97-20); Appeals Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Judgement, 19 September 2005 (ICTR-99-54)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Zoran Kupreskić, *Trial Judgement, 23 October 2001 (IT-95-16)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

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BEING SEIZED OF the Kabiligi "*Requête en extreme urgence aux fins de rejet des témoignages sur des faits qui ne figurent pas dans l'acte d'accusation*", filed on 19 October 2004;

CONSIDERING the Prosecution Response thereto, filed on 29 October 2004; the Kabiligi Defence Supplementary Memorandum, filed on 26 April 2005; the Prosecution Response thereto, filed on 6 May 2005; the Kabiligi Reply, filed on 10 May 2005; the Prosecution Response to that Reply, filed on 11 May 2005; and the Defence Amended Reply to that Response, filed on 12 May 2005;

HEREBY DECIDES the motion.

## Introduction

1. The Defence for Kabiligi requests that portions of the testimony of eight witnesses heard during the Prosecution case be excluded from the Chamber's consideration. It argues that the testimony in question cannot be connected to any material fact alleged in the Indictment, which is a condition of its admissibility. General references in the Indictment to "planning", "organising" and "conspiring" by the Accused are said to be too vague to justify admission of the evidence.

## Deliberations

2. Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged"[1]. The present motion complains that the evidence has no relevance to anything in the Indictment, or that some paragraphs of the Indictment to which it might be relevant are too vague to be taken into account. Some recent Appeals Chamber judgements thoroughly discuss the specificity with which an indictment must be pleaded, and the significance of other forms of Prosecution disclosure of its case[2]. Although the question addressed in those cases was whether a conviction should be quashed because of insufficient notice of a charge in the indictment, the analysis is equally relevant to the present question, namely, whether evidence is sufficiently related to some charge in the Indictment to be admissible.

3. The rights of the Accused enshrined in Article 20 of the Statute impose, according to the Appeals Chamber in *Kupreškić*,

> "an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven"[3].

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[1] *Bagosora et al.*, Decision on Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 4.

[2] *Ntakirutimana*, Judgement (AC), 13 December 2004; *Niyitegeka*, Judgement (AC), 9 July 2004. The principles set out in these two judgements have been applied in subsequent judgements : *Semanza*, Judgement (AC) 20 May 2005, paras. 85-88; Kamuhanda, Judgement (AC), 19 September 2005, paras. 13-28.

[3] *Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 88.

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Material facts may also be communicated to the Accused other than through the indictment :

> If an indictment is insufficiently specific, *Kupreškić* stated that such a defect 'may, in certain circumstances cause the Appeals Chamber to reverse a conviction.' However, *Kupreškić* left open the possibility that a defective indictment could be cured 'if the Prosecution provides the Accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.' The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeals Judgement put it, whether the trial was rendered unfair by the defect. *Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution's pretrial brief, during disclosure of evidence, or through proceedings at trial. In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution case are relevant. As has been previously noted, 'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial[4].

Whether vagueness in the indictment has been cured by subsequent disclosure involves consideration of the following factors : the consistency, clarity and specificity with which the material fact is communicated to the Accused[5]; the novelty and

[4] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 27. See *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197-98. Cf. *Bizimungu et al.*, Decision on Prosecution Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence (AC), 25 June 2004, para. 18 ("Further, in finding that the failure to plead could not be remedied by the Pre-Trial Brief, disclosed witness statements or the Prosecution's opening statement, the Trial Chamber made specific reference to the jurisprudence of the Appeals Chamber").

[5] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 221-222 (disclosure in a witness statement of an allegation not mentioned in the pre-trial brief did not provide the "timely, clear and consistent" notice required to cure a defect in the indictment because "the [Accused] could well have concluded from the failure to mention Kivumu in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe"); *Ntakirutimana*, Judgement (AC), para. 111 (Trial Chamber erred in basing conviction on a particular incident where it was alleged that the Accused was present during an attack, but without precisely specifying the location, date, or his conduct : "the information available to [the Accused] before trial, however, provided no notice of the location of the event, contained a date that the Trial Chamber found was inaccurate, and did not allege that [the Accused] had pointed out refugees to attackers during the event"); *id.*, para. 57 (a single, somewhat ambiguous reference in a pre-trial brief provided inadequate notice of a new material fact when the testimony of five other witnesses was also used at trial to prove the material fact); *Kamuhanda*, Judgement (AC), 19 September 2005, paras. 25-26 (disclosure in witness statement and pre-trial brief of precise commune in which weapons had allegedly been distributed provided sufficient information to the Accused, even though the Indictment itself identified only the prefecture).

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incriminating nature of the new material fact[6]; and the period of notice given to the Accused[7]. Mention of a material fact in a witness statement does not necessarily constitute adequate notice : the Prosecution must convey that the material allegation is part of the case against the Accused[8]. This rule recognizes that, in light of the volume of disclosure by the Prosecution in certain cases, a witness statement will not, without some other indication, adequately signal to the Accused that the allegation is part of the Prosecution case. The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront the Prosecution case[9].

4. In its responses, the Prosecution maintains that the motion is either moot or premature : either the admissibility of the evidence has been decided by the Chamber in its rulings during the testimony of the witnesses; or, alternatively, the significance of testimony requires an assessment of its inter-relationship with other testimony at

[6] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 95-98 (Trial Chamber erred in considering allegation of killing by the Accused of a specific named individual where only the general attack in which the killing took place had been mentioned in the pre-trial brief and witness statement); *id*., para. 75; *Bagosora et al*., Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 20 ("The Defence cannot be considered to be on notice of any and all possible orders to a witness in a specific location merely because there is notice that the witness is alleged to have been under the command of the Accused and was at that location. Here, the Defence for Ntabakuze has no notice of the killings of the fifty civilians in hiding in Remera; no notice that he gave the order that they be killed; and, indeed, no notice that he issued any particular order at all at that location. The nature of the criminal conduct alleged is at least arguably changed from one of superior responsibility for killings at roadblocks by subordinates, to a direct order to kill fifty individuals. The Defence's need to rebut the charge is substantial; and its ability to do so is seriously impaired in the absence of meaningful advance notice").

[7] Disclosure four days before trial, and eleven days before the testimony, that an accused had been armed and fired upon victims during an attack, was not timely, particularly because the Prosecution had the statement in its possession two months prior to the disclosure. Previous disclosure in the pre-trial brief of the Accused's participation in the attack, but without mentioning his specific involvement in the violence, provided insufficient notice. *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 82-84; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 29.

[8] Ntakirutimana, Judgement (AC), 13 December 2004, para. 27 ("'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial") (citations omitted); *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197.

[9] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 196 ("[A] Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response"). This does not, however, foreclose the Trial Chamber's discretion to reject allegations which radically alter the indictment, even if the Defence has a reasonable opportunity to investigate the charge. *Gacumbitsi*, Judgement (TC), 17 June 2004, para. 188 ("Consequently, the Chamber finds that the Indictment does not contain any specific allegation about the murder of Kanyogote and his children. That the Prosecutor mentioned the murder of Kanyogote and his children in his Pre-Trial Brief is not such as to cure the vagueness in the Indictment, especially as such brief does not establish a link between the new allegation and paragraph 33 of the Indictment. The Pre-Trial Brief does not seek to render the Indictment more specific, but rather alters the Indictment substantially by either changing the identity of the victims referred to in paragraph 33 or including a new allegation of murder. The Pre-Trial Brief cannot be used as an instrument to amend the Indictment substantially").

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the end of the case, when all the evidence can be weighed and viewed in context[10]. Furthermore, the Chamber's decision on the Defence motions for acquittal is said to have disposed of the present motion.

5. In the Chamber's opinion, the motion is neither moot, nor premature, nor previously decided. Rulings in response to contemporaneous objections by the Defence were, as is clear from the transcripts, provisional[11]. The Chamber's decision on the motions for acquittal expressly stated that the adequacy of notice of charges was not within the purview of the Chamber's analysis under Rule 98 *bis*[12]. Although a Chamber may determine at the end of the case that a conviction cannot be sustained on the basis of material allegations of which the Defence had insufficient notice, this does not displace the obligation to determine admissibility of evidence during trial[13]. If the Prosecution fails to establish the relevance of evidence to a charge against the accused, then it must be deemed inadmissible.

6. The Defence is expected, however, to make a timely objection to evidence whose admissibility it challenges. Failure to do so, particularly on grounds of lack of notice of a material allegation, deprives the Prosecution of the opportunity to make a motion for an adjournment or amendment of the indictment[14]. Failure to make a contempo-

[10] The Prosecution responses submit that the motion duplicates the relief already sought by the Defence in their motions to dismiss, filed under Rule 98 *bis*, and decided by the Chamber on 2 February 2005.

[11] T. 9 September 2003, pp. 9-10, concerning Witness XAI : ("For the time being we note what you said, Mr. Degli. Can we move on now? I know that you may be filing a motion on this"); T. 4 May 2004, p. 59, concerning Witness XXH ("It seems to me that this is something the parties will have to come back to at a later stage. So, your observation is noted, and your explanation is noted for the time being, Mr. White, but I don't think we can take this further now"); T. 11 October 2004, p. 16, concerning Witness XXQ : ("We have noted the objection of Mr. Tremblay, but leaving aside now the ultimate ruling on that issue, what we can see now is that on that page to which reference has been made there is information about Burundi and Rwanda. And that's where we are for the time being, and we may hear further arguments on this later on. Now, based on this preliminary ruling could you then continue your answer Mr. Witness?"). An objection to Witness DCH's testimony was interposed immediately after it had been said in court. The Prosecution asked no further questions concerning the incident and the Chamber did not at the time rule on the admissibility of the evidence. T. 18 June 2004 pp. 34-35. The Defence made a contemporaneous objection to Witness AAA's testimony, which the Chamber rejected on the basis of brief submissions by the parties. T. 14 June 2004 pp. 18-20.

[12] *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 7 ("The inquiry under Rule 98 *bis* is limited to determining whether "the *evidence* is insufficient to sustain a conviction". The Chamber is not mandated to consider whether the Defence has had insufficient notice of charges to sustain a conviction, or whether there are other legal defects in an Indictment which could lead to acquittal").

[13] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 196 ("A Trial Chamber … should take one or more of the steps envisioned by *Kupreškić*, including excluding the evidence or ordering the Prosecution to move to amend the indictment"); *Bizimingu et al.*, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence (AC), 25 June 2004 (upholding Trial Chamber's decision to exclude evidence during the course of the trial by reason of vagueness of the indictment).

[14] *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 24 ("As previously mentioned, evidence whose reliability cannot adequately be tested by the Defence cannot have probative value. Once the sting of prejudice has been removed, as

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raneous objection does not constitute an absolute waiver of the rights of the Accused, but shifts the burden of proof to the Accused to show that lack of notice has been prejudicial[15].

7. A ruling by the Chamber in response to a timely objection during a witness's testimony does not foreclose a subsequent written motion. In light of the complexity sometimes associated with determining whether adequate notice of a material fact has been given, the Chamber's oral decision during a witness's testimony cannot be taken to foreclose any further objection. Although it is true that the Chamber has in the past expressed its inclination to address exclusion of evidence on the basis of notice at the end of the case, there is no reason to preclude written motions at an earlier stage[16]. Now that the Prosecution case is closed, the Chamber has a clearer idea of the possible relevance of the challenged evidence than it did when the objections were made. Furthermore, the Appeals Chamber has now substantially clarified the law concerning vagueness of indictments and notice of material facts. Where the Chamber can be satisfied that the evidence in question cannot not be relied upon as a basis for conviction, then the interests of judicial economy are served by deciding in advance that the evidence should be excluded.

8. Timely objections were raised during the testimony of Witnesses XAI, XXH, XXQ, DCH, and AAA in respect of each of the items raised in the motion. Accordingly, the burden rests with the Prosecution to show that the material facts to which this evidence is relevant were adequately communicated to the Defence. Although the

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by giving the Defence adequate time to investigate and prepare for the new evidence, then the evidence can be admitted. The Chamber is of the view that it is preferable to hear relevant evidence, but will only permit admission of such evidence when there is a reasonable opportunity to evaluate the probative value of the evidence in conformity with the rights of the Accused"); *Niyitegeka*, Judgement (AC), 9 July 2004, para. 199 ("In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection *at the time the evidence is introduced*") (emphasis added); *Bizimungu et al*., Decision (TC), 23 January 2004, paras. 17-18.

[15] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 200 ("The importance of the accused's right to be informed of the charges against him under Article 20 (4) (a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal … an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired"); *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 29 ("When raised at the end of trial, the Defence has the burden of showing that its preparation was materially impaired by the defect in the indictment, notwithstanding any curative disclosure of the Prosecution case"). Although the objections in these cases were raised on appeal and at the end of the trial, respectively, the same logic applies to any objection after the opportunity to adjourn the witness's testimony has passed.

[16] T. 30 June 2003 pp. 57-59 ("And it is clear from those judgements [in *Ntakirutimana* and *Niyitigeka*] and it follows from the transcripts in those cases that on various occasions the Defence argued that the witness came with unexpected evidence and that it had to be excluded. And the Chamber, in these two cases, did not accept that point of view toward the evidence, but in the judgement, quite a few events having occurred in this way did not lead to conviction, but resulted in acquittal ….")

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Prosecution has not offered detailed written submissions concerning the adequacy of notice in response to the written motion, it did make such submissions orally while the testimony was being heard.

(a) *Witness XAI*

9. The Defence challenges the admissibility of evidence that (i) as commander of operations in the Byumba area in 1992, Mr. Kabiligi gave a speech to soldiers under his command in which he warned of RPF infiltrators dressed as civilians and encouraged the soldiers to be "vigilant so that the infiltrators can be captured"[17]; and (ii) that three infiltrators were subsequently arrested and killed on the orders of a company commander who, implicitly, acted on the orders of the Accused[18]. The Pre-trial Brief states that Witness XAI would testify that the Accused

> "would tell the FAR soldiers that RPF's troops were comprised of Tutsi and that Tutsi civilians who were their accomplices should be treated the same way"[19].

The witness's statement alleges that the Accused said that

> "the RPF was composed of Tutsis and that Tutsi civilians who were their accomplices should face the same fate"[20].

10. Although the Pre-trial Brief and witness statement are somewhat vague, notice was at least given that the Accused had given instructions about capturing RPF infiltrators. As the testimony is generally related to that topic, and is not highly incriminating, notice was sufficient to render it admissible. The killing of the specific civilians, however, is an entirely different matter. This is a well-defined incident of killing, allegedly on the instructions of the Accused, which is highly prejudicial. The Prosecution has not shown that there is any reference to this incident in the witness's prior statement or the Pre-trial Brief. The lack of notice renders the testimony of the alleged killings of the three civilians inadmissible.

(b) *Witness XXH*

11. The Defence challenges six distinct elements of testimony concerning the conduct of the Accused in Cyangugu prefecture. The Pre-trial Brief gives notice of four of these, namely : a meeting attended by President Sindukubwabo and others at which the Accused called for contributions for arms which would be distributed to civilians in order to pursue Tutsi; a meeting on 24 May 1994 at which the Accused collected funds for that purpose; the killing of Tutsi at a roadblock near Rusizi set up by the Accused and manned by soldiers and *Interahamwe*; and the killing of an army deserter, on the orders of the Accused. Essential notice of a fifth element, the distribution

[17] T. 9 September 2003 pp. 3, 9.

[18] T. 9 September 2003 pp. 10 (lines 29-37) – 11 (lines 1-11).

[19] Pre-trial Brief, p. 140. The paragraph of the indictment to which this allegation relates is not defined in the Pre-trial Brief with particularity, nor have specific submissions on this point been made by the Prosecution. An addendum to the Pre-trial brief identifies the testimony of Witness XAI as relevant to more than twenty-five paragraphs of the Indictments, some of which refer to killings of Tutsi civilians by soldiers. Prosecutor Pre-Trial Brief Revision (TC), 7 June 2002.

[20] Exhibit DK 25B, p. 3.

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of fuel coupons to Yussuf Munyakazi, an alleged *Interahamwe* leader, was given in the Pre-trial Brief and the witness statement. The Pre-trial Brief states that the Accused distributed such coupons to the *Interahamwe*, and the statement specifically names Munyakazi as one such recipient. Both the Pre-trial Brief and the witness statement were available to the Defence long before the witness's testimony[21].

12. The testimony concerning a sixth element – that the Accused himself shot dead a suspected deserter – is not to be found in the Pre-trial Brief or the witness statement disclosed to the Defence[22]. As proof that the Accused killed a specified individual, the evidence could be prejudicial[23]. On the other hand, the Prosecution emphasized that this evidence is relevant only to "the ability and willingness of this particular Accused to effect disciplinary measures upon soldiers"[24]. The Chamber is not satisfied, based on the submissions of the parties at this stage, that this testimony cannot be relied upon for lack of notice.

(c) *Witness XXQ*

13. The Pre-trial Brief gives clear notice of Witness XXQ's testimony that Mr. Kabiligi, during a meeting over which he presided in February 1994, rejected the Arusha Accords and outlined various "strategies to win the war", which included "to arm civilians and incite them to fight against Tutsi and moderate Hutu"[25]. The testimony goes further, alleging that the Accused "told us that they had envisaged that war had to resume on the 23rd February", which was less than two weeks after the meetings. The witness elaborated that

> "this is a date that had been settled on, that had been fixed a long time before. It was the date on which the Rwandan government and the Burundian government had agreed to launch the genocide in the two countries"[26].

14. The allegation that the Accused was involved in fixing a specific date for the resumption of war, and that there was a conspiracy between the Rwandan and Burundian governments to initiate a genocide on that date, is not explicitly mentioned in

[21] The addendum to the Pre-trial Brief refers the testimony of Witness XXH to paragraphs 6.43-6.48 of the Kabiligi Indictment.

[22] Although the objection to this testimony was somewhat vaguely articulated, Defence counsel did objectto the testimony in question saying that he believed that the witness had already described all of the incidents at the location in question. T. 4 May 2004, pp. 56, 58-59.

[23] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 74-76. The Appeals Chamber reversed the Trial Chamber's reference to a specific material fact based on the inadequacy of general allegations in the indictment. Though the Prosecution had not been negligent by failing to disclose the material fact in the indictment or elsewhere of which it was in possession, the Appeals Chamber nevertheless held that "the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual … in cases concerning physical acts of violence perpetrated by the Accused personally, however, location can be very important … When the Prosecution seeks to prove that the accused committed an act at a specific location, it cannot simultaneously claims that it is impracticable to specify that location in advance".

[24] T. 4 May 2004 p. 59.

[25] Pre-trial Brief, insert after p. 150. The paragraphs of the Kabiligi Indictment to which this testimony relates are said to be 5.1, 5.35, 6.31 and 6.32.

[26] T. 11 October 2004, pp. 13-14.

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the Pre-trial Brief. However, one of the witness's prior statements does say "it was resolved to resume war and put an end to the Arusha Peace Accords" during the meeting[27]. The significance of the witness's reference to an alleged decision concerning genocide requires further submissions by the parties. On the basis of the material presently available, the Chamber is not satisfied at this stage that no notice has been given.

(d) *Witness DCH*

15. After the witness referred during his testimony to the killing of refugees at Mburabuturo School by soldiers and *Interahamwe*, during which the Accused was alleged to have been present, the Defence objected. Discussion of this question was interrupted by another matter, followed by an adjournment. When the examination resumed, the Prosecution elicited no further testimony on this incident[28].

16. Neither the Pre-trial Brief nor the witness statements make any reference to the killing of refugees at Mburabuturo School, or the involvement of the Accused. The Prosecution argued orally that the incident may have been mentioned in the witness statements of Witness DH or Witness DY. Even assuming that notice by way of other witness statements could provide sufficient notice of a material fact, the Chamber has found no reference to the Mburabuturo School killings in those statements, or the presence of the Accused. The reference to the Mburabuturo killings in the witness's testimony is, accordingly, inadmissible[29].

(e) *Witness AAA*

17. The Defence objects to the witness's testimony in respect of two alleged incidents. The first concerns Mr. Kabiligi telling *conseillers* of three sectors in Kigali that they must kill Tutsi, or Tutsi collaborators, whom he believed were moving about freely and assisting the RPF[30]. The second incident concerns an alleged promise by the Accused during a meeting presided over by the Prefect of Kigali to distribute weapons to assist with "security" and to "protect members of the population"[31].

18. No summary of Witness AAA's testimony appears in the Pre-trial Brief, as the witness was added to the Prosecution's list of witnesses after the commencement of trial. In the motion to amend the witness list, however, the Prosecution provided a summary of witness's testimony which describes the first alleged incident in detail[32].

[27] Statement XXQ-1, p. 3 (disclosure dated 30 Jul 2003).
[28] T. 18 June 2004 pp. 33-35; T. 22 June 2004 pp. 21-24.
[29] T. 18 June 2004 p. 34 (lines 8-9).
[30] T. 15 June 2004, p. 3.
[31] T. 14 June 2004 p. 20.
[32] *Bagosora et al.*, Prosecution Motion (TC), 24 March 2004, para. 11. The paragraphs of the Indictment to which the witness's testimony relate have not been specifically identified by the Prosecution, as Witness AAA was added to the witness list after the Prosecution had filed its addendum to the Pre-trial Brief. Nevertheless, for present purposes, the Chamber accepts that the paragraphs of the Indictment which are described in the addendum to the Pre-trial Brief as relevant to the testimony of "all witnesses" (ie. paragraphs 5.1, 5.35, 6.31 and 6.32) may, similarly, be relevant to the testimony of Witness AAA.

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This constituted sufficient notice of the material allegation. The second incident is not mentioned in the Prosecution motion, but was communicated in a detailed will-say statement provided to the Defence several days before the witness's testimony. The will-say elaborates upon a vague reference in a previous witness statement[33]. The incident is not highly incriminating, and the will-say and prior statement provide sufficient notice of the charge to make the testimony admissible.

(f) *Witnesses in Respect of Whom No Contemporaneous Objection Was Made : ZF, XXY, LAI*

19. The Chamber can find no record of a contemporaneous objection to the testimony of Witnesses ZF, XXY, and LAI which is now challenged[34]. As described above, where no such objection is made, the Defence bears the burden of showing that it has suffered prejudice due to lack of notice. The Defence has made no such submissions and has, accordingly, failed to meet its burden. This does not mean, however, that the Defence is precluded at a later stage from proving that the absence of notice caused prejudice to the Accused which requires exclusion of the evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES inadmissible the portions of testimony of Witnesses XAI and DCH described above.

Arusha, 27 September 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[33] [Will say reference needed; Statement AAA-4, p. 7 (disclosed 24 March 2004).

[34] T. 28 November 2002 pp. 67-78 (ZF); T. 11 June 2004 pp. 3, 5 (XXY); T. 31 May 2004 p. 8 (LAI).

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## *Decision on Interlocutory Appeals of Decision on Witness Protection Orders 6 October 2005 (ICTR-98-41-AR73 & ICTR-98-41-AR73(B))*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahanuddeen; Florence Mumba; Mehmet Güney; Fausto Pocar

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Discretionay power of the Chamber, Conditions for an Appeal, Error of law, Error of facts – Protected witnesses, Disclosure of information over Witnesses, Protection of the identity of the witnesses, Witnesses and Victims Support Section submissions, Registry's submissions – Timing for disclosure of identifying information to the Prosecution, Adequate time for preparation of the Prosecution – Functions of the Prosecutor, Action in interest of the international community, victims, and witnesses – General principles of interpretation, Examination of the provisions, Plain and ordinary meaning, Context, Instrument's object and purpose, Case-law Interpretation, Distinguishable decision - Length of the Appeal Brief, Limit to the length of the Appeal Brief, – Rights of suspects and the accused, Right of the Accused to a fair trial, Interests of justice – Defence Motion denied – Prosecution Motion partially granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 33 (B), 37, 39, 47, 68, 68 (A), 68 (E), 69 (C) and 75 (F); Statute, art. 15 and 17; Practice Direction on the Length of Briefs and Motions on Appeal; Standards of Professional Conduct for Prosecution Counsel; Vienna Convention on the Law of Treaties*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Anatole Nsengiyumva, *Decision on Protective Measures for Defence Witnesses and Their Families and Relatives, 5 November 1997 (ICTR-96-42); Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violation, 19 April 2005 (ICTR-98-44)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, 18 September 2000 (IT-95-14/2); Appeals Chamber,* The Prosecutor v. Tihomir Blaškić, *Judgement, 29 July 2004 (IT-95-14); Appeals Chamber,* The Prosecutor v. Slobodan Milošević, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (IT-02-54); Trial Chamber,* The Prosecutor v. Radoslav Brđanin, *Decision on Appellant's Motion*

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*for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 (IT-99-36)*

## I. Background

1. On 1 June 2005, Trial Chamber I on the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("Trial Chamber" and "Tribunal", respectively), rendered its Decision on the Prosecurtion Motion to Harmonize and Amend Witness Protection Orders[1].

2. The Prosecution[2] and Théoneste Bagosora, Gratien Kabiligi, Anatole Nsengiyumva, and Aloys Ntabakuze ("Acused" or "Defence")[3] filed applications for leave to appeal the Impugned Decision. The Trial Chamber certified two issues for appeal : (1) the Defence appeal of that part of the Impugned Decision that permits the Prosecution to make certain inquiries regarding the protected witnesses to national immigration authorities,[4] and (2) the Prosecution appeal of that part of the Impugned Decision that denies the Prosecution permission to disseminate protected witnesses information to any person working for the Office of the Prosecutor[5].

## II. Standard of Review

3. A Trial Chamber exercises its discretion in many different situations, including when deciding points of pratice or procedure[6]. A Trial Chamber's decision on granting protective measures for witnesses is such an exercise of that discretion, drawing on the Trial Cham-

[1] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Decision on Motion to Harmonize and Amend Witness Protection Orders (amended and filed on 3 June 2005; "Impugned Decision"

[2] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Prosecutor's Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decision on Motion to Harmonize and Amend Witness Protection Orders Dated 1 June 2005, 9 June 2005.

[3] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Ntabakuze Defence Request for Certification to Appeal one of the Conclusions of the Trial Chamber in the Decision on Motion to Harmonize and Amend Witness Protection Orders of 1 June 2005, 7 june 2005; *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Nsengiyumva Defence Request for Certification to Appeal Part of the Trial Chamber Decision of 1 June 2005 on Motion to Harmonize and Amend Witness Protection Orders, 8 June 2005; *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Kabiligi Application for Certification for Appeal of the Trial Chamber's Decision on the Admissibility of Statements Obtained from Immigration Authorities, 9 June 2005.

[4] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Witnesses, 21 July 2005, p. 5.

[5] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, p. 5.

[6] *Prosecutor v. Milosevic*, Case n° IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 9 ("*Milosevic* Appeal Decision on Assignment of Counsel").

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ber's understanding of particular threats posed to specific witnesses and the practical demands of the case. These fact-intensive Trial Chamber decisions require a complex balancing of intangibles in crafting a case-specific order[7]. Therefore, in reviewing the Trial Chamber's exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather whether the Trial Chamber has reasonably exercised its discretion in reaching that decision[8]. To prevail in their appeal,

> "the appellants must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relavant to the exercise of the discretion, or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an eror as to the facts upon which it has exercised its discretion, or that the Trial Chamber's decision was unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly"[9].

The Appeals Chamber has stated these factors as a "simple algorithm" according to which

> "a Trial Chamber's exercise of discretion will be overtuned if he challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion"[10].

## III. The Defence Appeal

4. The dispute that is the subject of the Defence Appeal initially arose during a status conference on 1 March 2005 at which the Prosecution submitted that it would seek immigration records and refuge files of Defence witnesses from state authorities. On 14 March 2005, the Prosecution filed a Motion to harmonize and amend the four Defence witness protection measures that were in place[11], proposing, among other things, that the

> "Prosecution be allowed to reveal the identity of protected witnesses to third parties for the purposes of investigation"[12].

5. Anatole Nsengiyumva ("Nsengiyumva"), Aloys Ntabakuze ("Ntabakuze"), and Théoneste Bagosora ("Bagosora") filed responses to the Prosecution motion on 21 March 2005, 24 March 2005, and 30 March 2005, respectively. On 21 April 2005, the Prosecution requested information regarding the country of residence of the Defence witnesses in order to obtain information from the witnesses' immigration files[13]. The Defence renewed its objection at that time[14].

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[7] *Milosevic* Appeal Decision on Assignment of Counsel, para. 9.
[8] *Milosevic* Appeal Decision on Assignment of Counsel, para. 10.
[9] *Milosevic* Appeal Decision on Assignment of Counsel, para. 10.
[10] *Milosevic* Appeal Decision on Assignment of Counsel, para. 10.
[11] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Motion to Harmonize and Amend Witness Protection Measures, 14 March 2005 ("Prosecution Motion to Harmonize and Amend").
[12] Impugned Decision, para. 1 (citing Prosecution Motion to Harmonize and amend).
[13] Defence Appeal, para. 6.
[14] Defence Appeal, para. 6.

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6. On 26 April 2005, the Prosecution attempted to introduce, for purposes of cross-examination, a prior statement of Defence Witness LT-1 allegedly made by the witness to immigration authorities in the witness's country of residence. The Defence objected that the Prosecution's inquiries "might jeopardize the immigration status or safety" of witnesses[15], and would "discourage Defence witnesses from coming to testifiy", adversely affecting the Defence ability to present its case[16]. The Prosecution claimed that the issue at stake was the ability of the Prosecution to cross-examine a witness using prior inconsistent statements of the witness[17]. The Trial Chamber adjourned questioning of the witness and invited writeent submissions on the issue.

7. On 28 April 205, the Defence filed a joint brief arguing that the witness protection measures for Bagosora, Gratien Kabiligi ("Kabiligi"), and Ntabakuze should be read to prohibit the Prosecution from making inquiries of immigration authorities by prohibiting the Prosecution from

> "discuss[ing] witness identifying information either directly or indirectly with anyone outside the Prosecution team in this case"[18].

The Prosecution argued that it was not in violation of the relevant witness protectin orders because although it revealed the name of the witness to immigration authorities, it did not reveal the witness's status *as a witness* in the case in the course of seeking immigration files[19].

8. On 1 June 2005, the Trial Chamber the Impugned Decision. The Trial Chamber

> "denie[d] the Defence objection to the tendering in court of a prior statement of Witness LT-1 on the ground that, by making inquiries to the national immigration authorities, the Prosecution obtained the document in violation of the witness protection order"[20].

Ntabakuze, Nsengiyumva, and Kabiligi separately filed applicatons to certify an appeal of the Impugned Decision[21], and on 21 July 2005, the Trial Chamber granted certification of the appeal[22].

9. On 28 July 2005, the Accused filed a joint Defence Appeal arguing five grounds on which the Trial Chamber erred by holding that the protective orders permit the Prosecution to rveal the identity of protected witnesses to third parties for the pruposes of investigation[23]. The Prosecution responded to each of the grounds

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[15] Defence Appeal, para. 5.
[16] Defence Appeal, para. 7.
[17] Defence Appeal, para. 7.
[18] Defence Appeal, para. 8 (internal quotations omitted).
[19] Defence Appeal, para. 8 (empahasis added).
[20] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 4 ("Certification of Defence Appeal") (internatl quotations omitted).
[21] Filed on 7 June 2005, 8 June 2005 and 9 June 2005, respectively.
[22] Certification of Defence Appeal, para. 4.
[23] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-AR73(B), Joint Defence Appeal Under Rule 73 (B) from part of the Conclusion in the 1 July 2005 Trial Chamber I 'Decision on Motion to Harmonize and Amend Witness Protection Orders', 28 July 2005 ("Defence Appeal").

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in its Response filed on 8 August 2005[24]. The Defence filed its reply on 12 August 2005[25].

*A. Grounds 1 and 2 :*
*the Trial Chamber erred by interpreting Clause 7*
*contrary to the plain meaning of its text and by erroneously*
*assuming that it contained an implied exeption*

10. The first two grounds of the Defence Appeal are interrelated and collectively argue that the Trial Chamber erred by finding that the witness protection orders permitted the Prosecutor to reveal the identity of the Protected witnesses to third parties for the purposes of investigation as long as the Prosecution does not, directly or indirectly, reveal that the protected person is a witness. These two grounds are taken together by the Appeals Chamber since both argue for a particular interpretation of the text of the Claus e7 of the Witness Protection orders with regard to Bagosora, Kabiligi, and Ntabakuze.

11. Clause 7 provides that

> "the Prosecution team in this case shall keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reval any such information"[26].

The protection order in *Prosecutor v. Nsengiyumva*[27] was worded differently before the harmonization ordered in the Impugned Decision and the Defence suggests that a clause requiring that

> "the names, addresses, locations and other identifying information of the defence witnesses caontained in the supporting materials of the defence shall not be disclosed to the public or the media"

was the anologous clause to Clause 7[28]. The Defence argues that the issue is whether the phrases "information identifiying witness" and "identifying information" in the context of the two protective orders should be interpreted to mean

> "information about the identity of the witness, that is, information that would lead one to discover his or her name and other identifying particulars",

or

[24] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-AR73 (B), Prosecutor's Response to the Joint Defence Appeal Under Rule 73 (B) from part of the Conclusion in the 1 July 2005 Trial Chamber I Decision on Motion to Harmonize and Amend Wintess Protection Orders, 8 August 2005 ("Prosecution Response").

[25] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-AR73 (B), Appellants' Reply to the Prosecutor's Response to the Joint Defence Appeal Under Rule 73 (B) from part of the Conclusion in the 1 July 2005 Trial Chamber I Decision on Motion to Harmonize and Amend Wintess Protection Orders, 12 August 2005 ("Defence Reply").

[26] Impugned Decision, para. 11 (internal quotations omitted).

[27] Case n° ICTR-96-12-I, Decision on Protective measures for Defence witnesses and their Families and Relatives, 5 November 1997.

[28] Defence Appeal, para. 22 (citing Impugned Decision, fn 10).

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> "information as to the individual's status as a witness, that is, information that would lead one to discover that the individual in question had been or was to be a witness in these proceedings"[29].

12. The Defence argues that the former, more expansive interpretation is correct for two reasons. First, the Defence Appeal argues that the plain meaning of the text points to a more expansive interpretation of the protective measures than was provided in the Impugned Decision[30]. The Defence disputes the Trial Chamber's consluion that the phrase "identifying information" in the *Nsengiyumva* order "necessarily implies information which identifies the person as a witness"[31]. The Defence argues that the phrase "identifying information" in that context was the

> "residual part of a list that includes *names*, *addresses* and *locations*, non of which would identify the person as a witness"[32],

and that as such, it is reasonable to conclude that

> "*other identifying information* falls into the same category as the rest of the list, that is, information that tends to reval the *identity* of the witness".

The Defence argues that since "identifying information" reasonably includes both information about the "identity of the witness" and the "identity as a witness", the

> "best interpretation of 'information identifying any witness' is to see it as *simultaneously* meaning all information either 'about the identity of the witness' or 'about his or her status as a witness in the case'"[33].

13. Second, the Defence argues that the plain meaning of the text should prevail over other interpretations, and that the Trial Chamber erred when it decided that the witness protection orders included "an exception that reflects an assumption which is implied"[34]. The Defence argues that if the Witness Protection Orders were intended to include an exception that "authorize[s] reasonable investigations about protected witnesses" then it should have done so explicitly. The Defence argues that by reading in such an aception the Impugned Decision creates uncertainty in the protection afforded to witnesses and removes a protection that may have been relied upon by Defence witness[35]. Unlike sentencing guidelines and other regulations, witness protection orders require certainty and interpretive inflexibility in their application because they are "crafted in precise and narrow circumstances, [they] deal with the problems faced by specific individuals", and are relied upon by htem for specific protections[36].

14. The Prosecution responds that the Trial Chamber correctly rejected a strictly textual interpretation of Clause 7 and instead read the witness protection orders "purposively and holistically" to arrive at the conclusion that Clause 7 prohibits only the revelation that a person is a witness[37]. The Prosecution argues that a textual rerading

[29] Defence Appeal, para. 23.
[30] Defence Appeal, para. 23.
[31] Defence Appeal, para. 24 (quoting Impugned Decision, fn 10).
[32] Defence Appeal, para. 24 (emphasis in original).
[33] Defence Appeal, paras. 24-25 (emphasis in original).
[34] Defence Appeal, para. 30 (quoting Impugned Decision, para. 13.).
[35] Defence Appeal, paras. 30-33.
[36] Defence Reply, paras. 21-22.
[37] Prosecution Response, para. 8 (quoting Impugned Decisionn para. 11).

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of Clause 7, construed without reference to the rest of the witness protection regime, would distort the scope of the protective measures. Instead, the Prosecution argues that Clause 7 in light of the entire witness protection regime, clearly shows that the protection orders allow the Prosecution to make reasonable inquiries.

15. In support of its interpretation, the Prosecution points to Clause 10 of the witness protection orders, which the Prosecution argues expressly carves out an exception to the non-disclosure rule. Clause 10 states :

> "[t]he information withheld shall be disclosed by the Defence to the Prosecution thirty-five days prior to the commencement of the Defence case, *in order to allow adequate time for the preparation of the Prosecution pursuant to Rule 69 (C) of the Rules*"[38].

Rule 69 (C) of the Rules provides that,

> "[s]ubject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to *allow adequate time for prerparation of the Prosecution and the Defence*"[39].

The Prosecution argues that the Impugned Decision correctly interpreted the witness protection regime to allow an exception to Clause 7 for disclosure of a witness's name so that "reasonable inquiries" can be made in preparation of the Prosecution's case[40].

16. The Defence replies that reference to such "reasonable inquiries" is "entirely lacking from the witness protection orders", that the nature of such inquiries is let undetermined, and that rather than providing for "inquiries to third parties" the orders only speak of "preparation" which could include information gathering without revealing the names of individuals to third parites[41]. The Defence submits that the limits on disclosure in Clause 7 should be read to place limits on the "preparation" allowed in Clause 10, and that Clause 10 should not be read to create an exception to Clause 7[42].

## Analysis

17. The Appeals Chamber notes that following general principles of interpretation, the first step in the proper interpretation of a protective measure must always be an examination of its provisions. The term used are constued according to their plain and ordinary meaning in their context and in the light of the instrument's object and purpose.

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[38] Prosecution Response, para. 9 (quoting Clause 10 of witness protection orders, see Decision on Kabiligi Motion for Protection of Witness, 1 September 2003, p. 4) (emphasis added in the Prosecution Response).

[39] Prosecution Response, para. 9 (quoting Rule 69 (C) of the Rules) (emphasis added in the Prosecution Response).

[40] Prosecution Response, para. 7.

[41] Defence Reply, paras. 10-11.

[42] Defence Reply, para. 13 (arguing that Clause 7 enjoins the Prosecution team in this case to "keep confidential to itself *all* information identifying *any* witness" and prohibits the Prosecution team in this case to "disclose, discuss or reval cuss or reval *any* such information", and thus creates a "clear and total prohibition on disclosure of *any* and *all* identifying information [that] clearly places limits on the preparation envisaged in Clause 10") (internal quotation omitted).

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18. The Trial chamber considered the text of the witness protection orders at issue and determined that it prohibits "disclosure of information that would, directly or indirectly, reveal that the person is a witness", but that it does not "prevent use of witness' name [by th Prosecution] to make reasonable inquiries"[43]. The Appeals Chamber agrees and finds that the Trial Chamber's interpretation of Clause 7 is consistent with the text and the principles for adopting itness protection measures.

19. The Defence in fact, concedes that two interpreations of Clause 7 are textually "reasonable"[44]; the Defence interpretation (protecting information about the identity of the witness) and the Trial Chamber's interpretation (protecting information about the witness's status as a witness). The Defence argues, however, that because both can be accommodated by the text, Clause 7 should be interpreted to include both meanings. The construction proposed by the Defence emphasises the need to provide fair notice to the Defence and Defence witnesses. The Defence, however, fails to consider that when a Chamber interprets an existing protective measure it must consider that the measure was adopted to be least restrictive measure necessary to provide for the protection of victims or witnesses[45].

20. The Trial Chamber also considered that the Defence must have understood the witness protection regimes in this case to permit disclosure of some information about witnesses because the Defence itself used the names of protected witnesses during corss-examination, used prior statements by Prosecution witnesses, and sought and obtained the judicial *dossiers* of various Prosecution witnesses – all of which would violate the prohibition on use of "identifying information" that the Defence now proposes[46]. The Defence argued that its disclosure of 'identifying information" should be distinguished from the Prosecution's because the Defence "would likely have" used information discreetly, without disclosing the witness's connection to the Tribunal, whereas the Prosecution conducts its investigation as an identified organ of the Tribunal, causing, the Defence says "governments to pay attention"[47].

21. Certainly, some inquiries by their very nature would lead a reasonable person to conclude that the subject of the inquiry is a witness to a case before the Tribunal, and such inquiries are prohibited by the Impugned Decision. The Appeals Chamber agrees with the Trial Chamber that to avoid such inquiries the "inquiring party must scrupulously avoir, expressly or impliedly, suggesting that the person is a witness for, or otherwise associated with, one side or the other. If the third party demands explanations which would require revealing that information, then the investigation must cease. Investigations conducted within these parameters do not give rise to a breach of the witness protection order"[48] because not all inquiries from the Prosecution will *necessarily* reveal that the subject of the inquiry is a witness. The Appeals Chamber, for reasons that will be further discussed[49], finds no error in Trial Chamber's exercise

[43] Impugned Decision, para. 11.
[44] Defence Appeal, para. 25.
[45] See *Prosecutor v. Tadic*, Case n° IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness P, 15 May 1996, para. 8 (stating "if a less restrictive measure can secure the required protection, that measure shall be applied").
[46] Impugned Decision, para. 12.
[47] Defence Appeal, para. 28.
[48] Impugned Decision, para. 11.
[49] See *infra* paras. 27, 38.

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of discretion to interpret the protective measure in the least restrictive manner necessary to provide sufficient protection.

22. Neither Prosecution nor Defence arguments regarding the use of Clause 10 as an indication of an implied exception to the protective measure are convincing. Clause 10 merely requires the Defence, pursuant to Rule 69 (C) of the Rules, to disclose

> "the identity of the witness[es] within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution"[50].

Clause 10 provides the timing for disclosure of identifying information to the Prosecution, but says nothing about the manner in which the Prosecution may use that information in its preparation. Thus, it provides no guidance for interpreting the permissible extent of the Prosecution's preparation. The Appeals Chamber finds no error in the Impugned Decision, which gave no import to the terms of Clause 10 when interpreting Clause 7.

*B. Ground 3 : the Trial Chamber failed to consider properly Witnesses and Victims Support Section submissions that the safety of Defence witnesses and their Families would be imperilled by Prosecution investigations of their statements to state authorities*

23. The Defence argues that the Trial Chamber failed to consider properly submissions by the Witnesses and Victims Support Section ("WVSS") of the Tribunal, which claim that Defence witnesses would be imperilled by the Prosecution's investigation. The Defence submits that the WVSS twice orally communicated to the Trial Chamber that the Prosecution's investigation would result in "serious risks of peril" for the Defence witnesses[51]. The Registry also filed written submissions with the Trial Chamber[52]. The Defence argues that the Impugned Decision failed to weigh properly these submissions.

24. The Prosecution responds that the Trial Chamber's failure to discuss WVSS submissions in detail does not indicate error because the Trial Chamber does not need to articulate all of the evidence that it considered in rendering the Impugned Decision[53]. The Prosecution also points to the express reference to the submissions of the Registry made in the third pre-ambulatory paragraph of the Impugned Decision, saying that the reference shows that the Trial Chamber considered the submissions.

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[50] Rule 69 (C) of the Rules.

[51] Defence Appeal, para. 34.

[52] Defence Appeal, para. 34 (quoting the Registrar's Sumbmission under Rule 33 (B) of the Rules on the Prosecution Investigations and Questioning Concerning Protected Defence Witness's Immigration Files, 3 May 2005, para. 7.).

[53] Prosecution Response, para. 28 (citing *Prosecutor v. Delalic et al.*, Case n° IT-96-21-A, Judgement, 20 February 2001, para. 483; *Musema v. Prosecutor*, Case n° ICTR-96-13-A, Judgement, 16 November 2001, para. 19).

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**Analysis**

25. While it would have been desirable for the Trial Chamber to have analysed the WVSS submissions in the Impugned Decision, the Appeals Chamber has previously noted that

> "although the evidence produced may not have been referred to [in the Impugned Decision], base on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account"[54].

Thus, the failure to analyse WVSS submissions in the Impugned Decision does not necessarily demonstrate that the Trial Chamber disregarded the WVSS statements. Instead,

> "[i]t is for an appellant to show that the finding made by the Trial Chamber is erroneous and that the Trial Chamber indeed disregarded some item of evidence, as it did not refer to it"[55].

26. The extent to which the Trial Chamber gave weight or sufficient weight to the WVSS submissions is determined in light of the circumstances of the case. The record of the proceedings in the present wase shows that when the Defence told the Trial Chamber that Prosecution investigations were jeopardizing the safety of protected witnesses, the Trial Chamber twice sought out the opinion of the WVSS on the matter. First, on 1 March 2005, after bearing oral submissions from Raphaël Constant, counsel for Bagosora, who asserted that Prosecution visits to the countries of residence of Defence witnesses to review their refugee status would be disastrous and that the Trial Chamber should bear in mind the danger[56], the Trial Chamber called for the opinion of Joseph Essombé-Edimo, Head of the Support Unit of the WVSS[57]. The Trial Chamber asked Mr. Essombé-Edimo to tell it whether he had any comment on the issue raised by Mr. Constant[58]. Then again, on 21 April 2005, in the context of a discussion on the advisability of permitting the Prosecution to reveal the names of ptoected witnesses to State authorities, the Trial Chamber requested Mr. Emmanuel Onoja, a representative of WVSS, to explain the prior practice of the Tribunal in this situation[59]. The Trial Chamber subsequently received written submissions from the Registry, pursuant to Rule 33 (B) of the Rules and, as the parties have noted, cited these submissions in the Impugned Decision[60]. In light of the affirmative steps taken by the Trial Chamber to receive submissions from the WVSS, it is reasonable to conclude that Trial Chamber took those submissions into account.

27. The question then is not whether the Trial Chamber accorded the weight to the WVSS submissions that the Appeals Chamber would have given, but instead whether the weight given by the Trial Chamber constituted an abuse of its discretion. The two

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[54] *Musema v. Prosecutor*, Case n° ICTR-96-13-A, Judgement, 16 November 2001, para. 19 ("*Musema* Appeals Judgement").

[55] *Musema* Appeals Judgement, para. 21.

[56] Transcript, 1 March 2005, p. 24, lines 1-8.

[57] Transcript, 1 March 2005, p. 24.

[58] Transcript, 1 March 2005, p. 24, lines 13-15.

[59] Transcript, 1 March 2005, p. 5, lines 12-16.

[60] Impugned Decision, p. 2.

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submissions by the WVSS consisted on the following : First, Mr. Essombé-Edimo stated that the Prosecutor's proposal to "question the countries of residence of the witnesses" had him "perplexed"[61]. Mr. Essombé-Edimo's response showed concern about the potential danger of revealing the identity of a protected person, stating :

> "I do not know, but when you pout such questions to the State [authority, they] would like to know why you are putting such questions to [them]. And to answer your question, [*inaudible*] that will imperil not only the witnesses as individuals, but it would or may even threaten their personal safety and the safety of their family members, when necessary, where they are"[62].

Subsequently, Mr. Onoja orally endorsed Mr. Essombé-Edimo recommendations that witness's countries of residence not be disclosed, stating that he thought the recommendation

> "is still very relevant because of some of the issues that we are facing at the moment with regard to the security of these witnesses"[63]. Mr. Onoja also expressed concern that "from the indicators"

that the WVSS has,

> "it appears that sometimes when [witnesses] are in some of these foreign countries, they are afraid and they don't want to have contact with people they don't know"[64].

The Registrar's written submissions, cited by the Trial Chamber, merely consisted of a statement that

> "the Registry would pray to the Trial Chamber that whatever investigations that the Prosecutor is conducting in this matter, the Chamber would ensure that they do not prejudice the status of the protected witnesses earlier ordered by the Trial Chamber, which would put the WVSS in a avery difficult and untenable position to implement the Protective measures"[65].

28. As noted above[66], the Trial Chamber concluded that only in "exceptional" cases would Prosecution investigations imperil the witnesses. This conclusion appears to run against the opinion expressed by Mr. Essombé-Edimo that a Stater would want to know why the Prosecution was inquiring about an individual, and that such questioning will imperil the witnesses[67]. Considering, however, Mr. Onoja's statement that witnesses were sometimes concerned about being confronted in person by State authorities[68], and that the Prosecution has not proposed inquiries that would involve in-person confrontation by State authorities, a reasonable finder of fact could conclude that an absolute bar on Prosecution inquiries to State authorities was not necessary to protect witnesses from intimidation. The Appeals Chamber finds that, particularly

[61] Transcript, 1 March 2005, p. 24, lines 18-23.
[62] Transcript, 1 March 2005, p. 24, lines 17-30.
[63] Transcript, 21 April 2005, p. 5, lines 18-24.
[64] Transcript, 21 April 2005, p. 5, lines 19-21.
[65] *Prosecutor v. Bagosora et al.*, Case n° ICTR-98-41-T, The Registrar's Submission under Rule 33 (B) of the Rules on the Prosecution Investigations and Questioning Concerning Protected Defence Witness's Immigration Files, 3 May 2005, para. 7 ("Registrar Submission").
[66] *Supra* para. 21.
[67] Transcript, 1 March 2005, p. 24, line 28.
[68] Transcript, 21 April 2005, p. 5, line 20.

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in light of the Trial Chamber's objective to seek the least restrictive measure necessary to provide for the protection of witnesses, the Trial Chamber reasonably concluded that

> "[a]s long as Prosecution investigations are conducted in scrupulous adherence to the principles set out in this decision, protected witnesses are insulated from any prejudice arising from cooperation with the Tribunal",

and

> "[i]f the Defence believes that a witness is in particularly precarious situation, such that any indication of cooperation with the Tribunal could be a danger to the witness's security, then special protectives measure smay be sought"[69].

29. In the Appeals Chamber's considered view, the Defence has not shown that the particular inquiry regarding Witness LT-1 necessarily revealed that person as a witness to the case or further that he and his family would be imperilled by the Prosecution investigations of their statements to State authorities.

*C. Ground 4 : the Trial Chamber erred by distinguishing the Karemera Decision*

30. The Defence argues that a comparable issue arose in the case *Prosecutor v. Karemera et al.* ("*Karemera*") and in that case, Trial Chamber III reached a different decision than Trial Chamber I did in the Impugned Decision[70]. The *Karemera* Decision held that Defence Coubsel's inquiries to authorities of the State in which a protected witness resided violated an order prohibiting the Defence from disclosing infroamtion outside the defence team, because the

> "only criterion that the Order establishes with respect to the person receiving information is whether or not he or she is a member of the Defence team"[71].

The Defence submits that the same reasoning in the *Karemera* Decision should apply to the present case because the witness protection orders and the facts regarding disclosure are analogous to each other. The Defence argues that

> "as in the present case, only one half od the 'identity of the witness/identity *as* a witness' equation was revealed in *Karemera* and the same ambiguity as to whether or not a particular individual was to be a witness before the Tribunal [existed in both cases]"[72].

31. In response, the Prosecution first argues that the Karemera Decision was not binding authority on the Trial Chamber in this case, because the Karemera Decision was decided by another Trial Chamber[73]. Second, the Prosecution argues that the Impugned Decision properly distinguished the *Karemera* Decision because in that case, the witness protection measures provided extraordinary protection to an excep-

[69] Impugned Decision, paras. 16-17.

[70] Defence Appeal, para. 38 (quoting *Prosecutor v. Karemera et al.*, Case n° ICTR-98-44-R46, Decision on the Prosecution Motion for Sanctions Agsint Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violation, 19 April 2005 ("*Karemera* Decision on Sanctions"), para. 10).

[71] *Karemera* Decision on Sanctions, para. 10.

[72] Defence Appeal, para. 39.

[73] Prosecution Response, para. 32.

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tionally vulnerable witness and the nature and content of contact between the *Karemera* Defence and *the* State was significantly different than the contact between the Prosecution and the State in the present case[74]. The Prosecution notes that the *Karemera* protective measure instructed that "the whereabouts of wirnesses *G* and T *shall never* be disclosed to the public"[75], and the Prosecution notes that the *Karemera* Defence : disclosed to the State that "the witness was located in the respective state";

> "identified the witness by pseudonym and advised the state that the witness would be testifying in the accused's trial";

and

> "advis[ed] that the Defence was seeking certain information for the purpose of attempting to impeach the witness's credibility at trial"[76].

The Prosecution concedes that if it were to cary out the investigations in the same manner as the *Karemera* Defence, then it too would be in violation of the protection orders in this case[77].

32. The Defence replies that a careful reading of Karemera shows that it was the mere contact between the Defence and the State authorities, not the nature and content of that contact, that was found to violate the wimess protection order, and the Defence urges the same result in this case[78].

## Analysis

33. Trial Chamber III's Decision in the *Karemera* case is not binding authonty on Trial Chamber I, and Trial Chamber I need not have distinguished its Impugned Decision from the *Karemera* Decision[79]. The Appeals Chamber nonetheless finds it useful to point to the clear distinction between the two cases, which is instructive of the ways that protective measures can be applied and interpreted. At the relevant time in the *Karemera* case, a witness protection order was in force that "prohibit[ed] the Defence from disclosing documents, records and other information relating to Witnesses G and T outside their te am"[80]. Several features distinguish this protective measure from the one at issue in the present case. First, the *Karemera* protective measure prohibited disclosure of "information *relating* to [w]itnesses", whereas the protective measure in the present case prohibits disclosure of "information identifying

[74] Prosecution Response, para. 34.

[75] Prosecution Response, para. 34 (quoting *Prosecutor v. Karemera et al.*, Case n° ICTR-98-44-I, Decision on the Prosecution's Motion for Special Protective Measures for Witness G and T to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for immediate Disclosure, 20 October 2003 ("*Karemera* Decision on Special Protection"), para. 15) (emphasis added in the Prosecution Response).

[76] Prosecution Response, para. 36.

[77] Prosecution Response, para. 37.

[78] Defence Reply, para. 27.

[79] *Prosecutor v. Zlatko Alekovski*, Case n° IT-95-14/I-A, Judgement, 24 March 2000, para. 114 (noting that a Trial Chamber mays follow another Trial Chambe's decision if it binds them to be persuasive, but the decisions are not binding on it).

[80] *Karemera* Decision on Special Protection, p. 7.

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any witness". A Trial Chamber could reasonably infer that the former prohibition on disclosing "information relating to a witness" is a broader prohibition than that against disclosing "information identifying a witness". Second, the witness protection measures in *Karemera* were designed specifically for the protection of two witnesses, not for all of the defence witnesses, as is the case here. Considering that a Chamber must construct measures to be the least restrictive necessary to protect the witness, it is entirely reasonable that a Trial Chamber would construct more restrictive measures for one or two witnesses requiring special protection than for an entire class. Indeed, the Trial Chamber here stipulated that, should the Defence believe that a witness is "in a particularly precarious situation then special measures may be sought"[81].

*D. Ground 5 : the Trial Chamber failed to consider properly that the Impugned Decision will llead to a loss of Defence witnesses and will impede a fair trial*

34. The Defence claims that Defence witnesses are particularly fearful and vulnerable due to their political opposition to the current Rwandan govemment[82]. According to the Defence, many witnesses will refuse to testify at trial if the Prosecution makes the contested inquiries with State authorities, since the witnesses fear this will prejudice their immigration status and potentially lead to their return to Rwanda[83]. This, the Defence claims, will compromise the Accused's right to a fair trial. The Defence argues that, considering the collateral nature of the information sought by the Prosecution, and the nullifying effect the inquiries will have on the Accused's right to a fair trial, the Trial Chamber should not permit the inquiries[84].

35. The Prosecution responds that the Defence arguments regarding the loss of witnesses are not supported by "objective bases and specifics of the nature and reason of the alleged fears and [do not specify] whether those fears relate to all the witneses"[85]. The Prosecution argues that the Defence's proposed expansive interpretation of Clause 7 cannot be accepted, considering that the "witness protection regime must balance witness protection and the interests of justice", including the ability of the Prosecution to conduct its investigation[86]. The Prosecution argues that prior witness statements to immigration authorities are pertinent to the interests of justice because inconsistencies between them and statements made in court are useful in judging the weight of a witness's testimony.

36. Further, the Prosecution claims that the Impugned Decision adequately addresses the Defence concern that the exposure of inconsistencies between prior statements made to State authorities and witness's court testimony would endanger witnesses and contribute to their unwillingness to assist in the Defence's case. In this regard, the Prosecution notes that the Impugned Decision holds that

[81] Impugned Decision, para. 17.
[82] Defence Appeal, para. 42.
[83] Defence Appeal, para. 42.
[84] Defence Appeal, para. 46.
[85] Prosecution Response, para. 39.
[86] Prosecution Response, para. 39.

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> "[t]his danger should be obviated for the Prosecution aud the Defence witnesses alike by ensuring that any inconsistencies which could identify the witnesses are raised in closed session"[87].

As the fears of witness intimidation by the State authorities would be non-existent if the State authorities do not have access to any inconsistencies between the witness's prior statements and their in-court testimony, the Prosecution concludes that the Impugned Decision adequately considered the Defence's right to a fair trial, and left open the possibility that the Defence could seek exceptional protective measures if they are warranted by the circumstance[88].

37. The Defence concedes that it cannot point to the loss of a single witness to date, but insists that if inquiries go forward, loss of witnesses will occur. The Defence implores the Appeals Chamber to bear "in mind the paramount consideration that the accused is entitled to a fair and expeditious trial"[89].

### Analysis

38. The Appeals Chamber finds that it was reasonable in this instance for the Trial Chamber to construe the witness protection measures as permitting the inquiries made by the Prosecution. The Defence has not established any concrete reason to believe that it will be unable to prepare its case effectively in light of the Prosecution's inquiries. For instance, it has not pointed to any witness whose testimony is important to its case and who might be particularly vulnerable and thus discouraged from testifying. In the event that one of the Defence witnesses is in such a situation, the Impugned Decision allows the Defence to seek specific protective measures. The Defence has not explained why this provision does not resolve any threat to the accused's right to a fair trial. Moreover, the fact that immigration officials will not have access to the transcripts of closed session testimony alleviates the risk that testimony concerning prior contradictory statements of defence witnesses will endanger them. Nor will the Defence be unfairly prejudiced by the Trial Chamber's consideration of these potential contradictions; as the Trial Chamber explained, the probative value given to contradictory statements made by witnesses to immigration authorities can best be assessed by the Trial Chamber in light of the particular circumstances of the witnesses[90]. In short, the Appeals Chamber finds no error with the Trial Chamber's construction of this part of the witness protection measures.

## IV. The Prosecution Appeal

39. On 4 August 2005, the Prosecution filed its appeal, which challenges the Impugned Decision on nine grounds[91]. The Accused filed a joint response on

[87] Prosecution Response, para. 41 (quoting Impugned Decision, fn 19).

[88] Prosecution Response, paras. 41-42 (citing Impugned Decision, para. 17).

[89] Defence Reply, para. 31 (citing *Prosecutor v. Blaskic*, Case n° IT-95-14-AR72, Decision on Application for leave to appeal (Protection of Victims and Witnesses), 14 October 1996, p. 4).

[90] Impugned Decision, para. 16.

[91] *Prosecutor v. Bagosora et al.*, case n° ICTR-98-41-AR73, Prosecutor's Interlocutory appeal to Rule 73 (C), Respecting the Decision of Trial Chamber I on the Prosecutor's Motion to Harmonize and Amend Witness Protection Orders, 4 August 2005 ("Prosecution Appeal").

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15 August 2005[92], to which the Prosecution replied on 19 August 2005[93]. On 4 August 2005, the Prosecution sought clarification on the permissible length of its appeals brief[94]. The Defence responded on 5 August 2005[95]. The Appeals Chamber notes that the Prosecution Appeal consists of 24 pages plus annexes, and falls within the limits established in the Practice Direction on the Length of Briefs and Motions on Appeal for briefs of an appellant in an interlocutory appeal where leave to file briefs is granted[96]. The Prosecution Appeal is therefore considered validly filed.

40. Each of the grounds of the Prosecution Appeal relate to the Trial Chamber's ruling in the Impugund Decision

> "that disclosure of information pertaining to the identity of protected Defence witnesses must be restricted to the Prosecution team and cannot extend to anyone else within the Office of the Prosecutor who is not actively and directly engaged in work pertaining to the trial"[97].

The Appeals Chamber finds it unnecessary to analyze each ground of the Prosecution Appeal and the Defence responses thereto. Rather, it can dispose of the Prosecution Appeal by jointly examining the Prosecution's interrelated and often inseparable points about its obligation and ability to disclose exculpatory evidence and other relevant material.

41. The Prosecution's arguments largely rest on its obligation to disclose information, stemming from Rule 68 (A) ("Disclosure of Exculpatory Material") of the Rules of Procedure and Evidence of the Tribunal ("Rules"), which provides :

> "[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence",

Rule 68 (E) of the Rules further provides that :

> "[n]otwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above".

According to the Prosecution, this disclosure obligation with respect to excuIpatory material has been recognized by the Tribunal as fundamental to the fair functioning of its proceedings[98].

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[92] *Prosecutor v. Bagosora et al.*, case n° ICTR-98-41-AR73, Joint Defence Response to "Prosecutor's Interlocutory appeal to Rule 73 (C), Respecting the Decision of Trial Chamber I on the Prosecutor's Motion to Harmonize and Amend Witness Protection Orders", 15 August 2005.

[93] *Prosecutor v. Bagosora et al.*, case n° ICTR-98-41-AR73, Prosecutor's Reply to Joint Defence Response to Prosecutor's Interlocutory Appeal, 19 August 2005.

[94] *Prosecutor v. Bagosora et al.*, case n° ICTR-98-41-AR73, Motion for Clarification or Permission to File a Brief of a Certain Length, 4 August 2005.

[95] *Prosecutor v. Bagosora et al.*, case n° ICTR-98-41-AR73, Joint Defence Response to Motion for clarification or Permission to File a Brief of a certain length, 5 August 2005.

[96] 16 September 2002, § I.C.2.d.

[97] Prosecution Appeal, para. 2 (citing Impugned Decision, paras. 4-8).

[98] Prosecution Appeal, para. 33 (citing *Prosecutor v. Krstic*, Case n° IT-98-33-A, Judgement, 19 April 2004, para. 180).

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42. In the Impugned Decision, the Trial Chamber reasoned that information could be restricted to the Prosecution team in this case because "access should be limited to those with a *real* need for the information"[99]. The Trial Chamber considered that the Prosecution's obligation to disclose only exists when it has actual knowledge of potentially exculpatory material[100]. Thus, the Trial Chamber concluded that because other Office of the Prosecutor staff would not have access to the information in this case, they would not have actual knowledge of it, and their obligation pursuant to Rule 68 to disclose it to the defence in other cases would not be triggered[101]. The Appeals Chamber finds the Trial Chamber's analysis is premised on an erroneous interpretation of the Prosecutor's obligation under the Rules.

43. As a general principle, interpretation of the Rules should be guided by the principles which may be drawn from Article 31 (1) of the Vienna Convention on the Law of Treaties[102]. As previoiuly held by the Appeais Chamber,

> "[t]hese principles are considered today as general principles to be applied in the interpretation of all international instruments"[103].

Therefore, the Rules are to be interpreted in accordance with their "ordinary meaning" and "in the context" and "in light of [the] object and purpose" of the Statute and Rules of the Tribunal. The ordinary meaning of the text of Rule 68 (A) places the burden to disclose on the "Prosecutor". Indeed, parts four to eight of the Rules listing the functions of the Prosecutor describe those powers as belonging to the "Prosecutor". Obviously, the sheer amount of tasks ascribed to the Prosecutor under the Tribunal's Statute and Rules cannot be accomplished by one person; therefore, Rule 37 provides that the

> "Prosecutor's powers under Parts Four to Eight of the Rules may be exercised by staff members of the Office of the Prosecutor".

Thus, the mandate to the Prosecutor as an individual organ of the Tribunal under the Statute and Rules applies to his or her Office as an extension of him or her. Nowhere in the Statute or Rules is it stated that the Prosecutor's obligations may be limited to specific teams within the Office of the Prosecutor, which in the practice of the Tribunal, are sometimes referred to as the "Prosecution" in an individual case. The ordinary meaning and context of the text of the Rules suggest that the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations.

44. Reading Rule 68 in light of its object and purpose supports this finding. The obligation to disclose stems from the recognition of the dual purposes of the

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[99] Impugned Decision, para. 7.

[100] Impugned Decision, para. 6, fn 7.

[101] Impugned Decision, fn 7.

[102] See *Prosecutor v. Kordic and Cerkez*, Case n° IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evdience of Seven *Affidavits* and One Formal Statement, 18 September 2000, para. 22 (citing Vienna Convention on the Law of Treaties (1969), U.N. Doc. A/CONF.39/27 : "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose") ("*Kordic and Cerkez* Decision")

[103] *Kordic and Cerkez* Decision, fn 39.

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Prosecutor : to investigate and to prosecute[104]. This obligation is continuous, affecting both the Trial and Appeals Chambers[105], and is coterminous with and equally important to the function of the Prosecutor as the duty to prosecute[106]. In this way, the Prosecutor acts on the one hand in the public interest - the interest of the international community, victims, and witnesses[107] - and on the other as a distinct authority required to investigate[108] and then to disclose all exculpatory material to the defence out of respect for the fundamental rights of suspects and the accused[109]. The Appeals Chamber has recognized in this regard that

> "the Office of the Prosecutor has a duty to establish procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence provided by such witnesses is re-examined in light of Rule 68 to determine whether any material has to be disclosed"[110].

45. Further, sub-Rule 75 (F) of the Rules instructs that "'[o]nce protective measures have been ordered in respect of a witness" in one case, such protective measures "shall not prevent the Prosecutor from discharging any disclosure obligation" in another case. Underlying this rule is the proposition that evidence gained by one Prosecution team without the knowledge of others

> "may suggest the innocence or mitigate the guilt of an accused in another case, or affect the credibility of Prosecution evidence in that other case"[111].

This is particulatly true given the interrelationship that often exists between accused, witnesses, and events before the Tribunal. It is, moreover, significant that the Trial Chamber's construction of the protection order requires the Prosecution to designate individuals

> "including support staff or senior management who [are] actively and directly engaged in work pertaining *to this trial*"[112].

Thus, it seems that those working on related prosecutions would not be able to access the identity of witnesses who hold exculpatory evidence.

46. Accordingly, the Appeals Chamber finds that the Trial Chamber erred by construing the protective measures in a manner that contradicts the Prosecutor's obligation pursuant to Rule 68 of the Rules. The Appeals Chamber therefore remits this matter to the Trial Chamber for reconsideration consistent with this decision

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[104] Article 15 of the Statute of the Tribunal.

[105] *Prosecutor v. Blaskic*, Case n° IT-95-14-A, Judgement, 29 July 2004, para. 267.

[106] *Prosecutor v. Brdjanin*, Case n° IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for An Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3.

[107] See Prosecutor's Regulation n° 2 (1999), Standards of Professional Conduct for Prosecution Counsel, para. 2 (a) ("Prosecution's Regulation n° 2).

[108] See Articles 15 and 17 of the Statute of the Tribunal; Rules 37, 39 and 47 of the Rules.

[109] Prosecutor's Regulation n° 2, para. 2 (a).

[110] *Prosecutor's Blaskic*, Case n° IT-95-14-A, Judgement, 29 July 2004, para. 302.

[111] Prosecution Appeal, para. 33.

[112] Impugned Decision, para. 7 (emphasis added)

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## V. Disposition

47. For the foregoing reasons, the Defence Appeal is Dismissed, and the Prosecution Appeal is Granted in part and remitted to the Trial Chamber for further consideration consistent with this Decision.

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

Done this 6th day of October 2005, At the Hague, the Netherlands.

[Signed] : Theodor Meron

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## *Decision on Nsengiyumva Motion for an Extension of Time to file a Request for Certification 7 October 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Lack of notice to the Defence, Time for filing a request for certification, Extension of the time-limits, Fairness of the proceedings – Interests of Justice – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 72, 73 and 73 (C)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Nsengiyumva Defence's "Extremely Urgent Motion Seeking an Extension of Time Within which to Seek Certification of the Trial Chamber's Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", filed on 5 October 2005;

HEREBY DECIDES the motion.

1. The Nsengiyumva Defence seeks an extension of time to file its request for certification of the Chamber's Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, filed on 27 September 2005. The Defence indicates that it only learned of the decision on 5 October 2005, one day after the

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expiration of the seven day deadline for filing a request for certification provided in Rule 73 (C).

2. The Defence explains that its delay in filing its request was not deliberate. The proceedings were not in session, and the decision was served only by email to the parties. Lead Counsel was not able to access his email account until he returned to Arusha on 5 October, and Co-Counsel was away on mission. The Defence indicates that a request can be filed promptly if an extension is granted.

3. According to Rule 73 (C), the time for filing a request for certification commences from the day the impugned decision is filed. The Chamber has previously held in this case that

> "[t]he different wording in Rules 72 and 73 makes it doubtful whether the Chamber may grant a suspension of the time-limit in Rule 73 (C)"[1].

In the Chamber's view, however, the fairness of the proceedings requires that the seven day period commence only after the challenging party has actual notice of the decision. The Chamber further observes that Rule 73 (C) envisions this in connection with oral decisions rendered when the challenging party is not present when the decision is rendered.

4. The Chamber accepts the Defence's submissions that it had no notice of the decision until it arrived in Arusha on 5 October 2005. The Defence indicated that the request for certification is ready and can be filed promptly. Accordingly, in the present situation, the Chamber finds it in the interests of justice to extend the filing period.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion and extends the deadline until Tuesday 11 October 2005.

Arusha, 7 October 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[1] *Bagosora*, Decision on Prosecutor's Request for a Suspension of the Time-Limit under Rule 73 (C) in Respect of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)" (TC), 16 June 2004, para. 5.

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## *Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute 31 October 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Cooperation of the State, Togo, Precise Nature of the Assistance, United Nations Office of Legal Affairs – Request granted*

*International Instrument cited :*

*Statute, art. 28*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF "Anatole Nsengiyumva's Urgent Motion Requesting for an Order to the Government of Togo to Cooperate in Facilitating Defence Contacts with Potential Defence Witness TG-1", filed on 7 September 2005;

HEREBY DECIDES the request.

1. The Nsengiyumva Defence moves the Chamber to make a request to the Government of Togo, pursuant to Article 28 of the Statute, to facilitate contact with Mr. Aquili Tchemi Tchambi, a Togolese national who served as a United Nations military observer in Rwanda in 1994. The motion states that Mr. Tchemi has expressed his willingness to meet with the Defence on condition that he is authorized by his superiors to do so[1]. A letter from the United Nations Office of Legal Affairs, attached to the motion, indicates that the United Nations has no objection to the interview.

2. Article 28 of the Statute imposes an obligation on States to

[1] Motion, para. 5.

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## *Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'article 28 du Statut 31 octobre 2005 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva – Cooperation avec les Etats, Togo, Nature précise de l'assistance, Bureau des affaires juridiques de l'Organisation des Nations Unies – Requête acceptée*

*Instrument international cité :*

*Statut, art. 28*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au Général de division Yaache et la coopération de la République du Ghana, 23 juin 2004 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005 (ICTR-98-41)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI DE la requête de la Défense intitulée «*Anatole Nsengiyumva's Urgent Motion Requesting for an Order to the Government of Togo to Cooperate in Facilitating Defence Contacts with Potential Defence Witness TG-1*», déposée le 7 septembre 2005,

STATUE SUR la requête.

1. La défense de Nsengiyumva prie la Chambre de demander au Gouvernement togolais, en vertu de l'article 28 du Statut, de faciliter la prise de contact avec M. Aquili Tchemi Tchambi, ressortissant togolais et ancien observateur militaire des Nations Unies au Rwanda en 1994. La Défense déclare dans la requête que M. Tchemi s'est dit prêt à s'entretenir avec la Défense à condition que ses supérieurs l'y autorisent[1]. Une lettre du Bureau des affaires juridiques de l'Organisation des Nations Unies, annexée à la requête, indique que l'ONU ne s'oppose pas à un tel entretien.

2. Aux termes de l'article 28 du Statut, les Etats sont tenus de

[1] Requête, para. 5.

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"cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

A request to a Chamber to make an order under Article 28 must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it. The type of assistance sought should also be defined with particularity[2].

3. The motion adequately articulates the nature of the information sought and its relevance to the proceedings against the Accused. The annexes to the motion also demonstrate that the Nsengiyumva Defence has made reasonable efforts to secure the authorization of the Government of Togo to meet with Mr. Tchemi, without success. Formal and informal contacts by the Registry, including the issuance of a Note Verbale dated 30 May 2005, have not yet led to any response from the Togolese authorities concerning this matter.

FOR THE ABOVE REASONS, THE CHAMBER

RESPECTFULLY REQUESTS the Government of Togo to give its permission, to the extent required, to allow the Nsengiyumva Defence to meet and interview Mr. Aquili Tchemi Tchambi concerning his knowledge of events in Rwanda in 1994, and to provide any relevant assistance that may reasonably be required to facilitate this meeting;

DIRECTS the Registry to transmit this decision to the relevant authorities of the Government of Togo.

Arusha, 31 October 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[2] *Bagosora et al.,* Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Bagosora et al.,* Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

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«collabore[r] avec le Tribunal international pour le Rwanda à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire».

Toute demande présentée à une Chambre en vertu de l'article 28 du Statut pour qu'elle délivre une ordonnance doit indiquer la nature des renseignements demandés, la pertinence de ces renseignements pour le procès et les efforts qui ont été faits pour les obtenir. Elle doit également préciser la nature de l'assistance souhaitée[2].

3. La requête indique de manière adéquate la nature des renseignements demandés et leur pertinence pour la procédure engagée contre l'accusé. Par ailleurs, il ressort des annexes de la requête que la Défense de Nsengiyumva a déployé des efforts raisonnables pour obtenir du Gouvernement togolais l'autorisation de s'entretenir M. Tchemi, mais en vain. Des contacts formels et informels ont été pris par le Greffe, notamment sous la forme d'une note verbale datée du 30 mai 2005, mais il n'y a pas eu à ce jour de réponse des autorités togolaises à ce sujet.

PAR CES MOTIFS, LA CHAMBRE

PRIE le gouvernement togolais d'autoriser, dans la mesure requise, la Défense de Nsengiyumva à s'entretenir avec M. Aquili Tchemi Tchambi de ce qu'il sait des événements survenus au Rwanda en 1994, et de fournir toute assistance pertinente qui serait raisonnablement demandée en vue de faciliter cet entretien;

CHARGE le Greffe de transmettre la présente décision aux autorités concernées du gouvernement togolais.

Arusha, le 31 octobre 2005.

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[2] *Bagosora et consorts*, Décision relative à la demande de coopération et d'assistance adressée au Royaume des Pays-Bas, 7 février 2005, para. 5; *Bagosora et consorts*, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au Général de division Yaache et la coopération de la République du Ghana, 23 juin 2004, para. 4.

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## *Decision on Nzuwonemeye request for Disclsoure of Identifying Information of Witness XXO and Authorization to Interview him 31 October 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judge : Erik Møse, Presiding Judge

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Disclosure obligation of the Prosecutor, Conditions for a Request of Disclosure, Identification of the material, Prima facie case of the relevance of the evidence, Exculpatory information – Protection of the Witness – Function of the Registrar – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 68 (A) and 75 (F)(i)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Motion for Disclosure under Rule 68, 1 March 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Tharcisse Muvunyi, *Decision on Tharcisse Muvunyi's Motions for Disclosure of Exculpatory and Other Relevant Material and for Relief Pursuant to Rules 66 and 5 of the Rules, 9 February 2005 (ICTR-2000-55); Appeals Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Judgement, 23 May 2005 (ICTR-98-44A)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber in accordance with Rule 73 (A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED OF a "Motion for Disclosure of Identifying Information of Witness XXO and Authorization to Interview a Protected Witness", filed by the Defence of François-Xavier Nzuwonemeye on 11 October 2005, in connection with the case of *Prosecutor v. Ndindiliyimana et al.*;

CONSIDERING the oral submissions made by the Prosecution on 20 October 2005 in the case of *Prosecutor v. Bagosora et al.*;

HEREBY DECIDES the motion.

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## Introduction

1. The Defence for Nzuwonemeye, an accused in the case of *Prosecutor v. Ndindiliyimana et al.*, requests that it be given the identifying information and any unredacted statements of Witness XXO, who appeared in the *Prosecutor v. Bagosora et al.* case[1]. It also requests authorization to contact and interview this witness. Relying on transcripts from hearings in this case, the Defence argues that Witness XXO is in possession of evidence which exculpates the Accused in respect of the murder of former Prime Minister Agathe Uwilingiyimana.

2. The Prosecution argues that the Defence has failed to demonstrate that the information is exculpatory[2]. In the Prosecution's view, the appropriate procedure for contacting Prosecution witnesses is to have such requests forwarded through the Registry. If the witness consents to the interview, then the issue of disclosure of the witness' identity, whereabouts and prior statements is resolved; only if the witness does not consent should the Chamber address the merits of the request[3].

## Deliberations

3. Rule 68 (A) provides that :

> The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

4. An accused requesting an order for disclosure under Rule 68 must (i) identify the material with particularity and (ii) make a *prima facie* showing that the material may, in fact, suggest the innocence or mitigate the guilt of the accused, or affect the credibility of the prosecution's evidence[4]. The Nzuwonemeye Defence has described the evidence with sufficient particularity : it seeks the identifying information and any unredacted statements of Witness XXO. Having reviewed the submissions in the *Ndindiliyimana et al.* trial to which reference is made in the motion, the Chamber is satisfied that a *prima facie* showing has been made that the statements may contain exculpatory information. It follows that the identity of the source of the information is also exculpatory information[5].

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[1] The Nzuwonemeye Defence made an oral request to have certain portions of the transcript in this case admitted as evidence in the Accused's case on 14 September 2005, but Trial Chamber II denied the request. On 19 September 2005, the Nzuwonemeye Defence filed a motion for reconsideration, but Trial Chamber II again denied the request in a decision dated 10 October 2005. In its decision, Trial Chamber II directed the Defence to address Trial Chamber I for authorization to interview protected Witness XXO. In accordance with that decision, the Nzuwonemeye Defence has filed the present motion.

[2] *Bagosora et al.*, T. 20 October 2005 p. 23.

[3] *Bagosora et al.*, T. 20 October 2005 pp. 23-24.

[4] If disputed, the defence must also establish that the evidence is in the possession of the Prosecution. *Karemera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, paras. 9, 11. See also *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262.

[5] *Bagosora et al.*, Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004, para. 6 (finding that the identity of a witness is inextricably connected with the substance of his or her statement).

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5. The designation and control of protected witness information in the *Bagosora* case is governed by the witness protection order of 29 November 2001, attached hereto as Annex A[6]. The Chamber recalls that Rule 75 (F) (i) provides that, once protective measures have been ordered in respect of a victim or witness in any proceeding before the Tribunal, such protective measures automatically bind any party in receipt of the protected information[7].

6. The Chamber's normal practice, in conformity with the provisions set out by the witness protection order itself, is that requests to interview witnesses of an opposing party are channelled through the Registry. The Chamber therefore directs the Registrar to forward the request of the Nzuwonemeye Defence to Witness XXO and to facilitate an interview if the witness consents.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS THE MOTION by ordering the Prosecution to produce all unredacted versions of Witness XXO's statement(s);

DECLARES that the parties in receipt of the information are bound *mutatis mutandis* by the witness protection decision of 29 November 2001 in the *Bagosora* case;

ORDERS the Registry to forward the request of the Nzuwonemeye Defence to Witness XXO and to facilitate an interview if the witness consents to be interviewed;

Arusha, 31 October 2005.

[Signed] : Erik Møse

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## *Decision on Request to the Republic of Bangladesh for Assistance Pursuant to Article 28 of the Statute 31 October 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Cooperation of the State, Bangladesh, Precise Nature of the Assistance, Prior Efforts by the Defence, United Nations Office of Legal Affairs – Request granted*

[6] *Bagosora et al.*, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses (TC), 29 November 2001.

[7] *Muvunyi*, Decision on Tharcisse Muvunyi's Motions for Disclosure of Exculpatory and Other Relevant Material and for Relief Pursuant to Rules 66 and 5 of the Rules (TC), 9 February 2005, para. 12.

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*International Instrument cited :*

*Statute, art. 28*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41); Trial Chamber, T*he Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance, 7 February 2005 (ICTR-98-41)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik M^me^, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "*Requête de la Défense de Bagosora visant la collaboration de l'État du Bangladesh*", filed on 29 June 2005;

HEREBY DECIDES the request.

1. The Bagosora Defence moves the Chamber to request the Governrnent of Bangladesh, pursuant to Article 28 of the Statute, to facilitate a meeting with two members of the Bengali contingent of UNAMIR, Colonel Bashir (or Bashil) and Captain Wadud, who were present in Rwanda in 1994. A request by the Defence for assistance in locating and contacting these two individuals was made to the Permanent Mission of Bangladesh to the United Nations by letter dated 30 June 2004, followed by a Note Verbale issued by the Registrar of the Tribunal on 13 May 2005, addressed to the High Commission of Bangladesh in Nairobi, Kenya. Despite informal indications from the Governrnent of Bangladesh to the Registry that they are willing to provide assistance, no clear response to the request has yet been given. The United Nations Office of Legal Affairs, in a letter attached to the motion, expresses no objection to the meeting requested, and refers the Bagosora Defence to the Governrnent of Bangladesh for assistance.

2. Article 28 of the Statute imposes an obligation on States to "cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". A request to a Chamber to make an order under Article 28 must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it. The type of assistance sought should also be defined with particularity[1].

3. The motion adequately articulates the nature of the information sought and its relevance to the proceedings against the Accused. The annexes to the motion also demonstrate that the Bagosora Defence has made reasonable efforts to obtain the

[1] *Bagosora et al.*, Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

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assistance without recourse to the Charnber. Furthermore, the type of assistance requested is defined with particularity, and is similar to that which has been granted in previous requests for assistance under Article 28[2].

FOR THE ABOVE REASONS, THE CHAMBER

RESPECTFULLY REQUESTS the Governent of Bangladesh to provide any relevant assistance in facilitating a meeting between the Defence for Bagosora and Colonel Bashir (or Bashil) and Captain Wadud concerning their knowledge of events in Rwanda in 1994;

DIRECTS the Registry to transmit this decision to the relevant authorities of the Government of Bangladesh.

Arusha, 31 October 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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## *Decision Amending Defence Witness Protection Orders 2 December 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Protection of the witness, Confidentiality of the identity of the witness, Disclosure within the Office of the Prosecutor*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Ntabakuze Motion for Protection of Witnesses, 15 March 2004 (ICTR-98-41)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

[2] *Bagosora et al.*, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the government of Ghana (TC), 25 May 2004, p. 3.

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SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Appeals Chamber Decision on Interlocutory Appeals of Decision on Witness Protection Orders, filed on 6 October 2005, remitting an issue to this Chamber for further consideration;

CONSIDERING the oral submissions of the parties on 1 November 2005; and the Joint Defence Brief, filed on 2 November 2005;

HEREBY RENDERS its decision.

1. By its decision of 1 June 2005, this Trial Chamber affirmed the wording of its witness protection orders to the effect that automatic access to protected Defence witness information should be limited to members of "the Prosecution team in this case". Leave to appeal that decision was granted on 29 July 2005, and on 6 October 2005, the Appeals Chamber held that the restriction contradicts the Prosecutor's obligation to disclose exculpatory material to accused in other trials, pursuant to Rule 68 of the Rules of Procedure and Evidence ("the Rules"), and that the restriction interfered with the Prosecutor's discretion to delegate to his Office as "a whole, undivided unit"[1]. The matter was remitted to this Trial Chamber for "further consideration consistent with this Decision"[2].

2. Paragraph 7 of the witness protection orders applicable for all Defence witnesses presently reads :

> The Prosecution team in this case shall keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information[3].

Paragraph 8 requires the Prosecution to designate

> "all persons working on the Prosecution team in this case who will have access to any identifying information concerning any protected witness",

and to attest that any confidential materials have been remitted by persons leaving the team. The Defence suggests that paragraph 7 need be modified only by adding the words

> "except in so far as it is necessary to disclose such information to such personnel of the Office of the Prosecution who have a genuine need to know such information in order to discharge the Prosecutor's disclosure obligations under the Rules of Procedure and Evidence".

3. The Defence also wishes to retain paragraph 8, which would henceforth be applicable to all persons

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[1] *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005 ("Appeals Decision"), paras. 44-46.

[2] *Id.* para. 47.

[3] *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003. By virtue of the Chamber's 1 June 2005 Decision on Motion to Harmonize and Amend Witness Protection Orders, the Nsengiyumva witness protection decision was superseded, and replaced by the order applicable to Ntabakuze witnesses.

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"working on the Prosecution team in this case or others within the office of the Prosecution who will have access to any identifying information"[4].

The Prosecution considers paragraph 8 to be redundant, in light of the Appeals Chamber decision.

4. The Appeals Chamber decision specifically holds that

"the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations"[5].

The Appeals Chamber reached this conclusion notwithstanding the Trial Chamber's view that its decision would not preclude sharing the content of potentially exculpatory witness testimony with other trial teams, and that its only practical consequence was that specific applications would have to be brought before this Trial Chamber for disclosure of the identities of the witnesses in question[6]. Against this background, the Appeals Chamber decision must be taken to mean that the Prosecutor is endowed by the Rules with an unfettered discretion to give anyone within the Office of the Prosecutor access to any confidential information to which he is entitled to have access. Witness protection orders which purport to constrain or qualify the exercise of this unfettered discretion are, accordingly, contrary to the Rules.

5. The present restriction to the "Prosecution team in this case" undoubtedly violates the Appeals Chamber's guidance. Even an exception for those within the Office of the Prosecutor "who have a genuine need to know such information", as proposed by the Defence, would represent an impermissible incursion on the Prosecutor's power to treat his office as "a whole, undivided unit"[7]. It is now up to the Prosecutor, not the Chamber, to determine the modalities for sharing information within his Office. Similarly, there is no scope for the continued application of paragraph 8, requiring the Prosecution to designate all persons with access to confidential information. The Prosecutor is, of course, bound to ensure that confidential information is not disclosed by his Office to other persons; but the mechanism to prevent such disclosure rests within his sole discretion.

FOR THE ABOVE REASONS, THE CHAMBER

DELETES the words "team in this case" from paragraph 7 of the witness protection orders applicable to the Defence in this case;

DELETES paragraph 8 of the witness protection orders applicable to the Defence in this case.

Arusha, 2 December 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

***

[4] Joint Defence Brief, 2 November 2005, para. 8.

[5] Appeals Decision, para. 43.

[6] *Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 7 ("When testimony is heard in closed session, the Chamber's witness protection orders do not necessarily prevent Prosecution Counsel in other cases from being informed of material that may be exculpatory, provided that the identity of the witness is not revealed").

[7] *Rwamakuba*, Decision on Prosecution Motion for Variation, Or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses (TC), 2 November 2005.

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# *Decision on Kabiligi Application for Certification concerning Defence Cross-examination after Prosecution Cross-examination 2 December 2005 (ICTR-98-41-T)*

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

*Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva – Requirements for certification, Materially advance of the proceedings, Serious doubt as to the correctness of the legal principles at issue, Right of the Accused to cross-examination, Discretionary power of the Chamber – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 73 (B), 90 and 90 (G) (iii); Statute, art. 20 (4) (e)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA, 5 December 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO, 11 December 2003 (ICTR-98-41); Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42); Appeals Chamber,* The Prosecutor v. Tharcisse Muvunyi, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005 (ICTR-2000-55); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries, 21 July 2005 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Kabiligi Application for Certification concerning Defence Cross-Examination after Prosecution Cross-Examination, 2 December 2005 (ICTR-98-41).*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Slobodan Milošević, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (ICTR-02-54)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Kabiligi "Application for Certification [to] Appeal the Trial Chamber's Oral Decision on the Denial of the Right of the Defence to Cross-Examine a Defence Witness After the Prosecution Had Terminated its Cross-Examination", filed on 28 October 2005;

CONSIDERING the Prosecution response, filed on 9 November 2005, and the Kabiligi "Motion to Preclude the Prosecution from Replying or Pleading to the Kabiligi Application", filed on 11 November 2005;

HEREBY DECIDES the application.

## Introduction

1. On 21 October 2005, the Chamber ruled orally that the Kabiligi Defence could ask certain limited questions based on issues raised during the Prosecution's cross-examination of Defence Witness LE1 but that the Defence was precluded from asking questions on a matter which the Chamber deemed to be a "general issue which has been on the table throughout the proceedings".[1] The Chamber reaffirmed the principle enunciated in its Decision on Modalities for Examination of Defence Witnesses of 26 April 2005 (the "26 April 2005 decision") that questions by Defence teams, other than the one(s) calling the witness, should generally be asked before the Prosecution begins its cross-examination[2]. In its oral decision, the Chamber recognized, however, that Defence teams should be permitted to ask additional questions of a witness where new and adverse information emerges during the Prosecution's cross-examination[3].

2. The Defence thereafter filed an application for certification of the issue to the Appeals Chamber. On 11 November 2005, the Chamber issued an oral decision denying the Kabiligi Defence request for certification. The Chamber indicated that a written decision would follow[4].

## Deliberations

3. The first requirement for certification of an appeal under Rule 73 (B) is that the decision at issue

[1] *Bagosora et al.*, T. 21 October 2005 pp. 43, 49.

[2] *Bagosora et al.*, T. 21 October 2005 p. 43. The Chamber's 26 April 2005 decision denied the Prosecution's request to set general rules concerning the examination of Defence witnesses on the grounds that the issue was best decided on a case-by-case basis. The Chamber noted that, despite the fact that this is a multi-accused case, the same general principles for cross-examination apply and that each accused has a right to ask questions of a witness after the examination-in-chief by the party or parties presenting the witness. The Chamber further held that the scope of the questioning by other co-accused need not be limited to issues that are "adverse" to that accused, as suggested by the Prosecution. *Bagosora et al.*, Decision on Modalities for Examination of Defence Witnesses (TC), 26 April 2005, paras. 3, 5.

[3] *Bagosora et al.*, T. 21 October 2005 p. 43.

[4] *Bagosora et al.*, T. 11 November 2005 pp. 3-4.

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"involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial".

The crux of the Kabiligi Defence argument is that the Chamber's decision limiting the subject matter of its cross-examination of Witness LE1 amounted to a deprivation of the Accused's right to cross-examination in violation of Article 20 (4) (e) of the Statute[5]. The Defence asserts that it should be allowed to cross-examine a Defence witness, even after the Prosecution's cross-examination provided that the Prosecution is given an opportunity to conduct further cross-examination. The Defence asserts that a ruling by the Appeals Chamber would clarify the "complicated procedural workings of joint proceedings" so as to allow the parties to streamline questioning of Defence witnesses and to shorten the length of the proceedings. Both of these issues may have a substantial impact on the conduct of the proceedings and the outcome of trial and should therefore be certified to the Appeals Chamber.

4. The Prosecution opposes certification of the Chamber's decision and points to the Chamber's 26 April 2005 decision which ordered that questioning of Defence witnesses by other Co-Accused would be decided on a case-by-case basis. The Defence did not seek to appeal this earlier decision and is therefore without recourse to challenge that decision at this stage of the proceedings.

5. The Chamber agrees with the Kabiligi Defence that any infringement of the right to cross-examination may affect the fair and expeditious conduct of the proceedings and the outcome of trial. This does not, however, mean that all issues touching upon cross-examination of witnesses should be certified to the Appeals Chamber for resolution. Rule 90 addresses the testimony of witnesses and vests the Trial Chamber with discretion to decide what inquiries are appropriate for cross-examination[6]. In situations where an appeal is based on an exercise of discretion by the Trial Chamber, the scope of review by the Appeals Chamber is limited.[7] The Appeals Chamber has repeatedly emphasized the primacy of Trial Chamber rulings involving an exercise of discretion and has noted that interlocutory appeals under Rule 73 (B) are only warranted under exceptional circumstances[8].

6. The second consideration for certification of an appeal under Rule 73 (B) is whether a ruling by the Appeals Chamber "may materially advance the proceedings". The Kabiligi Defence argues that the Chamber's case-by-case approach to issues of whether to allow cross-examination by Defence teams after the Prosecution has finished its cross-examination leads to inconsistent rulings, as in the case of Witness

[5] *Bagosora et al.*, T. 21 October 2005 p. 49.

[6] Rule 90 (G) (iii) of the Rules of Procedure and Evidence.

[7] *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries (TC), 21 July 2005, para. 5; *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5.

[8] A Trial Chamber's decision will only be overturned if the challenged decision was "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion". *Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (AC), 1 November 2004, paras. 9-10. See also *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 5; *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 5.

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DM-25, and slows down the pace of the proceedings[9]. The Prosecution makes no arguments on this point.

7. As this Chamber has previously held, the question of whether resolution of the matter by the Appeals Chamber may materially advance the proceedings

> "requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue"[10].

The Defence has failed to raise such doubt on the Chamber's decision, in large part because the decision rested on an exercise of the Chamber's discretion.

8. Moreover, the determination of whether to allow cross-examination of a witness by a Defence team will continue to require a case-by-case analysis and will depend on the actual subject matter of the Prosecution's cross-examination of each witness at issue[11]. Consequently, the Chamber does not find that resolution of this matter by the Appeals Chamber would materially advance the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Kabiligi Defence's application for certification.

Arusha, 2 December 2005.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

***

[9] Witness DM25 testified before this Chamber on 11-13 April 2005. After the end of the Prosecution's cross-examination, the Chamber allowed the Bagosora, Nsengiyumva and Ntabakuze teams to cross-examine the witness based on information arising out of the Prosecution's cross-examination. The Prosecution was then given the opportunity for additional cross-examination.

[10] *Bagosora et al.*, Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO (TC), 11 December 2003, para. 6. See also *Bagosora et al.*, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003, para. 10.

[11] Trial Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Kabiligi Application for Certification concerning Defence Cross-Examination after Prosecution Cross-Examination, 2 December 2005 (ICTR-98-41).

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# *The Prosecutor v. Jean Bosco BARAYAGWIZA, Ferdinand NAHIMANA and Hassan NGEZE*

# Case N° ICTR-99-52

***Case History : Jean Bosco Barayagwiza***

- Name : BARAYAGWIZA
- First Names : Jean Bosco
- Date of Birth : 1950
- Sex : male
- Nationality : Rwandan
- Former Official Function : Director of Political Affairs in the Ministry of Foreign Affairs
- Date of Indictment's Confirmation : 23 October 1997 [1]
- Counts : genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of Indicment's Amendments : see Decisions of 5 November 1999 and 11 April 2000
- Date of the decision to joint Trials : 6 June 2000 with Ferdinand Nahimana and Hassan Ngeze (Case N° ICTR-99-52)
- Date and Place of Arrest : 27 March 1996, in Cameroon
- Date of Transfer : 19 November 1997
- Date of Initial Appearance : 23 February 1998
- Pleading : not guilty
- Date Trial Began : 23 October 2000
- Date and content of the Sentence : 3 December 2003, life imprisonment, reduced to 35 years of imprisonment
- Appeal : Sentence reduced to 32 years imprisonment (28 November 2007)

***

[1] The text of the indictment is reproduced in the *1995-1997 Report*, p. 130. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 138.

# *Le Procureur c. Jean Bosco BARAYAGWIZA, Ferdinand NAHIMANA et Hassan NGEZE*

## Affaire N° ICTR-99-52

***Fiche technique : Jean Bosco Barayagwiza***

- Nom : BARAYAGWIZA
- Prénoms : Jean Bosco
- Date de naissance : 1950
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : directeur des affaires politiques au ministère des affaires étrangères au Rwanda
- Date de la confirmation de l'acte d'accusation : 23 octobre 1997 [1]
- Chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide et crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de modifications subséquentes portées à l'acte d'accusation : voyez les décisions du 5 novembre 1999 et du 11 avril 2000
- Date de jonction d'instance : 6 juin 2000 avec Ferdinand Nahimana et Hassan Ngeze (aff. N° ICTR-99-52)
- Date et lieu de l'arrestation : 27 mars 1996, au Cameroun
- Date du transfert : 19 novembre 1997
- Date de la comparution initiale : 23 février 1998
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 23 octobre 2000
- Date et contenu du prononcé de la peine : 3 décembre 2003 – emprisonnement à vie, peine réduite du fait de la violation de ses droits durant le procès à 35 ans d'emprisonnement
- Appel : Peine réduite à 32 ans d'emprisonnement (28 novembre 2007)

***

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 130. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 139.

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***Case History : Ferdinand Nahimana***

- Name : NAHIMANA
- First Name : Ferdinand
- Date of birth : 15 June 1950
- Sex : male
- Nationality : Rwandan
- Former Official Function : Director of *Radio Télévision Libre Milles Collines* (RTLM)
- Date of indictment's Confirmation : 12 July 1996 [2]
- Counts : conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity
- Date of indictment's Amendments : 10 November 1999
- Date of the decision to joint Trials : 30 November 1999 with Hassan Ngeze and 6 June 2000 with Jean Bosco Barayagwiza (Case N° ICTR-99-52)
- Date and Place of Arrest : 27 March 1996, in Cameroon
- Date of transfer : 23 January 1997
- Date of Initial Appearance : 19 February 1997
- Pleading : not guilty
- Date Trial Began : 23 October 2000
- Date and content of the Sentence : 3 December 2003, life imprisonment
- Appeal : Sentence reduced to 30 years of imprisonment (28 November 2007)

***

***Case History : Hassan Ngeze***

- Name : NGEZE
- First Name : Hassan
- Date of Birth : 1961
- Sex : male
- Nationality : Rwandan
- Former Official Function : Chief Editor of the *Kangura* Newspaper
- Date of indictment's Confirmation : 3 October 1997

[2] The text of the indictment is reproduced in the *1995-1997 Report*, p. 412. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 434.

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***Fiche technique : Ferdinand Nahimana***

- Nom : NAHIMANA
- Prénom : Ferdinand
- Date de naissance : 15 juin 1950
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : directeur de la *Radio Télévision Libre des Mille Collines* (RTLM)
- Date de la confirmation de l'acte d'accusation : 12 juillet 1996 [2]
- Chefs d'accusation : entente en vue de commettre le génocide, génocide, incitation directe et publique à commettre le génocide, complicité dans le génocide et crimes contre l'humanité
- Date des modifications subséquentes portées à l'acte d'accusation : 10 novembre 1999
- Date de jonction d'instance : 30 novembre 1999 avec Hassan Ngeze et 6 juin 2000 avec Jean Bosco Barayagwiza (aff. N° ICTR-99-52)
- Date et lieu de l'arrestation : 27 mars 1996, au Cameroun
- Date du transfert : 23 janvier 1997
- Date de la comparution initiale : 19 février 1997
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 23 octobre 2000
- Date et contenu du prononcé de la peine : 3 décembre 2003, emprisonnement à vie
- Appel : Peine réduite à 30 ans d'emprisonnement (28 novembre 2007)

***

***Fiche technique : Hassan Ngeze***

- Nom : NGEZE
- Prénom : Hassan
- Date de naissance : 1961
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : rédacteur en chef du journal *Kangura*
- Date de la confirmation de l'acte d'accusation : 3 octobre 1997

[2] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 413. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 434.

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- Counts : conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide and crimes against humanity
- Date of indictment's Amendments : 10 November 1999
- Date of the decision to joint Trials : 30 November 1999 with Ferdinand Nahimana and 6 June 2000 with Jean Bosco Barayagwiza (Case N° ICTR-99-52)
- Date and Place of Arrest : 18 July 1997, in Kenya
- Date of Transfer : 18 July 1997
- Date of Initial Appearance : 19 November 1997
- Pleading : not guilty
- Date Trial Began : 23 October 2000
- Date and content of the Sentence : 3 December 2003, life imprisonment
- Appeal : Sentence reduced to 35 years of imprisonment (28 November 2007)

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- Chefs d'accusation : entente en vue de commettre le génocide, génocide, complicité dans le génocide, incitation directe et publique à commettre le génocide et crimes contre l'humanité
- Date des modifications subséquentes portées à l'acte d'accusation : 10 novembre 1999
- Date de jonction d'instance : 30 novembre 1999 avec Ferdinand Nahimana et 6 juin 2000 avec Jean Bosco Barayagwiza (aff. N° ICTR-99-52)
- Date et lieu de l'arrestation : 18 juillet 1997, au Kenya
- Date du transfert : 18 juillet 1997
- Date de la comparution initiale : 19 novembre 1997
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 23 octobre 2000
- Date et contenu du prononcé de la peine : 3 décembre 2003, emprisonnement à vie
- Appel : Ppeine réduite à 35 ans d'emprisonnement (28 novembre 2007)

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## *Decision on Jean Bosco Barayagwiza's Motion concerning the Registrar's Decision to Appoint Counsel 19 January 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Appointment of a Counsel, Availability to the Accused, Choice of the Lead Counsel, Discretion of the Registry in assigning counsel to an indigent accused – Rights of other defendants – Interests of justice*

*International Instrument cited :*

*Directive on the Assignment of Defence Counsel*

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean Kambanda, *Judgement, 19 October 2000 (ICTR-97-23); Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4); Trial Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004 (ICTR-99-52)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Jadranko Prlić et al., *Decision on Appeal by Bruno Stojic Against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004 (IT-04-74)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED of the "*Recours très urgent contre le refus du Greffier de commettre M. Richard Harvey comme mon Conseil principal en exécution de la décision de la Chambre d'appel du 3 novembre 2004*" ("Motion") filed by Appellant Jean Bosco Barayagwiza ("Appellant Barayagwiza") on 6 December 2004, in which he asks the Appeals Chamber to order the Registrar to assign Mr. Richard Harvey as lead counsel and Mr. Donald Herbert as co-counsel and to assign new counsel with the time and facilities to acquaint themselves with the case before proceeding with the appeal;

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NOTING that the proceedings in this case have been stayed since 19 May 2004, pending the assignment of new lead counsel[1];

NOTING the "Decision on Barayagwiza Motion for Appointment of Counsel or a Stay of Proceedings" of 22 October 2004, in which the Appeals Chamber ordered the Registrar, in the interests of justice, to assign counsel to Appellant Barayagwiza;

NOTING the "Order to Appoint Counsel to Jean Bosco Barayagwiza" of 3 November 2004, in which the Appeals Chamber ordered the Registrar (i) to consider reinstating Mr. Richard Harvey on the list of eligible counsel, and, if he is eligible and available, to assign Mr. Richard Harvey as lead counsel for the Appellant Barayagwiza, (ii) if Mr. Richard Harvey is not eligible or available, to assign Mr. Donald Herbert as lead counsel, and (iii) to ensure that Appellant Barayagwiza is represented by lead counsel no later than 10 November 2004;

NOTING the "Registrar's Representation Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding the Appeals Chamber Decision on *Jean Bosco Barayagwiza's* Motion for Appointment of Counsel or a Stay of Proceedings", filed 2 December 2004, in which the Registrar indicates that, after learning that Mr. Harvey was assigned as co-counsel in an ongoing trial before the International Criminal Tribunal for the Former Yugoslavia, the Registry considered that Mr. Harvey's availability to the Appellant and to the Appeals Chamber could not be assured and therefore appointed Mr. Herbert as lead counsel for Appellant Barayagwiza;

NOTING the "Observations sur la 'Registrar's Representation' datée du 2 decembre 2004 'regarding the Appeals Chamber Decision on Jean Bosco Barayagwiza's Motion for Appointment of Counsel or Stay of Proceedings'", filed on 8 December 2004, in which the Appellant contests the Registrar's finding that his first choice for lead Counsel is not "available" to defend the Appellant Barayagwiza, and reiterates his request that Mr. Harvey be appointed to serve as his lead counsel and that Mr. Herbert be appointed as co-counsel;

NOTING the "Registrar's Representation Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding Jean-Bosco Barayagwiza's *Observations sur la Registrar's Representations Datée du 2 Décembre 2004* Regarding the Appeals Chamber Decision on Jean Bosco Barayagwiza's Motion for Appointment of Counsel or Stay of Proceedings", filed on 27 December 2004, in which the Registrar details his reasons for finding that Mr. Harvey is not available to defend the Appellant Barayagwiza, argues that such an assignment could prejudice the rights of other defendants, and stresses that, according to Article 15 (A) of the Directive on the Assignment of Defence Counsel, co-counsel is chosen by lead counsel and not by the accused;

NOTING the *"Réplique a la réponse du Greffier du 27 décembre 2004 à mes observations sur la 'Registrar'[*sic*] Representation' datée du 2 décembre 2004* 'regarding the Appeals Chamber Decision on Jean Bosco Barayagwiza's Motion for Appointment of Counsel or Stay of Proceedings'", filed on 5 January 2005, in which the Appellant Barayagwiza states that Mr. Harvey considers himself available to defend the Appellant Barayagwiza, argues that in Tribunal practice it is not the Reg-

[1] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.

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istrar who chooses co-counsel but the Accused, and reiterates his request that Mr. Harvey serve as lead counsel and Mr. Herbert as co-counsel;

NOTING that proceedings in this appeal have been delayed for a significant time and that it is therefore in the interests of justice for this case to advance immediately after the appointment of lead counsel for the Appellant Barayagwiza, and that in such circumstances, it is preferable for Appellant Barayagwiza to be assigned lead counsel who is in a position to prioritize the preparation of this appeal;

CONSIDERING that, although the choice of an accused regarding his defence counsel should be respected, the Registrar maintains a degree of discretion in assigning counsel to an indigent accused, and may decide not to appoint the accused's first choice of counsel if there are sufficient grounds overriding the accused's preference[2];

FINDING that, in the circumstances of this case, the Registrar has given reasonable explanations why Appellant Barayagwiza's first choice of lead counsel is unsuitable for appointment and has therefore assigned another lead counsel from the names proposed by the Appellant, as ordered by the Appeals Chamber;

HEREBY Dismisses the Motion in its entirety.

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

Dated this 19th day of December 2004,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

***

[2] See, *e.g.*, *Prosecutor v. Akayesu*, ICTR-97-23 Appeals Judgement, para. 61; *Prosecutor v. Kambanda*, ICTR-97-23 Appeals Judgement, 19 October 2000, para. 33; *Prosecutor v. Prlić et al.,* IT-04-74-AR73.1, 24 November 2004, para. 19.

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## *Order to registrar*
## *19 January 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Pre-Appeal proceedings, Report of the Registrar, Appointment of an Accused's Legal team*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING that, in the Status Conference of 15 December 2004, the Pre-Appeal Judge accepted the Registrar's commitment to expedite the appointment of Co-counsel and three legal assistants for Appellant Hassan Ngeze and that the Pre-Appeal Judge set deadlines on the basis of the Registrar's representations;

CONSIDERING that it appears that Co-Counsel has still not been appointed;

HEREBY

ORDER the Registrar to file a report to the Pre-Appeal Judge, no later than 25 January 2005, indicating the reasons for the delay in appointing Co-Counsel for Appellant Ngeze and setting out the steps taken to ensure that Appellant Ngeze's legal team is appointed promptly; and

ORDER Mr. Bharat Chadha, Lead Counsel for the Appellant Ngeze, to file a report to the Pre-Appeal Judge, no later than 25 January 2005, outlining the steps taken by the defence to ensure that Appellant Ngeze's legal team is appointed promptly.

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

Dated this 19 January 2005,

At The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

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## *Decision on Hassan Ngeze's Motion appealing the Registrar's Denial of Marriage Facilities 20 January 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – United Nations Detention Facility, Function of the President of the Tribunal, Function of the Registry, Facilities available to a detainee, Marriage ceremony of an Accused, Conjugal visits – Frivolous Motion – Motion denied*

*International Instruments cited :*

*Directive for the Registry of the International Criminal Tribunal for Rwanda Judicial and Legal Services Division Court Management Section, 8 June 1998; Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, adopted 5 June 1998; Rules of Procedure and Evidence, rules 19 and 73 (F)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED of "Appellant Hassan Ngeze's Motion for Setting Aside the Decision of the Registrar of Dated 12th January 2005 Pursuant to Article 8 (3) (c) on the Request for Marriage and other Reliefs [*sic*] and to Grant Leave to Marry at the ICTR Premises Before the Determination of his Pending Appeal" filed 17 January 2005 ('Motion"), in which Appellant Hassan Ngeze appeals the "Registrar's Decision Pursuant to Article 8 (3) (c) on the Request for Marriage and other Reliefs [*sic*]" issued 12 January 2005, denying Appellant Ngeze's requests, *inter alia*, to have a marriage ceremony at the United Nations Detention Facility, to be provided facilities to consummate the marriage, and to be permitted conjugal visits after the marriage;

NOTING the "Decision On Hassan Ngeze's Motion Seeking Leave To Marry" of 28 September 2004, in which the Appeals Chamber specifically instructed Appellant Ngeze that (i) the Registry is responsible for the day-to-day management of the United Nations Detention Unit including the determination of the facilities available to a detainee[1], and that his requests therefore fell within the competence of the Registry of the International Tribu-

[1] Directive for the Registry of the International Criminal Tribunal for Rwanda Judicial and Legal Services Division Court Management Section, 8 June 1998, as amended, Article 8 (3) (c).

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nal, and not the Appeals Chamber; (ii) the Appellant should first address his request to use the premises of the United Nations Detention Unit for the purpose of marrying to the authorities of the United Nations Detention Unit; and (iii) in the event of an adverse decision, the Appellant should follow the relevant complaints procedures set out in the Rules of Detention[2];

CONSIDERING that Rule 19 of the Rules of Procedure and Evidence ("Rules") provides that the President, and not the Appeals Chamber, supervises the activities of the Registry, and that pursuant to Rule 83 of the Rules of Detention, a detainee who is not satisfied with a response of the authorities of the United Nations Detention Unit, should file a written complaint to the Registrar who shall forward it to the President;

FINDING that, since the Appeals Chamber has already instructed the Appellant to follow the procedures set out in the Rules of Detention, and that the Appellant has not filed any complaint with the President, this Motion is frivolous;

HEREBY

DISMISSES the Motion; and

DIRECTS the Registrar, pursuant to Rule 73 (F) of the Rules, not to pay for any fees or costs relating to the preparation and filing of this Motion.

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

Dated this 20th day of January 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza 26 January 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

[2] Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, adopted 5 June 1998, as amended (Rules of Detention).

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*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Lifting of the stay of proceedings, Interests of Justice*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004 (ICTR-99-52)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING that the proceedings in relation to Appellant Barayagwiza have been stayed since 19 May 2004, pending the assignment of new lead counsel[2];

NOTING that, on 30 November 2004, the Registrar assigned Mr. Donald Herbert as lead counsel to Appellant Barayagwiza;

NOTING the "Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel" of 19 January 2005, in which the Appeals Chamber dismissed the Appellant's challenge to the Registrar's assignment of Mr. Donald Herbert as his lead counsel (Decision of 19 January 2005);

CONSIDERING that proceedings in this appeal have been delayed for a significant time and that it is therefore in the interests of justice for this case to advance immediately;

NOTING the "*Acte d'appel modifié*" filed by Appellant Jean-Bosco Barayagwiza on 27 April 2004[3];

NOTING the "*Mémoire d'appel*" filed by Mr. Barletta-Caldarera, former lead counsel for Appellant Barayagwiza (Former Counsel), on 25 June 2004;

NOTING further that a motion to adduce additional evidence, filed by Former Counsel prior to the imposition of the stay, remains pending[4];

HEREBY

LIFTS the stay of proceedings in relation to Appellant Barayagwiza;

ORDERS Appellant Barayagwiza to file any amended or new Notice of Appeal no later than 21 February 2005 (*i.e.*, thirty days from the Decision of 19 January 2005);

ORDERS Appellant Barayagwiza to file any amended or new Appellant's Brief no later than 9 May 2005 (*i.e.*, seventy-five days after the time limit for filing the Notice of Appeal); and

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[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

[2] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.

[3] *Notification sur la détermination de mon Acte d'appel*, 5 May 2004.

[4] *Requête d'acceptation des moyens de preuves supplémentaires pour des motifs valables qui permettent d'accorder une extension du délai ex article 115 du Règlement de Procédure et de Preuve (concernant le Rapport du Juge d'instruction français Jean-Louis Bruguière sur le crash de l'avion présidentiel au Rwanda)*, 29 March 2004 (Motion for Additional Evidence).

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ORDERS Appellant Barayagwiza to notify the Appeals Chamber of his intention to pursue or abandon the Motion for Additional Evidence no later than 21 February 2005.

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

Dated this 26th day of January 2005,

At The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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## *Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005*
## *4 February 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Discretionary power of the Appeals Chamber to reconsider a previous interlocutory decision, Error of reasoning – Request dismissed*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Tribunal");

BEING SEISED OF the "*Demande de réexamen de la décision de la Chambre d'Appel du 19 janvier 2005 rejetant mon 'Recours très urgent contre le refus du Greffier de commettre M. Richard Harvey comme mon Conseil principal en exécution de la décision de la Chambre d'appel du 3 novembre 2004*'" ("Request for Reconsideration"), submitted by Jean-Bosco Barayagwiza ("Appellant") on 25 January 2005, in which the Appellant requests the Appeals Chamber to reconsider its "Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel" issued on 19 January 2005 ("Decision of 19 January 2005"), dismissing the

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Appellant's challenge to the Registrar's assignment of Mr. Donald Herbert as his lead counsel;

NOTING the Appellant's submission that the Decision of 19 January 2005 fails to assign responsibility to the Registrar for the excessive delay in assigning counsel to him;

NOTING the Appellant's argument that the Decision of 19 January 2005 deprives him of assistance by a very competent counsel and might lead to further delays in the proceedings since counsel assigned by the Registrar is not familiar with the events in Rwanda, with the case law of this Tribunal and that of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), or with the French language;

NOTING the Appellant's argument that the Decision of 19 January 2005 seems to be condoning what the Appellant considers a discriminatory decision by the Registrar;

NOTING the Appellant's argument that the assignment of Mr. Richard Harvey would not cause any inconvenience to the Tribunal, but that its refusal to do so would cause him great prejudice;

CONSIDERING that the Appeals Chamber has an inherent discretionary power to reconsider a previous interlocutory decision, for example, if a clear error of reasoning has been demonstrated or if it is necessary to do so in order to prevent an injustice;

CONSIDERING that, while the deadline for submitting a response has not expired, the Prosecutor would not be prejudiced by the fact that he still has not filed a response to the Request for Reconsideration;

FINDING that none of the arguments raised by the Appellant Barayagwiza against the Decision of 19 January 2005 justify reconsideration thereof;

HEREBY DISMISSES the Request for Reconsideration.

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

Dated this 4th day of February 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

***

## *Decision on Hassan Ngeze's Motion for an Extension of Time 4 February 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Extension of time, Appointment of a counsel – Motion granted*

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I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

BEING SEISED of Appellant Hassan Ngeze's Urgent Motion for the Grant of Extension of Time to File Motion for Filing Appeal Brief and Corresponding Amended Notice of Appeal ("Appellant" and "Motion for an Extension of Time", respectively) filed 2 February 2005;

RECALLING that the Appellant has already benefited from several extensions of time to submit his Notice of Appeal and his Appellant's Brief[2];

RECALLING that, during the status conference of 15 December 2004, the Appellant was granted another extension of time of one month to file his Appellant's Brief and to make modifications to the Notice of Appeal already filed to account for the expected one-month delay in appointing co-counsel for the Appellant[3];

NOTING that, while it was anticipated at the status conference of 15 December 2004 that co-counsel to the Appellant would be appointed approximately a week later, co-counsel to the Appellant was in fact only appointed on 26 January 2005;

NOTING the Appellant's argument that, because of the delay in appointing co-counsel, a further extension of time is warranted;

FINDING that the additional one-month delay in appointing co-counsel to the Appellant justifies an additional one-month extension to file the Appellant's Brief and to make modifications to the Notice of Appeal already filed;

FINDING that none of the other arguments raised by the Appellant justify a further extension of time;

HEREBY ORDERS the Appellant to submit his Appellant's Brief by 2 May 2005 and to submit any modification to the Notice of Appeal already filed by 9 May 2005.

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

Dated this 4th day of February 2005,

At The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

***

[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

[2] "Decision on Motions for an Extension of Time to File Appellant's Notices of Appeal and Briefs", issued 19 December 2003; "Decision on Ngeze's motion for an Additional Extension of Time to File His Notice of Appeal and Brief", issued 6 February 2004; "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order", issued 2 March 2004; "Decision on Hassan Ngeze's Motion for an Extension of Time", issued 2 December 2004.

[3] Decision taken during the status conference of 15 December 2004 (T. 15 December 2004, pp. 18, 19). The Appellant was ordered to file his Appellant's Brief by the 1st of April 2005 (instead of the 1st of March 2005) and any amended Notice of Appeal a week later.

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## *Order concerning filing by Jean-Bosco Barayagwiza 4 February 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Responsibility of the Lead Counsel – Request denied*

*International Instrument cited :*

*Directive on the Assignment of Defence Counsel*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

HAVING RECEIVED from Appellant Jean-Bosco Barayagwiza ("Appellant") a "*Demande de sursis à l'application de l'Ordonnance du 26 janvier 2005*" dated 28 January 2005 ("Request for a Stay");

NOTING that, on 30 November 2004, the Registrar assigned Mr. Donald Herbert as lead counsel to Appellant Barayagwiza;

NOTING the "Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel" of 19 January 2005, in which the Appeals Chamber dismissed the Appellant's challenge to the Registrar's assignment of Mr. Donald Herbert as his lead counsel (Decision of 19 January 2005);

NOTING the "Decision Denying Jean-Bosco Barayagwiza's Request for Reconsideration" of 4 February 2005, in which the Appeals Chamber dismissed the Appellant's Request for Reconsideration of its Decision of 19 January 2005;

NOTING Article 15 (E) of the Directive on the Assignment of Defence Counsel, which provides that lead counsel has "primary responsibility for the Defence" and

> "shall sign all the documents submitted to the Tribunal unless the authorizes Co-Counsel, in writing, to sign on his behalf";

FINDING that all further submissions which the Appellant wishes to make to the Appeals Chamber shall be made on his behalf by assigned counsel;

HEREBY

ORDERS the Registrar to serve this Order on the Appellant;

REJECT the Appellant's Request for a Stay, without prejudice to the Appellant's right to re-file through counsel;

ORDERS the Appellant to make all further submissions relating to his appeal through assigned counsel.

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[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

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

Dated this 4th day of February 2005,

At The Hague, The Netherlands.

[Signed] : Inés Weinberg de Roca

***

## *Order scheduling a Status Conference 8 February 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Reasonable delay for trial, Status Conference,*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 65* bis *(A) and 65* bis *(B)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING that pursuant to Rule 65 *bis* (A) and (B) of the Rules of Procedure and Evidence, "the Appeals Chamber or an Appeals Chamber Judge" may convene a status conference to organize exchanges between the parties so as to ensure expeditious proceedings;

CONSIDERING that the Trial Chamber rendered its Judgement in this case on 3 December 2003 ("Trial Judgement"), that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze ("the Appellants") have all appealed from the Trial Judgement, and that the Appellants have remained in detention pending the hearing of their appeal;

CONSIDERING that a status conference would be useful to ensure that this case proceeds without any further unnecessary delay;

ORDERS the Parties to appear before me for a status conference on 9 March 2005, at 10:00 a.m. in room S-355, third floor, Serengeti Wing of the International Conference Centre of Arusha.

[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

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

Dated this 8th day of February 2005,

At The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

***

## *Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence 14 February 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Admissibility of evidence, Additional evidence, Requirements for leave to additional evidence, Written statements of the witness(es), Unavailability at trial, Due diligence, Miscarriage of justice – Extension of time, Good Cause – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 115 and 115 (A)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli, *"Decision on Defence Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence", 28 October 2004 (ICTR-98-44A); Trial Chamber,* The Prosecutor v. André Ntagerura et al., *"Decision on Prosecution Motion for Admission of Additional Evidence", 10 December 2004 (ICTR-99-46)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Zoran Kupreskic et al., *Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B), 8 May 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Radislav Krstić, *"Decision on Applications for Admission of Additional Evidence on Appeal", 5 August 2003 (IT-98-33)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Interna-

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tional Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED OF the "Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence", filed on 11 January 2005 ("Appellant" and "Motion for Additional Evidence", respectively);

NOTING the "Prosecutor's Response to Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence (Rule 115)", filed on 19 January 2005 ("Response");

NOTING the "Appellant's Reply to the Prosecutor's Response to Appellant Ngeze's Motion for Leave to Present Additional Evidence (Rule 115)", filed on 24 January 2005 ("Reply");

NOTING that the Trial Chamber rendered its Judgement in this case on 3 December 2003 ("Trial Judgement");

CONSIDERING that under Rule 115 (A) of the Rules of Procedure and Evidence of the Tribunal ("Rules"),

> "[a] party may apply by motion to present additional evidence before the Appeals Chamber" and that said motion "must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgment, unless good cause is shown for further delay";

NOTING that, while the Appellant repeatedly asked for extensions of time to file his Notice of Appeal (and consequently his Appellant's Brief)[1]– which motions were repeatedly granted[2] – he never properly asked for an extension of time to file a motion to present additional evidence[3];

CONSIDERING that the Appellant has not attempted to show good cause for the eleven months delay in filing his Motion for Additional Evidence;

---

[1] "Motion of the Ngeze Defence Seeking an Extension of Time for Filing the Notice of Appeal", filed 19 December 2003; Appellant Ngeze's "Motion Seeking a Further Extension of Time for Filing the Notice of Appeal", filed on 5 February 2004; "Appellant Hassan Ngeze's Motion for the Grant of Extension of Time to File Motion for the Amendment of Notice of Appeal and Appeal Brief", filed 29 November 2004; "Appellant Hassan Ngeze's Extremely Urgent Motion for Reconsideration of the Decision of the Pre-Appeal Judge Dated 2nd December 2004 on Hassan Ngeze's Motion for Extension of Time and His Further Request for an Order of a Status Conference Pursuant to Rule 65 *bis* of the Rules of Procedure and Evidence", filed on 6 December 2004.

[2] "Decision on Motions for an Extension of Time to File Appellant's Notices of Appeal and Briefs", issued 19 December 2003; "Decision on Ngeze's Motion for an Additional Extension of Time to File His Notice of Appeal and Brief", issued 6 February 2004; "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order", issued 2 March 2004; "Decision on Hassan Ngeze's Motion for an Extension of Time", issued 2 December 2004; Decision taken during the status conference of 15 December 2004 (T. 15 December 2004, pp. 18, 19).

[3] See "Order Concerning Ngeze's Motion", issued 5 May 2004; "Order Concerning Hassan Ngeze's Request to Join Co-Appellant's Motion", issued 24 May 2004; "Decision Denying Further Extension of Time", issued 25 May 2004.

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FINDING that the Motion for Additional Evidence was not filed in time[4] and that no good cause has been shown to justify this;

CONSIDERING FURTHER that a party seeking the admission of additional evidence on appeal must provide to the Appeals Chamber the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of Rule 115[5],

NOTING that the Appellant has not appended written statements of the witnesses whose evidence he seeks to have admitted, but merely asserts that, if called to testify, the proposed witnesses would testify in a certain manner;

CONSIDERING FURTHER that, under Rule 115 of the Rules, the Appellant is required primarily to establish that the evidence sought to be admitted was not available at trial in any form and could not have been discovered through the exercise of due diligence, which means that the Appellant must show, *inter alia*, that he made use of all of the mechanisms of protection and compulsion available to him under the Statute and Rules of the International Tribunal before the Trial Chamber[6];

CONSIDERING that evidence that was unavailable at trial and could not have been discovered through the exercise of due diligence is admissible under Rule 115 of the Rules if it is relevant to a material issue and credible and if it *could* have had an impact on the verdict[7],

CONSIDERING that evidence that was available at trial or could have been discovered through the exercise of due diligence is not admissible unless the moving party shows that its exclusion *would* lead to a miscarriage of justice, in that, if it had been adduced at trial it *would* have affected the verdict[8];

FINDING FURTHER that, even if the proposed witnesses were to testify as the Appellant submits they would, their evidence would still fail to be admissible under Rule 115 for the following reasons :

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[4] In this connection, see "Decision on Barayagwiza's Motion for Determination of Time Limits", issued 5 March 2004.

[5] As explained in *Prosecutor v. Kupreškić, et al.*, Case No. IT-95-16-A, "Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to Be Taken Pursuant to Rule 94 (B)", 8 May 2001, at para. 5 :

[Rule 115] deals with the situation where a party *is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial. *The Rule does not permit a party to simply request that a particular person be summoned to give evidence at the appellate stage* [Emphasis added].

[6] See *The Prosecutor v. Ntagerura, et al.*, Case No. ICTR-99-46-A, "Decision on Prosecution Motion for Admission of Additional Evidence", 10 December 2004 ("*Ntagerura* Rule 115 Decision"), para. 9; *M. Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, "Decision on Motion to Admit Additional Evidence" ("M. Nikolić Rule 115 Decision"), para. 21; *Prosecutor v. Krstić*, Case No. IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal", 5 August 2003 ("*Krstić* Rule 115 Decision"), p. 3.

[7] *Ntagerura* Rule 115 Decision, para. 10; M. Nikolić Rule 115 Decision, para. 23.

[8] *Ntagerura* Rule 115 Decision, para. 11; *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, "Decision on Defence Motion for the Admission of Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence", 28 October 2004, para. 11; *Krstić* Rule 115 Decision, p. 4.

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The Appellant has not shown that the additional evidence was not available at trial and that it could not have been discovered through the exercise of due diligence :

– As to witnesses Hassan Gitoki and Colonel Ephrem Setako (who, according to the Appellant, were not available at trial since their whereabouts were unknown at the time), the Appellant does not show the Appeals Chamber that he ever informed the Trial Chamber of his inability to locate these witnesses;
– As to other witnesses men[9]tioned by the Appellant, they were all detained at the United Nations Detention Facility in Arusha at the time of the trial and were t[10]hus clearly available during trial;

a) The Appellant has not shown that failure to admit the additional evidence *would* result in a miscarriage of justice in the sense that, if the additional evidence had been adduced at trial[11], it *would* have affected the verdict :

– As to witness Hassan Gitoki – whose evidence the Appellant seeks to have admitted on appeal to impugn the credibility of Prosecution Witness AEU[12] – even if he were to testify as anticipated by the Appellant[13] and to be found credible, it has not been shown that this would have any effect on the verdict, especially since the Trial Chamber already accepted that a small circle of individuals (in particular

[9] See "Motion for Additional Evidence", para. 2. The Appellant also argues that he did not know of the existence of these witnesses at the time of trial ("Motion for Additional Evidence", para. 2). However, Prosecution Witness AEU testified at length about Hassan Gitoki (see T. 26 June 2001, pp. 29-34, 66-81) : she even testified that the Appellant and Hassan Gitoki knew each other (T. 26 June 2001, p. 31). Thus, even if the Appellant did not know Hassan Gitoki before trial, he certainly became aware of his existence during trial. As to Colonel Setako, Hassan Ngeze himself explains in a document attached to his Motion for Additional Evidence that he was brought before an "awful military court which was presided over by judges Bagosora Théoneste & Colonel Ephraim Setako" (p. 1 of the "Attachment" to the Motion for Additional Evidence). In these circumstances, it is clear that the Appellant knew of Colonel Setako before his trial.

[10] As reiterated most recently in the *Ntagerura* Rule 115 Decision, at para. 9 :

"Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded contemporaneously." (References omitted).

[11] The Appellant's argument that he requested the Trial Chamber to compel these witnesses' appearance but that the Trial Chamber refused this fails at two levels :

1) while the Appellant mentioned to the Trial Chamber that some witnesses refused to testify on his behalf (See T. of Status Conference of 17 September 2002, p. 39), the Trial Chamber explained to the Appellant that, before using its power to compel witnesses to testify at trial, it would require the Appellant to make a list of the witnesses sought to be compelled and to submit their statements in order to allow the Trial Chamber to make a determination of whether the said witnesses would be helpful to the Appellant's case and of whether they are reluctant to testify (T. 17 September 2002, pp. 41-43). No such steps were ever taken by the Appellant.

2) Even if the Trial Chamber had refused to compel the witnesses to appear, a motion under Rule 115 would not be the appropriate vehicle to challenge this decision; rather, the Appellant would have to challenge this on appeal.

[12] In particular, the Appellant seeks to challenge the Trial Chamber's finding that, through Hassan Gitoki, he extorted money from AEU's employer to save AEU and her children : see "Trial Judgement", paras. 838, 839, 849 and 850.

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Tutsi of the Muslim faith and Tutsi close relatives) might have been saved by the Appellant's intervention[14];

– As to the other witnesses – whose evidence the Appellant seeks to have admitted to buttress his alibi defence for 6-9 April 1994 (the Appellant contends that the witnesses would testify that he was imprisoned during that period) – it has not been shown that their evidence would have been a decisive factor affecting the Trial Chamber's decision to accept the Prosecutor's evidence of the Appellant's actions for the period 6-9 April[15];

HEREBY DISMISSES the Motion for Additional Evidence.

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

Dated this 14th day of February 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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[13] The Appellant submits that Hassan Gitoki would testify that he agreed to save AEU's life but that he did not ask for any money from AEU or take a letter from the Appellant to AEU's employer : see "Motion for Additional Evidence", para. 8.

[14] Trial Judgement, para. 850.

[15] The Trial Chamber carefully considered the evidence of the Prosecution as to the Appellant's actions between 6 and 9 April 1994 (see Trial Judgement, paras. 783-801, 811-825) and the alibi evidence (see Trial Judgement, paras. 802-810, 826-829). In the end, the Trial Chamber was satisfied that the alibi evidence did not raise a reasonable doubt as to the Appellant's actions from 6 to 9 April 1994 : see Trial Judgement, paras. 829, 836 and 837. In particular, the Trial Chamber found (Trial Judgement, para. 829) : "In light of the inconsistencies in Ngeze's own testimony, as well as among the Defence witnesses, and the unreliable nature and source of the information to which they testified, the Chamber finds that the defence of alibi is not credible (see para. 99). Four Prosecution witnesses saw Ngeze on 7 April 1994. Their eyewitness testimony under oath is not shaken by the hearsay of the Defence witnesses or the contradictory testimony of Ngeze himself. Moreover, the Chamber notes that even if Ngeze had been arrested on 6 or 7 April, depending on the time of his arrest and the length of his detention, which could have been a few hours, he would not have been precluded from participation in the events described by the Prosecution witnesses".

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## *Order concerning Status Conference of 9 March 2005*
## *18 February 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Status conference, Attendance of the Counsel*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING the "Order Scheduling a Status Conference", issued on 8 February 2005, which scheduled a status conference on 9 March 2005 in Arusha;

CONSIDERING that Mr. Donald Herbert, Counsel for Appellant Jean-Bosco Barayagwiza, has indicated that it will be impossible for him to be in Arusha on 9 March 2005;

CONSIDERING that the attendance of Mr. Donald Herbert to the status conference scheduled for 9 March 2005, while desirable, is not indispensable and that, if necessary, a supplementary status conference can be organized at a later date;

HEREBY

ORDER that the anticipated Status Conference of 9 March 2005 proceed as scheduled, despite the absence of Mr. Donald Herbert;

ORDER the Registrar to provide to Appellant Jean-Bosco Barayagwiza, if he so desires, the assistance of duty counsel during the Status Conference of 9 March 2005.

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

Dated this 18th day of February 2005,

At The Hague, The Netherlands.

[Signed] : Inés Weinberg de Roca

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[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

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## *Decision on Appellant Ferdinand Nahimana's motion for assistance from the registrar in the Appeals phase 3 April 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Funding for investigations on appeal, Time of the investigations – Responsibility of the Registrar, Administration of the Legal aid, Translation – Right to fair proceedings, Privileged Communications between the Appellant and his Legal Assistants – Miscarriage of Justice, Due diligence – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 115; Statute, art. 24 and 25; Directive on the Assignment of Counsel; Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4); Appeals Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 16 November 2001 (ICTR-96-13); Appeals Chamber,* The Prosecutor v. Ignace Bagilishema, *Reasons for the Judgement, 13 December 2002 (ICTR-95-1A); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and 96-17)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Dražen Erdemović, *Judgement, 7 October 1997 (IT-96-22); Appeals Chamber,* The Prosecutor v. Dusko Tadic, *Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, 15 October 1998 (IT-94-1); Appeals Chamber,* The Prosecutor v. Anto Furundzija, *Judgement, 21 July 2000 (IT-95-17/1); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić et al., *Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić et al., *Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Zdravko Mucić et al., *Judgement on Sentence Appeal, 8 April 2003 (IT-96-21); Appeals Chamber,* The Prosecutor v. Mitar Vasiljević, *Judgement, 25 February 2004 (IT-98-32); Appeals Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Judgement, 17 December 2004 (IT-95-14/2)*

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THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED OF Appellant Ferdinand Nahimana's "*Requête aux fins de diverses mesures concernant l'assistance du Greffe à la Défense en phase d'appel*", filed 6 April 2005 ("Appellant" and "Motion", respectively), in which the Appellant requests the Appeals Chamber to a) order the Registrar to fund further investigations on appeal[1]; b) order the Registrar to cover the expenses of additional travelling costs to Arusha[2]; c) authorize the Appellant's legal assistants to meet him confidentially in the absence of Counsel[3]; and d) order the Registrar to provide a translation of a series of documents[4];

NOTING that the Prosecution did not file a response;

DECIDES AS FOLLOWS :

a) Request for Funding of Investigations on Appeal

1. The Appellant submits that he is put in an impossible position because, in order to file a motion for the admission of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"), he must provide the evidence sought to be admitted[5]. This evidence, he suggests, will only become available after investigations[6]. However, the Appellant notes that the Registrar will not fund investigations on appeal in the absence of an order of the Appeals Chamber[7]. The Appellant argues that the only way to resolve the contradiction is to recognize that the right to funding for investigations on appeal is recognized by the Rules and the case-law of this Tribunal[8].

2. The Appeals Chamber disagrees. It recalls the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the former Yugoslavia ("ICTY") to the effect that an appeal pursuant to Article 24 of the Statute of the Tribunal (or pursuant to Article 25 of the Statute of the ICTY) is not a *de novo* trial[9], and that the appeal

[1] Motion, paras. 4-11 and p. 5.
[2] Motion, paras. 12-20 and p. 5.
[3] Motion, paras. 21-26 and p. 5.
[4] Motion, paras. 27 & 30 and p. 5.
[5] Motion, para. 7.
[6] Motion, para. 8.
[7] Motion, para. 4.
[8] Motion, para. 9.
[9] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 17; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Reasons for the Judgement, 13 December 2002, para. 11; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR 96-17-A, Judgement, 13 December 2004, para. 13. See also, *e.g., Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras. 41-42; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 40; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 22; *Prosecutor v. Mucić et al.*, Case No. IT-96-21-

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is not an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases[10]. Investigations should be made during the pre-trial and trial stage. As to Rule 115, it provides for a corrective measure and its purpose is to deal

> "with the situation *where a party is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial"[11].

Rule 115 does not imply that the Registrar must fund investigations at the appeal stage.

3. In an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party shows, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation will not merely be a fishing expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence. However, the Appellant has not established that his is an exceptional case. In particular, the Appellant is extremely vague as to the evidence he seeks to uncover and he does not show that he has specific information that needs to be further investigated in order to avoid a miscarriage of justice, or that this specific information was not available to him at trial or could not have been discovered through the exercise of due diligence.

a) *Request for Funding of Costs for Additional Travel to Arusha*

4. The Registrar has the primary responsibility for the administration of the legal aid scheme in general, and in particular for authorising travel expenses[12]. In the case at hand, the Appellant disagrees with the Registry's policy of funding only three trips to Arusha at the appeal stage[13]. The Directive on the Assignment of Counsel provides a procedure for the settlement of disputes[14]. The Appellant should thus file a formal complaint with the Registrar, explaining why funding for additional travel is necessary. Pursuant to Article 30 of Directive on the Assignment of Counsel,

> "the Registrar shall make a decision after consulting the President and, if necessary, the Advisory Panel, on an equitable basis".

If, after having gone through this procedure, the Appellant still considers that his right to fair proceedings is infringed by restrictions on the travel of his legal team,

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A*bis*, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 5; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras. 13 and 21.

[10] *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Judgement of 7 October 1997, para. 15.

[11] *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001, para. 5 (emphasis added).

[12] See in particular Articles 27 and 28 of the Directive on the Assignment of Counsel, adopted 9 January 1996, as modified.

[13] Motion, paras. 12-20, referring to statements made by the representative of the Registry during last Status Conference (T. 9 March 2005, pp. 8-9).

[14] Article 30.

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he can raise the matter with the Appeals Chamber, which has the statutory duty to ensure the fairness of the proceedings on appeal[15].

a) Privileged Communications between the Appellant and his Legal Assistants

5. The Appellant asserts that he is unable to have privileged communications with his legal assistants, except when these take place in the presence of his Counsel[16]. The Appellant requests that he be authorized to communicate confidentially with his legal assistants in the absence of his Counsel[17].

6. Pursuant to Rule 3 of

> "The Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal" ("Rules on Detention"),

the Commanding Officer of the United Nations Detention Unit has sole responsibility for all aspects of the daily management of the Detention Unit[18]. More specifically, Rule 65 of the Rules on Detention provides that

> "[e]ach detainee shall be entitled to communicate fully. If the Appellant disagrees with the interpretation of this rule given by the Commanding Officer, he may make a written complaint to the Registrar who shall forward it to the President"[19].

In the present case, it does not appear that this procedure was followed.

7. If, after having gone through the prescribed procedure, the Appellant still considers that his right to fair proceedings is being infringed by the alleged restriction, he can raise the matter with the Appeals Chamber which, as already noted, has the statutory duty to ensure the fairness of the proceedings on appeal.

a) *Request for Translation of Various Documents*

8. During the Status Conference held in this case on 9 March 2005, the Appellant requested the translation of four documents which he said were needed for the preparation of his appeal[20]. The Pre-Appeal Judge asked the representative of the Registry to inform her when the requested translation could be ready. On 11 March 2005, the Pre-Appeal Judge was informed that the translations of the first two documents would be ready at the latest by 6 April 2005, but that the translation of the Prosecutor's Closing Brief and Reply Brief at trial would only be available in draft form on 30 June 2005 and 30 July 2005, respectively. In his Motion, the Appellant requests

[15] *Cf. Prosecutor* v. *Milutinović, Ojdanić & Sainović*, Case No IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, paras. 19-20.

[16] Motion, para. 21.

[17] Motion, paras. 22-26.

[18] Rule 3 of the Rules on Detention.

[19] Rule 83 of the Rules on Detention.

[20] T. 9 March 2005, pp. 9-11. The Appellant requested the translation of four documents : Exhibit C7, CD104k0151838 (1 standard page); Exhibit 1 D50D (3 standard pages); the Prosecutor's Closing Brief at trial (466 standard pages); the Prosecutor's Reply Brief at trial (239 standard pages).

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that these translations be provided to him without delay. The Appeals Chamber is sympathetic to the concerns of the Appellant, but is at the same time conscious of the available resources of the Registry. In the circumstances, the Appeals Chamber can do no more than to order the Registrar to adhere to the commitments made on 11 March 2005.

9. As to the Appellant's Brief, the Appeals Chamber agrees that it should be translated into English.

FOR THE FOREGOING REASONS

ORDERS the Registrar to provide a draft translation of the Prosecutor's Closing Brief at trial no later than 30 June 2005, and a draft translation of the Prosecutor's Reply Brief at trial no later than 30 July 2005, with certified translations of said briefs to be provided to the Appellant as soon as possible thereafter;

ORDERS the Registrar to prepare an English translation of the Appellant's Brief;

DISMISSES the Motion in all other respects

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

Dated this 3rd day of April 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Decision on "Appellant Hassan Ngeze's motion for leave to permit his defence counsel to communicate with him during afternoon Friday, Saturday, Sunday and public holidays" 25 April 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Conditions of detention, United Nations Detention Unit, Communication between the Accused and his/her Counsel, Procedures for an detained Accused to make a complaint, Complaint to the Commanding Officer of the United Nations Detention Unit, Complaint to the Registrar – Right of the Accused to fair proceedings – Statutory duty of the Appeals Chamber to ensure the fairness of the proceedings on appeal – Motion denied*

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*International Instrument cited :*

*Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal*

BEFORE THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively).

1. The Appeals Chamber is seized of "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with Him During Afternoon Friday, Saturday, Sunday and Public Holidays", filed 4 April 2005 ("Appellant" and "Motion", respectively), in which the Appellant requests the Appeals Chamber to issue an order

> "to permit his counsel to communicate with [him] any time whenever the counsel requires to do so in connection with the preparation of his pending Appeal as was the practice during the trial proceedings"[1].

The Registrar submitted observations on this matter on 21 April 2005[2]. The Prosecution did not file a response.

2. The Appeals Chamber recalls that, pursuant to Rule 3 of "The Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal"[3] ("Rules on Detention"), the Commanding Officer of the United Nations Detention Unit has primary responsibility for all aspects of the daily management of the Detention Unit[4]. Rules 82 and 83 of the Rules of Detention set out the procedure by which a detainee may make a complaint to the Commanding Officer regarding his conditions of detention. If the detainee is not satisfied with the response of the Commanding Officer, he or she may make a written complaint to the Registrar who shall forward it to the President[5]. The Appeals Chamber finds that in the present case, this procedure was not followed.

3. The Appeals Chamber notes however that, if, after having gone through the prescribed procedure, the Appellant still considers that his right to fair proceedings is being infringed by the alleged restriction on his communications with his Counsel, he can raise the matter with the Appeals Chamber, which has the statutory duty to ensure the fairness of the proceedings on appeal[6].

4. For the foregoing reasons, the Motion is dismissed.

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[1] Motion, p. 2.

[2] Registrar's Submission under Rule 33 (B) of the Rules on Appellant Hassan Ngeze's Motion for Leave to Permit His Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays, filed 21 April 2005.

[3] Adopted 5 June 1998, as amended.

[4] Rule 3 of the Rules on Detention.

[5] Rules 82 and 83 of the Rules on Detention.

[6] *Cf. Prosecutor v. Milutinović, Ojdanić & Sainović*, Case No IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, paras. 19-20.

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

Dated this 25th day of April 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Decision concerning Appellant Hassan Ngeze's Extremely Urgent Motion for the Extension of Time 27 April 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Extension of time, Good Cause – Motion denied*

*International Instrument cited :*

*Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision on Motions for an Extension of Time to File Appellant's Notices of Appeal and Briefs, 19 December 2003 (ICTR-99-52); Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision on Ngeze's motion for an Additional Extension of Time to File His Notice of Appeal and Brief, 6 February 2004 (ICTR-99-52); Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004 (ICTR-99-52); Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision on Hassan Ngeze's Motion for an Extension of Time, 2 December 2004 (ICTR-99-52); Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision on Hassan Ngeze's Motion for an Extension of Time, 4 February 2005 (ICTR-99-52)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

BEING SEIZED OF "Appellant Hassan Ngeze's Extremely Urgent Motion for the Extension of Time", filed 26 April 2005 ("Appellant" and "Motion", respectively), in

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which the Appellant requests an extension of time to file his Appellant's Brief because he has not yet received the English translation of six Kangura excerpts;

CONSIDERING that

> "a motion for an extension of time may, in accordance with existing practice, be disposed of without giving the other party the opportunity to respond to the motion if, on the face of the motion, [...] the Pre-appeal Judge is of the opinion that no prejudice would be caused to the other party"[2];

RECALLING that the Appellant has already benefited from several extensions of time to submit his Notice of Appeal and his Appellant's Brief[3];

CONSIDERING that the provision of the translations mentioned by the Appellant has not been ordered by the Pre-Appeal Judge;

FINDING, therefore, that no good cause has been shown for the requested extension of time;

HEREBY DENIES the Motion.

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

Dated this 27th day of April 2005,

At The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

[2] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 18.

[3] "Decision on Motions for an Extension of Time to File Appellant's Notices of Appeal and Briefs", issued 19 December 2003; "Decision on Ngeze's motion for an Additional Extension of Time to File His Notice of Appeal and Brief", issued 6 February 2004; "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order", issued 2 March 2004; "Decision on Hassan Ngeze's Motion for an Extension of Time", issued 2 December 2004; "Decision on Hassan Ngeze's Motion for an Extension of Time", issued 4 February 2005.

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## *Decision on Appellant Ferdinand Nahimana's Motion for assistance from the Registrar in the Appeals Phase 3 May 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Ferdinand Nahimana – Funding of Investigations on Appeal by the Registry, Exceptional caracter of the funding of Investigations on Appeal by the Registry,* Nemo turpitudinem suam allegans auditur *– Function of the Registry, Administration of the legal aid scheme, Restrictions on the travel of the Defence legal team – Privileged Communications between the Appellant and his Legal Assistants, Function of the Commanding Officer of the United Nations Detention Unit – Translation of documents – Procedure for the settlement of disputes, Exhaustion of all remedies – Interpretation, Case Law of* ad hoc *tribunals – Motion partially granted*

*International Instruments cited :*

*Directive on the Assignment of Counsel, 9 January 1996, art. 27, 28 and 30; Rules of Procedure and Evidence, rule 115; Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, rules 3, 65 and 83; Statute, art. 24; Statute of the ICTY, art. 25*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4); Appeals Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 16 November 2001 (ICTR-96-13); Appeals Chamber,* The Prosecutor v. Ignace Bagilishema, *Reasons for the Judgement, 13 December 2002 (ICTR-95-1A); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Dražen Erdemović, *Judgement, 7 October 1997 (IT-96-22); Appeals Chamber,* The Prosecutor v. Dusko Tadić, *Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, 15 October 1998 (IT-94-1); Appeals Chamber,* The Prosecutor v. Anto Furundzija, *Judgement, 21 July 2000 (IT-95-17/1); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić et al., *Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B), 8 May 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić, *Trial Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Zdravko Mucić et al., *Judgement and Sentence Appeal, 8 April 2003 (IT-96-21); Appeals Chamber,* The Prosecutor v. Milan

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## *Décision relative à la requête de l'appelant Ferdinand Nahimana aux fins de mesures d'assistance du Greffe en phase d'appel 3 mai 2005 (ICTR-99-52-A)*

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président de Chambre; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Inès Monica Weinberg de Roca

*Ferdinand Nahimana – Prise en charge par le Greffe des frais afférents aux enquêtes complémentaires en phase d'appel, Caractère exceptionnel de la prise en charge par le Greffe des frais afférents aux enquêtes complémentaires en phase d'appel, Nemo turpitudinem suam allegans auditur – Rôle du Greffe, Gestion du régime d'aide juridique, Restrictions aux voyages des conseil de la Défense – Confidentialité des communications entre l'appelant et ses assistants juridiques, Rôle du Commandant du Quartier pénitentiaire – Traduction de documents – Mécanisme de règlement des différends, Epuisement des voies de recours internes – Interprétation, Jurisprudences des tribunaux* ad hoc *– Requête partiellement acceptée*

*Instrument international cité :*

*Directive à la commission d'office des conseils de la Défense, 9 janvier 1996, art. 27, 28 et 30; Règlement de Procédure et de preuve, art. 115; Règlement portant régime de détention des personnes en attente de jugement ou d'appel devant le Tribunal ou détenues sur l'ordre du Tribunal, art. 3, 65 et 83; Statut, art. 24; Statut du TPIY, art. 25*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre d'appel,* Le Procureur c. Jean-Paul Akayesu, *Arrêt, 1er juin 2001 (ICTR-96-4); Chambre d'appel,* Le Procureur c. Alfred Musema, *Jugement, 16 novembre 2001 (ICTR-96-13) Chambre d'appel,* Le Procureur c. Ignace Bagilishema, *Motifs de l'arrêt, 13 décembre 2002 (ICTR-95-1A); Chambre d'appel,* Le Procureur c. Gérard et Elizaphan Ntakirutimana, *Jugement, 13 décembre 2004 (ICTR-96-10 et ICTR-96-17)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Dražen Erdemović, *Arrêt, 7 octobre 1997(IT-96-22); Chambre d'appel,* Le Procureur c. Dusko Tadić, *Décision relative à la requête de l'appelant aux fins de prorogations de délais et d'admissions de moyens de preuve supplémentaire, 15 octobre 1998 (IT-94-1-A); Chambre d'appel,* Le Procureur c. Anto Furundzija, *Arrêt, 21 juillet 2000 (IT-95-17/1-A); Chambre d'appel,* Le Procureur c. Zoran Kupreskić et consorts, *«Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B)», 8 mai 2001 (IT-95-16); Chambre d'appel,* Le Procureur c. Zoran Kupreskić, *Arrêt, 23 octobre 2001 (IT-95-16-A); Chambre d'appel,* Le Procureur c. Zdravko Mucić et consorts, *Arrêt relatif à la sentence, 8 avril 2003 (IT-96-21); Chambre d'appel,* Le Procureur

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Milutinović et al., *Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87); Appeals Chamber,* The Prosecutor v. Mitar Vasiljević, *Judgement, 25 February 2004 (IT-98-32); Appeals Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Judgement, 17 December 2004 (IT-95-14/2)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED OF Appellant Ferdinand Nahimana's "*Requête aux fins de diverses mesures concernant l'assistance du Greffe à la Défense en phase d'appel*", filed 6 April 2005 ("Appellant" and "Motion", respectively), in which the Appellant requests the Appeals Chamber to a) order the Registrar to fund further investigations on appeal[1]; b) order the Registrar to cover the expenses of additional travelling costs to Arusha[2]; c) authorize the Appellant's legal assistants to meet him confidentially in the absence of Counsel[3]; and d) order the Registrar to provide a translation of a series of documents[4];

NOTING that the Prosecution did not file a response;

DECIDES AS FOLLOWS :

a) *Request for Funding of Investigations on Appeal*

1. The Appellant submits that he is put in an impossible position because, in order to file a motion for the admission of additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"), he must provide the evidence sought to be admitted[5]. This evidence, he suggests, will only become available after investigations[6]. However, the Appellant notes that the Registrar will not fund investigations on appeal in the absence of an order of the Appeals Chamber[7]. The Appellant argues that the only way to resolve the contradiction is to recognize that the right to funding for investigations on appeal is recognized by the Rules and the case-law of this Tribunal[8].

2. The Appeals Chamber disagrees. It recalls the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the former Yugoslavia ("ICTY") to the

[1] Motion, paras. 4-11 and p. 5.
[2] Motion, paras. 12-20 and p. 5.
[3] Motion, paras. 21-26 and p. 5.
[4] Motion, paras. 27 & 30 and p. 5.
[5] Motion, para. 7.
[6] Motion, para. 8.
[7] Motion, para. 4.
[8] Motion, para. 9.

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c. Milan Milutinović et al., *Decision on Interlocutory Appeal on Motion for Additional Funds, 13 novembre 2003 (IT-05-87); Chambre d'appel,* Le Procureur c. Mitar Vasiljević, *Arrêt, 25 février 2004 (IT-98-32); Chambre d'appel,* Le Procureur c. Dario Kordić et Mario Cerkez, *Arrêt, 17 décembre 2004 (IT-95-14/2)*

LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (la «Chambre d'appel» et le «Tribunal» respectivement);

SAISIE de la *requête aux fins de diverses mesures concernant l'assistance du Greffe à la Défense en phase d'appel* de l'appelant Ferdinand Nahimana, déposée le 6 avril 2005 (l'«appelant» et la «Requête», respectivement), dans laquelle l'appelant demande à la Chambre d'appel d'ordonner au Greffe de prendre les mesures suivantes : a) prendre en charge les frais afférents aux enquêtes complémentaires de la Défense en phase d'appel[1]; b) prendre en charge les frais afférents aux déplacements supplémentaires à Arusha[2]; c) autoriser les assistants juridiques membres de l'équipe chargée de sa défense à le rencontrer confidentiellement hors la présence du conseil[3]; et d) assurer la traduction d'un lot de documents[4];

NOTANT que le Procureur n'a pas déposé de réponse à la requête;

DECIDE CE QUI SUIT :

a) *De la prise en charge par le Greffe des frais afférents aux enquêtes complémentaires en phase d'appel*

1. L'appelant fait valoir qu'il est placé dans une situation inextricable, car, pour former une requête aux fins d'admission de moyens de preuve supplémentaires en appel sur la base de l'article 115 du Règlement de procédure et de preuve (le «Règlement»), il doit présenter les moyens de preuve dont l'admission est sollicitée[5]. Ces moyens de preuve, laisse-t-il entendre, ne seront disponibles qu'à l'issue des enquêtes[6]. Toutefois, fait-il observer, le Greffier subordonne la prise des frais afférents aux enquêtes en phase d'appel à une ordonnance de la Chambre d'appel[7]. Il fait valoir que la seule façon de résoudre cette contradiction est de reconnaître que le droit à la prise en charge des frais afférents aux enquêtes en phase d'appel est consacré par le Règlement et la jurisprudence du Tribunal de céans[8].

2. La Chambre d'appel n'est pas du même avis. Elle rappelle la jurisprudence du Tribunal et celle du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») à l'effet

[1] Requête, paras. 4 à 11 et p. 5.
[2] Requête, paras. 12 à 20 et p. 5.
[3] Requête, paras. 21 à 26 et p. 5.
[4] Requête, paras. 27 et 30 et p. 5.
[5] Requête, para. 7.
[6] Requête, para. 8.
[7] Requête, para. 4.
[8] Requête, para. 9.

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effect that an appeal pursuant to Article 24 of the Statute of the Tribunal (or pursuant to Article 25 of the Statute of the ICTY) is not a *de novo* trial[9], and that the appeal is not an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases[10]. Investigations should be made during the pre-trial and trial stage. As to Rule 115, it provides for a corrective measure and its purpose is to deal "with the situation *where a party is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial"[11]. Rule 115 does not imply that the Registrar must fund investigations at the appeal stage.

3. In an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party shows, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation will not merely be a fishing expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence. However, the Appellant has not established that his is an exceptional case. In particular, the Appellant is extremely vague as to the evidence he seeks to uncover and he does not show that he has specific information that needs to be further investigated in order to avoid a miscarriage of justice, or that this specific information was not available to him at trial or could not have been discovered through the exercise of due diligence.

b) *Request for Funding of Costs for Additional Travel to Arusha*

4. The Registrar has the primary responsibility for the administration of the legal aid scheme in general, and in particular for authorising travel expenses[12]. In the case at hand, the Appellant disagrees with the Registry's policy of funding only three trips

[9] *Prosecutor v. Akayesu*, Case n° ICTR-96-4-A, Judgement, 1 June 2001, para. 177; *Prosecutor v. Musema*, Case n° ICTR-96-13-A, Judgement, 16 November 2001, para. 17; *Prosecutor v. Bagilishema*, Case n° ICTR-95-1A-A, Reasons for the Judgement, 13 December 2002, para. 11; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases n°s ICTR-96-10-A and ICTR 96-17-A, Judgement, 13 December 2004, para. 13. See also, *e.g., Prosecutor v. Tadić*, Case n° IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras. 41-42; *Prosecutor v. Furundžija*, Case n° IT-95-17/1-A, Judgement, 21 July 2000, para. 40; *Prosecutor v. Kupreškić et al.*, Case n° IT-95-16-A, Judgement, 23 October 2001, para. 22; *Prosecutor v. Mucić et al.*, Case n° IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Prosecutor v. Vasiljević*, Case n° IT-98-32-A, Judgement, 25 February 2004, para. 5; *Prosecutor v. Kordić and Čerkez*, Case n° IT-95-14/2-A, Judgement, 17 December 2004, paras. 13 and 21.

[10] *Prosecutor v. Dražen Erdemović*, Case n° IT-96-22-A, Judgement of 7 October 1997, para. 15.

[11] *Prosecutor v. Kupreškić et al.*, Case n° IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001, para. 5 (emphasis added).

[12] See in particular Articles 27 and 28 of the Directive on the Assignment of Counsel, adopted 9 January 1996, as modified.

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qu'un recours introduit en vertu de l'article 24 du Statut du Tribunal (ou de l'article 25 du Statut du TPIY) n'est pas un procès *de novo*[9], et que la procédure d'appel n'a pas pour vocation de permettre aux parties de remédier à leurs propres «erreurs ou négligences» durant les phases de mise en état d'appel[10]. Les enquêtes devraient être menées durant les phases de mise en état et du procès. S'agissant de l'article 115, il autorise la prise de mesures correctives et a pour but de régir les situations où «une partie est *en possession de pièces* dont elle ne disposait pas au moment du procès en première instance et qui constituent des moyens de preuve supplémentaires concernant un fait ou une question en litige lors du procès»[11]. L'article 115 n'implique pas que le Greffe doit prendre en charge les frais afférents aux enquêtes en phase d'appel.

3. Exceptionnellement, la Chambre d'appel peut ordonner au Greffe de prendre en charge les frais afférents aux enquêtes en phase d'appel, si la partie requérante démontre, par exemple, qu'elle est en possession d'une information spécifique nécessitant une enquête plus approfondie afin d'éviter un déni de justice (en d'autres termes, l'enquête en phase d'appel ne consistera pas en une simple recherche à l'aveuglette d'information), et que cette information spécifique n'était pas disponible au moment du procès et n'aurait pu être découverte alors malgré toute la diligence voulue. Toutefois, l'appelant n'a pas établi qu'il s'agissait en l'espèce d'un cas exceptionnel. Qui plus est, il se montre extrêmement vague quant aux moyens de preuve qu'il tente de découvrir et ne démontre pas qu'il est en possession d'une information spécifique nécessitant une enquête plus approfondie afin d'éviter un déni de justice, ni que cette information spécifique ne lui était pas disponible au moment du procès ou n'aurait pu être découverte malgré toute la diligence voulue.

b) *De la prise en charge par le Greffe des frais afférents aux déplacements supplémentaires à Arusha*

4. Il incombe au premier chef au Greffier de gérer le régime d'aide juridique en général et, en particulier, d'autoriser le paiement des frais de déplacement[12]. En

[9] *Le Procureur c. Akayesu*, affaire n° ICTR-96-4-A, Arrêt, 1er juin 2001, para. 177; *Le Procureur c. Musema*, affaire n° ICTR96-13-A, Arrêt, 16 novembre 2001, para. 17; *Le Procureur c. Bagilishema*, affaire n° ICTR-95-1A-A, Motifs de l'arrêt, 13 décembre 2002, para. 11; *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaires nos ICTR-96-10-A et ICTR-96-17-A, Arrêt, 13 décembre 2004, para. 13. Voir également, par exemple, *Le Procureur c. Tadić*, affaire n° IT-94-1-A, Décision relative à la requête de l'appelant aux fins de prorogation de délai et d'admission de moyens de preuve supplémentaires, 15 octobre 1998, paras. 41 et 42; *Le Procureur c. Furundžija*, affaire n° IT-95-17/1-A, Arrêt, 21 juillet 2000, para. 40; *Le Procureur c. Kupreškić*, affaire n° IT-95-16-A, Arrêt, 23 octobre 2001, para. 22; *Le Procureur c. Mucić et consorts*, affaire n° 96-21-A*bis*, Arrêt relatif à la sentence, 8 avril 2003, para. 11; *Le Procureur c. Vasiljević*, affaire n° IT-98-32-A, Arrêt, 25 février 2004, para. 5; *Le Procureur c. Kordić et Čerkez*, affaire n° IT-95-14/2-A, Jugement, 17 décembre 2004, paras. 13 et 21.

[10] *Le Procureur c. Drožen Erdemović*, affaire n° IT-96-22-A, Arrêt du 7 octobre 1997, para. 15.

[11] *Le Procureur c. Kupreškić et consorts*, affaire n° IT-95-16-A, Décision relative aux requêtes des appelants Drago Josipocić, Zoran et Vlatko Kupreškić aux fins d'admission de moyens de preuve supplémentaires en vertu de l'article 115, et aux fins de constat judiciaire, en vertu de l'article 94 (B), 8 mai 2001, para. 5 (non souligné dans l'original).

[12] Voir en particulier les articles 27 et 28 de la *Directive à la commission d'office de conseils de la Défense*, adoptée le 9 janvier 1996, ensemble ses modifications.

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to Arusha at the appeal stage[13]. The Directive on the Assignment of Counsel provides a procedure for the settlement of disputes[14]. The Appellant should thus file a formal complaint with the Registrar, explaining why funding for additional travel is necessary. Pursuant to Article 30 of Directive on the Assignment of Counsel,

> "the Registrar shall make a decision after consulting the President and, if necessary, the Advisory Panel, on an equitable basis".

If, after having gone through this procedure, the Appellant still considers that his right to fair proceedings is infringed by restrictions on the travel of his legal team, he can raise the matter with the Appeals Chamber, which has the statutory duty to ensure the fairness of the proceedings on appeal[15].

c) *Privileged Communications between the Appellant and his Legal Assistants*

5. The Appellant asserts that he is unable to have privileged communications with his legal assistants, except when these take place in the presence of his Counsel[16]. The Appellant requests that he be authorized to communicate confidentially with his legal assistants in the absence of his Counsel[17].

6. Pursuant to Rule 3 of "The Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal" ("Rules on Detention"), the Commanding Officer of the United Nations Detention Unit has sole responsibility for all aspects of the daily management of the Detention Unit[18]. More specifically, Rule 65 of the Rules on Detention provides that "[e]ach detainee shall be entitled to communicate fully and without restraint with his Defence Counsel" and that these communications shall be privileged. If the Appellant disagrees with the interpretation of this rule given by the Commanding Officer, he may make a written complaint to the Registrar who shall forward it to the President[19]. In the present case, it does not appear that this procedure was followed.

7. If, after having gone through the prescribed procedure, the Appellant still considers that his right to fair proceedings is being infringed by the alleged restriction, he can raise the matter with the Appeals Chamber which, as already noted, has the statutory duty to ensure the fairness of the proceedings on appeal.

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[13] Motion, paras. 12-20, referring to statements made by the representative of the Registry during last Status Conference (T. 9 March 2005, pp. 8-9).

[14] Article 30.

[15] Cf. *Prosecutor* v. *Milutinović, Ojdanić & Sainović*, Case No IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, paras. 19-20.

[16] Motion, para. 21.

[17] Motion, paras. 22-26.

[18] Rule 3 of the Rules on Detention.

[19] Rule 83 of the Rules on Detention.

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l'espèce, l'appelant n'est pas d'accord avec la politique du Greffe consistant à ne prendre en charge que trois déplacements du conseil à Arusha en phase d'appel[13]. La *Directive à la commission d'office de conseil de la Défense* prévoit un mécanisme de règlement des différends[14]. L'appelant devrait ainsi déposer une plainte officielle auprès du Greffe, exposant les raisons pour lesquelles la prise en charge des frais de voyage supplémentaires s'impose. Selon l'article 30 de la *Directive à la commission d'office de conseil de la Défense*,

> «le Greffier statue, en toute équité, après consultation du Président et, si nécessaire, du Conseil consultatif».

Si, après avoir épuisé cette voie de recours, l'appelant considère toujours que son droit d'être jugé équitablement est enfreint par les restrictions aux voyages des membres de l'équipe chargée de sa défense, il peut saisir la Chambre d'appel, qui a l'obligation statutaire de veiller à l'équité de la procédure en appel[15].

c) *De la confidentialité des communications entre l'appelant et ses assistants juridiques*

5. L'appelant affirme qu'il n'a la possibilité de communiquer confidentiellement aves ses assistants juridiques qu'en présence de son conseil[16]. Il sollicite de la Chambre d'appel qu'elle l'autorise à communiquer confidentiellement avec ses assistants juridiques en l'absence de son conseil[17].

6. Selon l'article 3 du *Règlement portant régime de détention des personnes en attente de jugement ou d'appel devant le Tribunal ou détenues sur l'ordre du Tribunal* (le «Règlement relatif à la détention»), le Commandant assume l'entière responsabilité de l'administration quotidienne du Quartier pénitentiaire[18]. Plus précisément, selon l'article 65 du Règlement relatif à la détention «[t]out détenu a le droit de communiquer librement et sans entrave avec son avocat» et le secret des communications est sauvegardé. S'il est en désaccord avec l'interprétation de cette disposition par le Commandant, l'appelant peut formuler une plainte par écrit au Greffier qui la transmet au Président du Tribunal[19]. Dans la présente affaire, cette procédure semble ne pas avoir été suivie.

7. Si, après avoir épuise la voie de recours prévue, l'appelant considère toujours que son droit d'être jugé équitablement est enfreint par les restrictions alléguées, il peut saisir la Chambre d'appel qui, ainsi qu'il est souligné plus haut, a l'obligation statutaire de veiller à l'équité de la procédure en appel.

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[13] Requête, paras. 12 à 20, faisant référence aux déclarations du représentant du Greffe à la conférence de mise en état (Compte rendu de l'audience du 9 mars 2005, pp. 9 à 11).

[14] Article 30.

[15] Voir *Le Procureur c. Milutinović, Ojdanović & Sainović*, affaire n° IT-99-37-AR73.2, Décision relative à l'appel interlocutoire concernant la Requête aux fins de l'octroi de fonds supplémentaires, 13 novembre 2003, paras. 19 et 20.

[16] Requête, para. 21.

[17] Requête, paras. 22 à 26.

[18] Article 3 du Règlement relatif à la détention.

[19] Article 83 du Règlement relatif à la détention.

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d) *Request for Translation of Various Documents*

8. During the Status Conference held in this case on 9 March 2005, the Appellant requested the translation of four documents which he said were needed for the preparation of his appeal[20]. The Pre-Appeal Judge asked the representative of the Registry to inform her when the requested translation could be ready. On 11 March 2005, the Pre-Appeal Judge was informed that the translations of the first two documents would be ready at the latest by 6 April 2005, but that the translation of the Prosecutor's Closing Brief and Reply Brief at trial would only be available in draft form on 30 June 2005 and 30 July 2005, respectively. In his Motion, the Appellant requests that these translations be provided to him without delay. The Appeals Chamber is sympathetic to the concerns of the Appellant, but is at the same time conscious of the available resources of the Registry. In the circumstances, the Appeals Chamber can do no more than to order the Registrar to adhere to the commitments made on 11 March 2005.

9. As to the Appellant's Brief, the Appeals Chamber agrees that it should be translated into English.

FOR THE FOREGOING REASONS

ORDERS the Registrar to provide a draft translation of the Prosecutor's Closing Brief at trial no later than 30 June 2005, and a draft translation of the Prosecutor's Reply Brief at trial no later than 30 July 2005, with certified translations of said briefs to be provided to the Appellant as soon as possible thereafter;

ORDERS the Registrar to prepare an English translation of the Appellant's Brief;

DISMISSES the Motion in all other respects.

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

Dated this 3rd day of April 2005, At The Hague, The Netherlands.

[Signed] : Asoka De Silva; Flavia Lattanzi; Florence Rita Arrey

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[20] T. 9 March 2005, pp. 9-11. The Appellant requested the translation of four documents : Exhibit C7, CD104k0151838 (1 standard page); Exhibit 1 D50D (3 standard pages); the Prosecutor's Closing Brief at trial (466 standard pages); the Prosecutor's Reply Brief at trial (239 standard pages).

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d) *De la demande de traduction de divers documents*

8. Lors de la Conférence de mise en état d'appel tenue le 9 mars 2005, l'appelant avait demandé la traduction de quatre documents dont il disait avoir besoin pour la préparation de son appel[20]. La juge de la mise en état en appel a demandé au représentant du Greffe de lui communiquer la date à laquelle la traduction sollicitée pourrait être disponible. Le 11 mars 2005, la juge de la mise en état en appel a été informée que la traduction des deux premiers documents serait disponible le 6 avril 2005 au plus tard, mais que la traduction non certifiée du Réquisitoire et du Mémoire en duplique du Procureur en première instance ne serait disponible que les 30 juin 2005 et 30 juillet 2005, respectivement. Dans sa requête, l'appelant demande que lui soient communiquées sans délai ces traductions. La Chambre d'appel est réceptive aux préoccupations de l'appelant, mais est en même temps consciente des ressources dont dispose le Greffe. Dans les circonstances, elle ne peut qu'ordonner au Greffe de respecter les engagements pris le 11 mars 2005.

9. S'agissant du mémoire de l'appelant, la Chambre d'appel convient qu'il devrait être traduit en anglais.

PAR CES MOTIFS,

ORDONNE au Greffe de fournir une traduction non certifiée du Réquisitoire du Procureur le 30 juin 2005 au plus tard, et une traduction non certifiée du mémoire en duplique du Procureur en première instance le 30 juillet 2005 au plus tard, les versions certifiées de ces traductions devant être communiquées à l'appelant aussitôt que possible ultérieurement;

ORDONNE au Greffe d'assurer la traduction en anglais du mémoire de l'appelant;

REJETTE la requête à tous autres égards.

Fait en anglais et en français, le texte anglais faisant foi.

Fait le 3 mai 2005, à La Haye (Pays-Bas).

[Signé] : Theodor Meron

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[20] Compte rendu de l'audience du 9 mars 2005, pp. 9 à 11. L'appelant a demandé la traduction de quatre documents : la pièce à conviction C7, CDI04k0151838 (1 page standard); la pièce à conviction 1 D50D (3 pages standard); le réquisitoire du Procureur au procès (466 pages standard); le Mémoire en duplique du Procureur en première instance (239 pages standard).

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## *Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage 3 May 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Additional evidence, Unavailability of the additional evidence at trial, Purpose of an appeal procedure, Nemo turpitudinem suam allegans auditor, Exceptional character of the funding for investigations at the appellate stage by the Registry – Textual interpretation – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 115; Statute, art. 24; Statute of the I.C.T.Y., art. 25*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4); Appeals Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 16 November 2001 (ICTR-96-13); Appeals Chamber,* The Prosecutor v. Ignace Bagilishema, *Reasons for the Judgement, 13 December 2002 (ICTR-95-1A); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Dražen Erdemović, *Judgement, 7 October 1997 (IT-96-22); Appeals Chamber,* The Prosecutor v. Dusko Tadić, *Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, 15 October 1998 (IT-94-1); Appeals Chamber,* The Prosecutor v. Anto Furundzija, *Judgement, 21 July 2000 (IT-95-17/1); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić et al., *Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B), 8 May 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić, *Trial Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Zdravko Mucić et al., *Judgement and Sentence Appeal, 8 April 2003 (IT-96-21); Appeals Chamber,* The Prosecutor v. Milan Milutinović et al., *Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87); Appeals Chamber,* The Prosecutor v. Mitar Vasiljević, *Judgement, 25 February 2004 (IT-98-32); Appeals Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Judgement, 17 December 2004 (IT-95-14/2)*

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## *Décision relative à la Requête de l'appelant Hassan Ngeze tendant à l'autoriser à mener des enquêtes en phase d'appel 3 mai 2005 (ICTR-99-52-A)*

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président de Chambre; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Fauso Pocar; Inès Monica Weinberg de Roca

*Hassan Ngeze – Moyens de preuves supplémentaires, Indisponibilité du moyen de preuve au moment du procès, Vocation de la procédure d'appel, Nemo turpitudinem suam allegans auditor, Caractère exceptionel de la prise en charge des frais d'enquêtes menées en phase d'appel – Interprétation textuelle – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 115 et 115 (B); Statut, art. 24; Statut du TPIY, art. 25*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre d'appel,* Le Procureur c. Jean-Paul Akayesu, *Arrêt, 1er juin 2001 (ICTR-96-4); Chambre d'appel,* Le Procureur c. Alfred Musema, *Jugement, 16 novembre 2001 (ICTR-96-13) Chambre d'appel,* Le Procureur c. Ignace Bagilishema, *Motifs de l'arrêt, 13 décembre 2002 (ICTR-95-1A); Chambre d'appel,* Le Procureur c. Gérard et Elizaphan Ntakirutimana, *Jugement, 13 décembre 2004 (ICTR-96-10 et ICTR-96-17)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Dražen Erdemović, *Arrêt, 7 octobre 1997(IT-96-22); Chambre d'appel,* Le Procureur c. Dusko Tadić, *Décision relative à la requête de l'appelant aux fins de prorogations de délais et d'admissions de moyens de preuve supplémentaire, 15 octobre 1998 (IT-94-1-A); Chambre d'appel,* Le Procureur c. Anto Furundzija, *Arrêt, 21 juillet 2000 (IT-95-17/1-A); Chambre d'appel,* Le Procureur c. Zoran Kupreskić et consorts, *« Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B) », 8 mai 2001 (IT-95-16); Chambre d'appel,* Le Procureur c. Zoran Kupreskić, *Arrêt, 23 octobre 2001 (IT-95-16-A); Chambre d'appel,* Le Procureur c. Zdravko Mucić et consorts, *Arrêt relatif à la sentence, 8 avril 2003 (IT-96-21); Chambre d'appel,* Le Procureur c. Milan Milutinović et al., *Decision on Interlocutory Appeal on Motion for Additional Funds, 13 novembre 2003 (IT-05-87); Chambre d'appel,* Le Procureur c. Mitar Vasiljević, *Arrêt, 25 février 2004 (IT-98-32); Chambre d'appel,* Le Procureur c. Dario Kordić et Mario Cerkez, *Arrêt, 17 décembre 2004 (IT-95-14/2)*

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THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED OF "The Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage", filed on 22 March 2005 ("Appellant" and "Motion for Approval of Investigation", respectively), in which the Appellant requests the Appeals Chamber

> "to allow [him] to conduct investigation and to collect newly discovered evidence before filing the motion to present additional evidence under Rule 115 (B) of [the] Rules of Procedure and Evidence"

or,

> "alternatively, to direct the Registrar to approve estimated expenditure related to such investigation as the witnesses are staying oversees [sic], without recourse to the Appeals Chamber for the approval of investigation to provide newly discovered additional evidence";

NOTING the "Prosecutor's Response to 'The Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage'", filed on 31 March 2005 ("Response");

NOTING the "Appellant' [*sic*] Reply to the Prosecutor's Response to the Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage", filed on 11 April 2005 ("Reply");

BEING SEISED ALSO OF the "Prosecutor's Motion for Rejection and Dismissal of the 'Appellant' [*sic*] Reply to the Prosecutor's Response to the Appellant Hassan Negeze's [*sic*] Motion for the Approval of the Investigation at the Appeal Stage'", filed 12 April 2005 ("Motion for Rejection of Reply"), in which the Prosecution submits that the Reply was filed out of time and that no good cause has been shown for this;

NOTING "Appellant Hassan Ngeze's Response to the Prosecutor's Motion for Rejection and Dismissal of the Appellant's Reply to the Prosecutors [sic] Response to the Appellant Hassan Negeze's [*sic*] Motion for the Approval of the Investigation at the Appeal Stage", filed 18 April 2005 ("Response to Motion for Rejection of Reply"), in which the Appellant argues that his Counsel only received the Response on 6 April 2005 and that therefore good cause for the delay has been shown;

NOTING that the Prosecutor has not filed a reply to the Response to Motion for Rejection of Reply;

FINDING that, because of the delay in notifying Counsel for the Appellant of the Response, good cause has been shown for the delay in filing the Reply;

NOTING the Appellant's argument that he is put in an impossible position because, on the one hand, the Registrar does not approve funding for investigations at the appellate stage in the absence of an order of the Appeals Chamber, and, on the other hand, the Appeals Chamber does not admit new evidence pursuant to Rule 115 of the

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LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (la «Chambre d'appel» et le «Tribunal», respectivement);

SAISIE de la requête de l'appelant intitulée *The Appellant Hassan Ngeze's Motion for the Approval of the Jnvestigation at the Appeal Stage*, déposée le 22 mars 2005 (l' «appelant» et la «Requête en autorisation d'enquêtes en phase d'appel», respectivement), dans laquelle l'appelant demande à la Chambre d'appel

> «de l'autoriser à mener des enquêtes et à recueillir des é1éments de preuve nouvellement découverts avant de déposer 1a requête aux fins de présenter des moyens de preuve supplémentaires sur la base de l'article 115 (B) du Règlement de procédure et de preuve»,

ou,

> «subsidiairement, d'ordonner au Greffier de prendre en charge les frais relatifs à ces enquêtes étant donné que les témoins résident à l'étranger, sans que l'appelant ait à solliciter l'autorisation de la Chambre d'appel pour mener ces enquêtes aux fins de présenter des éléments de preuve nouvellement découverts»;

VU la réponse du Procureur à la Requête en autorisation d'enquêtes en phase d'appel intitulée *Prosecutor's Response to 'The Appellant Hassan Ngeze's Motion for the Approval of the Investigation ut the Appeal Stage'*, déposée le 31 mars 2005 (la «Réponse»);

VU la réplique de l'appelant à la Réponse du Procureur intitulée *Reply to the Prosecutor's Response to The Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage*, déposée le 11 avril 2005 (la «Réplique»);

SAISIE EGALEMENT de la requête du Procureur intitulée *Prosecutor's Motion for Rejection and Dismissal of the 'Appellant'[sic] Reply to the Prosecutor's Response to the Appellant Hmsan Negeze's [sic] Motion for the Approval of the Investigation at the Appeal Stage',* déposée le 12 avril 2005 («Requête en rejet de la réplique»), dans laquelle le Procureur soutient que la Réplique a été déposée hors délais et qu'aucune raison n'a été donnée pour justifier ce retard;

VU la réponse de l'appelant Hassan Ngeze à la Requête en rejet de la réplique intitulée *Appellant Hassan Ngeze's Response to the Prosecutor's Motion for Rejection and Dismissal of the Appellant's Reply to the Prosecutors [sic] Response to the Appellant Hassan Negeze's [sic] Motion for the Approval of the Investigation at the Appeal Stage,* deposée le 18 avril 2005 (la «Réponse à la Requête en rejet de la réplique»), dans laquelle l'appelant soutient que ce n'est que le 6 avril 2005 que son conseil a reçu la Réponse et que donc une justification valable du retard a été donnée;

ATTENDU que le Procureur n'a pas déposé de réplique à la Réponse à la Requête en rejet de la réplique;

CONSTATANT que, à cause du retard mis à notifier le conseil de l'appelant de la Réponse, une raison valable justifiant le retard mis à déposer la réplique a ainsi été donnée;

NOTANT l'argument de l'appelant qui affirme se retrouver ainsi dans une situation inextricable, attendu, d'une part, que le Greffe subordonne la prise en charge des frais d'enquêtes en phase d'appel à une ordonnance de la Chambre d'appel, et, d'autre part, que la Chambre d'appel n'admet de nouveaux moyens de preuve sur la base de

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Rules of Procedure and Evidence ("Rules") if the moving party does not append the statements of the proposed witnesses, which statements cannot be obtained without investigating[1];

RECALLING the jurisprudence of the Tribunal and that of the International Criminal Tribunal for the former Yugoslavia ("ICTY") that an appeal pursuant to Article 24 of the Statute of the Tribunal (or pursuant to Article 25 of the Statute of the ICTY) is not a *de novo* trial[2], and that the appeal is not an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases[3];

CONSIDERING that Rule 115 of the Rules provides for a corrective measure and that its purpose is to deal

> "with the situation *where a party is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial"[4];

CONSIDERING that investigations should be made during the pre-trial and trial stage, and that the Registrar will generally not fund investigations at the appeal stage[5];

CONSIDERING, however, that in an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party could show, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation at the appeal stage is not a fishing expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence;

FINDING that Appellant has not established that his is an exceptional case justifying ordering the Registrar to fund further investigations at the appeal stage in that :

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[1] Motion for Approval of Investigation, pp. 2-3.

[2] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 177; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 17; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Reasons for the Judgement, 13 December 2002, para. 11; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR 96-17-A, Judgement, 13 December 2004, para. 13. See also, *e.g., Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras. 41-42; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 40; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 22; *Prosecutor v. Mucić et al.*, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003, para. 11; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 5; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras. 13 and 21.

[3] *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Judgement of 7 October 1997, para. 15.

[4] *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001, para. 5 (emphasis added).

[5] T. 9 March 2005, p. 9.

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l'article 115 du Règlement de procédure et de preuve que si la partie requérante y joint les déclarations des témoins qu'elle entend citer, déclarations que la défense ne saurait obtenir sans enquêtes préalables[1];

RAPPELANT la jurisprudence du Tribunal et celle du Tribunal pénal international pour l'ex-Yougoslavie («TPIY») à l'effet qu'un recours introduit en vertu de l'article 24 du Statut du Tribunal (ou de l'article 25 du Statut du TPIY) n'est pas un procès de *novo*[2], et que la procédure d'appel n'a pas pour vocation de permettre aux parties de remédier à leurs propres «erreurs ou négligences» durant les phases de mise en état et du procès[3];

CONSIDERANT QUE l'article 115 du Règlement de procédure et de preuve autorise la prise de mesures correctives et a pour but de régir les situations où

> «*une partie est en possession de pièces* dont elle ne disposait pas au moment du procès en première instance et qui constituent des moyens de preuve supplémentaires concernant un fait ou une question en litige lors du procès»[4];

CONSIDÉRANT que les enquêtes doivent être menées durant les phases de mise en état et du procès, et qu'en règle générale le Greffe ne prend pas à sa charge les frais d'enquêtes menées en phase d'appel[5];

CONSIDERANT, toutefois, que la Chambre d'appel peut exceptionnellement ordonner au Greffe de prendre en charge les frais afférents aux enquêtes en phase d'appel, si la partie requérante démontre, par exemple, qu'elle est en possession d'une information spécifique nécessitant une enquête plus approfondie afin d'éviter un déni de justice (en d'autres termes, l'enquête en phase d'appel ne consistera pas en une simple recherche à l'aveuglette d'information), et que et cette information spécifique n'était pas disponible au moment du procès et n'aurait pu être découverte alors malgré toute la diligence voulue;

ATTENDU que l'appelant n'a pas établi qu'il s'agissait en l'espèce d'un cas exceptionnel qui justifie que la Chambre d'appel ordonne au Greffe de prendre en charge les frais afférents aux enquêtes complémentaires en phase d'appel, en ce sens que :

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[1] Requête en autorisation d'enquêtes en phase d'appel, pp. 2 et 3.

[2] Arrêt *Akayesu*, affaire n° ICTR-96-4-A, 1er juin 2001, para. 177; Arrêt *Musema*, affaire n° ICTR-96-13-A, 16 novembre 2001, para. 17; *Le Procureur c. Bagilishema*, affaire n° ICTR-95-1A-A, Motifs de l'arrêt, 13 décembre 2002, para. 11; *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaires n°s ICTR-96-10-A et ICTR-96-17-A, Arrêt, 13 décembre 2004, para. 13; Voir également par exemple, *Le Procureur c. Tadić*, affaire n° IT-94-1-A, Décision relative à la requête de l'appelant aux fins de prorogation de délai et d'admission de moyens de preuve supplémentaires, 15 octobre 1998, paras. 41 et 42; *Le Procureur c. Furundžija*, affaire n° IT-95-17/1-A, Arrêt, 21 juillet 2000, para. 40; *Le Procureur c. Kupreskić et consorts*, affaire n° IT-95-16-A, Arrêt, 23 octobre 2001, para. 22; *Le Procureur c. Mucić et consorts*, affaire n° IT-96-21-A*bis*, Arrêt relatif à la sentence, 8 avril 2003, para. 11; *Le Procureur c. Vasiljević*, affaire n° IT-98-32-A, Arrêt, 25 février 2004, para. 5; *Le Procureur c. Kordić et Cerkez*, affaire n° IT-95-14/2-A, Arrêt, 17 décembre 2004, paras. 13 et 21.

[3] *Le Procureur c. Dražen Erdemović*, affaire n° IT-96-22-A, Arrêt, 7 octobre 1997, para. 15.

[4] *Le Procureur c. Kupreskić et consorts*, affaire n° IT-95-16-A, Décision relative aux requêtes des appelants Drago Josipović, *Zoran et Vlatko Kupreskić aux fins d'admission de moyens de preuve supplémentaires en vertu de l'article 115, et aux fins de constat judiciaire, en vertu de l'article 94 (B)*, 8 mai 2001, para. 5 (non souligné dans l'original).

[5] Compte rendu de l'audience du 9 mars 2005, p. 9.

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The Appellant is extremely vague as to the evidence he seeks to uncover and he does not show that he has specific information that needs to be further investigated in order to avoid a miscarriage of justice, or that this specific information was not available to him at trial or could not have been discovered through the exercise of due diligence;

The two motions for additional evidence which the Appellant intended to file at the time he filed the present Motion have now been filed, and it does not appear that investigations in relation to these motions for additional evidence[6] are still necessary[7];

HEREBY,

DISMISSES the Motion for Rejection of Reply;

DISMISSES the Motion for Approval of Investigation.

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

Dated this 3rd day of May 2005, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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[6] See Motion for Approval of Investigation, para. 1.

[7] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed 4 April 2005; Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed 11 April 2005. The Appellant even submitted a third motion : Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB, filed 25 April 2005 and corrected 28 April 2005.

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L'appelant se montre extrêmement vague quant aux moyens de preuve qu'il tente de découvrir et ne démontre pas qu'il est en possession d'une information spécifique nécessitant une enquête plus approfondie afin d'éviter un déni de justice, ni que cette information spécifique ne lui était pas disponible au moment du procès ou n'aurait pu être découverte malgré toute la diligence voulue;

les deux requêtes aux fins de présenter des moyens de preuve supplémentaires que l'appelant se proposait de déposer au moment où il a déposé la présente Requête en autorisation d'enquêtes en phase d'appel[6] sont maintenant déposées[7], et il ne semble pas que les enquêtes relatives à ces requêtes aux fins d'autorisation de présenter des moyens de preuve supplémentaires soient toujours nécessaires;

PAR CES MOTIFS,

REJETTE la Requête en rejet de la réplique;

REJETTE la Requête en autorisation d'enquêtes en phase d'appel.

Fait en anglais et en fiançais, le texte anglais faisant foi.

FAIT le 3 mai 2005, à La Haye (Pays-Bas).

[Signé] : Theodor Meron

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[6] Voir la Requête en autorisation d'enquêtes en phase d'appel, para. 1.

[7] Requête de l'appelant Hassan Ngeze intitulée *Appellant Hassan Ngeze's urgent Motion for leave to Present Additional Evidence*, déposée le 4 avril 2005 et la requête de l'appelant Hassan Ngeze intitulée *Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence*, déposée le 11 avril 2005. L'appelant avait même déposé une troisième requête intitulée *Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB*, déposée le 25 avril 2005 et corrigée le 28 avril 2005.

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## *Further Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase 6 May 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Ferdinand Nahimana – Submission of the Prosecutor erroneously not examined – Reaffirmation of the previous decision*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

RECALLING its "Decision on Appellant Ferdinand Nahiman'as Motion for Assistance from the Registrar in the Appeals Phase", issued on 3 May 2005 ("Decision"), in which it noted that the Prosecution had not filed a response[1];

CONSIDERING that it appears that the Prosecution did in fact submit a response on 15 April 2005[2];

CONSIDERING that the disposition of the Decision need not to be changed in light of the submissions made in the Response;

FOR THE FOREGOING REASONS

REAFFIRMS the Decision.

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

Dated this 6th day of May 2005, At the Hague, The Netherlands.

[Signed] : Theodor Meron

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[1] Decision, p. 2.

[2] "Prosecutor's Response to '*Requête aux fins de diverses mesures concernant l'assistance du Greffe à la défense en phase d'appel*'", filed on 15 April 2005 ("Response").

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# *Decision on "Appellant Jean-Bosco Barayagwiza's urgent motion for leave to have further time to file the appeals brief and the appeal notice" 17 May 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Ground of Appeal, Effectiveness of an appellant's brief – Right of the Accused to fair proceedings, Statutory duty of the Appeals Chamber to ensure the fairness of the proceedings on appeal – Responsibility of the Registrar, Administration of the legal aid scheme, Travel expenses – Communication between the Accused and his/her Counsel, Procedures for an detained Accused to make a complaint, Complaint to the Commanding Officer of the United Nations Detention Unit, Complaint to the Registrar – Extension of the page-limits – Extension of time, Composition of the Appellant's Legal Team – Motion denied*

*International Instruments cited :*

*Directive on the Assignment of Counsel; Practice Direction on Length of Briefs; Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, Rule 3 and 65*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Tribunal");

NOTING the "*Acte d'appel modifié*" submitted by Appellant Jean-Bosco Barayagwiza ("Appellant") on 27 April 2004[1] and the "*Mémoire d'appel*" submitted by Mr. Barletta-Caldarera, former lead counsel for Appellant, on 25 June 2004;

BEING SEISED OF the "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", filed 4 May 2005 ("Motion")[2], in which the Appellant requests that he be allowed to file a new Appellant's Brief of up to 300 pages[3] and prays the Appeals Chamber to :

[1] "*Notification sur la détermination de mon Acte d'appel*", filed 5 May 2004.

[2] The Motion presumably replaces the "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", filed 2 May 2005.

[3] Motion, p. 16.

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(a) Authorise the Appellant to file his modified Notice of Appeal on 1st [of] May 2006;
(b) Authorise the Appellant to file his Brief 75 days after the filing of the Notice of Appeal;
(c) Order the Registrar to allow Appellant's defence counsel to make at least six visits to Arusha;
(d) Order the Registrar to authorise privileged meetings at the UNDF between the Appellant and the Legal Assistants without the presence of any counsel and grant them at least four visits to Arusha;
(e) Order the Registrar to instruct the UNDF Commanding Officer to allow the Appellant to receive and conduct, without interruption, a telephone conference with the Counsel every Monday;
(f) Order the Registrar to instruct the UNDF Commandant to expedite legal correspondence between the Appellant and his Defence team, especially via a fax facility that is easily accessible to him;
(g) Order the Registrar to facilitate correspondence between the Appellant and his Counsel by secure e mail;
(h) Issue other orders or directions deemed necessary to expedite the preparation of the Appellant's Notice of Appeal[4];

NOTING the "Prosecutor's Response to 'Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice'", filed 5 May 2005 ("Response"), in which the Prosecution objects to the Appellant's requests for an extension of time and an extension of length of the Appellant's Brief;

NOTING the "Appellant's Response [*sic*] to Prosecutor's Response to the Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have further Time to File the Appeals Brief and the Appeal Notice", filed 13 May 2005 ("Reply");

FINDING that, although the Reply was submitted out of time, good cause has been shown for this since it appears that the Appellant did not receive the Response before 9 May 2005;

CONSIDERING that the effectiveness of an appellant's brief does not depend on its length but on the clarity and persuasiveness of the arguments and that the Appeals Chamber may, if it considers it necessary, request elaboration of a ground of appeal in a further written brief or during oral argument of the appeal;

FINDING that, although this appeal raises important legal and factual issues adjudicated in a long Judgement, the Appellant has not demonstrated exceptional circumstances which distinguish this case and which necessitate an extension of the page limits prescribed in the Practice Direction on Length of Briefs[5];

[4] Motion, p. 17.

[5] In this connection, the Appeals Chamber is not convinced by the Appellant's argument that his case is more complex than that of his co-appellants because "the Appellant has had three judgements : the first connected with the Appeals Chamber Decision of 3/11/1999; the second, with the Appeals Chamber decision of 31/3/2000; and the third with the Judgement of the trial itself on 3/12/2003" (Motion, pp. 11-12), as the Appeals Chamber considers that the matters decided in its previous decisions need not be re-examined. Further, the Appeals Chamber notes

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AS TO THE REQUEST FOR AN EXTENSION OF TIME

CONSIDERING that Counsel for the Appellant was assigned by the Registrar on 30 November 2004, that the Appellant challenged this decision[6], that this challenge was rejected by the Appeals Chamber[7], that the Appellant requested the Appeals Chamber to reconsider its rejection of his challenge[8], that the Appeals Chamber rejected this request for reconsideration[9], that the Appellant was only able to meet for the first time with assigned Counsel at the end of March 2005, and that the Appellant's Legal Team has not been completely assigned yet[10];

CONSIDERING that the amount of material to be reviewed by Counsel is quite substantial and that the other appellants in this case have benefited from significant extensions of time to file their Notices of Appeal and their Appellant's Briefs[11]

FINDING that a 4-month period of time, starting from the moment the Appellant's Legal Team is complete, should be sufficient to allow the preparation of an amended Notice of Appeal and of a new Appellant's Brief[12];

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that the requests for extension of the length of the briefs submitted by the co-appellants were also denied : "Decision on Ngeze's Motion for an Extension of Page Limits for Appeals Brief", issued 2 March 2004; "Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits [of] his Appellant's Brief", issued 11 March 2004; "Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief", issued 24 June 2004; "Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief", issued 31 August 2004.

[6] "';*Recours très urgent contre le refus du Greffier de commettre M. Richard Harvey comme mon Conseil principal en exécution de la décision de la Chambre d'appel du 03 [sic] novembre 2004*", filed on 6 December 2004.

[7] "Decision on Jean-Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel", 19 January 2005.

[8] "*Demande de réexamen de la décision de la Chambre d'Appel du 19 janvier 2005 rejetant mon 'Recours très urgent contre le refus du Greffier de commettre M. Richard Harvey comme mon Conseil principal en exécution de la décision de la Chambre d'appel du 03 [sic] novembre 2004'*", filed 25 January 2005.

[9] "Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005", filed 4 February 2005.

[10] Two legal assistants were assigned on 30 March 2005, but Co-Counsel has not yet been assigned.

[11] As to Appellant Ferdinand Nahimana : "Decision on Motions for an Extension of Time to File Appellant's Notices of Appeal and Briefs", issued 19 December 2003; "Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief", issued 31 August 2004, p. 4. As to Appellant Hassan Ngeze : "Decision on Motions for an Extension of Time to File Appellant's Notices of Appeal and Briefs", issued 19 December 2003; "Decision on Ngeze's motion for an Additional Extension of Time to File His Notice of Appeal and Brief", issued 6 February 2004; "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order", issued 2 March 2004; "Decision on Hassan Ngeze's Motion for an Extension of Time", issued 2 December 2004; "Decision on Hassan Ngeze's Motion for an Extension of Time", issued 4 February 2005.

[12] Nevertheless, the Appeals Chamber emphasizes that Counsel should not wait for the assignment of Co-counsel before starting work on the Appellant's Brief and Notice of Appeal.

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### As to the Request for Additional Travel to Arusha

CONSIDERING that the Registrar has the primary responsibility for the administration of the legal aid scheme in general, and in particular for authorising travel expenses[13];

CONSIDERING that the Directive on the Assignment of Counsel provides a procedure for the settlement of disputes[14] and that if, after having gone through this procedure, the Appellant still considers that his right to fair proceedings is infringed by restrictions on the travel of his legal team, he can raise the matter with the Appeals Chamber, which has the statutory duty to ensure the fairness of the proceedings on appeal[15];

### As to the Requests Relating to Communications Between the Appellant and his Legal Team

CONSIDERING that, pursuant to Rule 3 of "The Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal" ("Rules on Detention"), the Commanding Officer of the United Nations Detention Unit has the sole responsibility for all aspects of the daily management of the Detention Unit[16];

CONSIDERING that Rule 65 of the Rules on Detention provides that

> "[e]ach detainee shall be entitled to communicate fully and without restraint with his Defence Counsel"

and that these communications shall be privileged;

CONSIDERING that, if the Appellant disagrees with the interpretation of this rule given by the Commanding Officer, he may make a written complaint to the Registrar who shall forward it to the President[17];

CONSIDERING that, in the present case, it does not appear that this procedure was followed;

CONSIDERING that, if after having gone through the prescribed procedure, the Appellant still considers that his right to fair proceedings is being infringed by the alleged restriction, he can raise the matter with the Appeals Chamber which, as already noted, has the statutory duty to ensure the fairness of the proceedings on appeal[18];

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[13] See in particular Articles 27 and 28 of the Directive on the Assignment of Counsel, adopted 9 January 1996, as modified.

[14] Article 30. The Appellant should file a formal complaint with the Registrar, explaining why funding for additional travel is necessary. The Registrar shall then make a decision after consulting the President and, if necessary, the Advisory Panel, on an equitable basis.

[15] "Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase", issued 3 May 2005, para. 4. This decision was reaffirmed on 6 May 2005 ("Further Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase").

[16] Rule 3 of the Rules on Detention.

[17] Rule 83 of the Rules on Detention.

[18] "Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase", issued 3 May 2005, para. 7. This decision was reaffirmed on 6 May 2005 ("Further Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase").

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HEREBY

ORDERS the Appellant to file any amended Notice of Appeal and his new Appellant's Brief not later than 4 months after Co-Counsel has been assigned;

DISMISSES the Motion in all other respects.

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

Dated this 17th day of May 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Decision on Prosecution's Urgent Motion for Extension of Time to file Results of Investigation into the New Evidence of Witness EB 28 June 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – New evidence, Report of the Forensic Document Examiner, Reliability of the new evidence, Extension of time – Motion granted*

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Tribunal"),

RECALLING the "Decision on Appellant Hassan Ngeze's Motions for the Admission of Additional Evidence on Appeal", issued 24 may 2005 in which the Appeals Chamber asked the Prosecution to conduct a further investigation into reliability of Witness EB's new evidence and to provide it with the results of its further investigation not later than one month after the date of the decision[1];

[1] Decision on Appellant Hassan Ngeze's Motions for the Admission Evidence on Appeal, 24 May 2005, paras. 43 and 48.

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BEING SEISED OF the "Prosecution's Urgent Motion for Extension of Time to File Results of Investigation into the New Evidence of Witness EB', filed 23 June 2005 ("Motion"), in which the Prosecution requests a two-week extension of time to file the results of its investigation into the new evidence of Witness EB because it

> "only received the report of the Forensic Document Examiner yesterday, 22 June 2005 and, in light of the outcome of the report, deems it necessary to make further enquiries in order to present the Appeals Chamber with a thorough and proper analysis of the reliability of the new evidence of Witness EB"[2];

CONSIDERING that "a motion for an extension of time may, in accordance with existing practive, be disposed of without giving order party the opportunity to respond to the motion if, on the face of the motion, the Appeals Chamber […] is of the opinion that no prejudice would be caused to the other party"[3];

FINDING that a two-week extension of time is warranted and would not cause prejudice to the other parties;

HEREBY

ORDERS the Prosecution to submit the results of its further investigation into the reliability of Witness EB's new evidence not later than 7 July 2005;

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

Done at The Hague, The Netherlands, on 28 June 2005.

[Signed] : Theodor Meron

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[2] Motion, para. 4.

[3] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 18.

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## *Order replacing a Judge in a Case before the Appeals Chamber 15 July 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Commune Appeals Chamber to the I.C.T.R. and the I.C.T.Y., Replacement of a Judge before the Appeals Chamber, Interest of an effective management of the case, Absence of delay*

*International Instruments cited :*

*Statute, art. 11 (3), 12* bis*, 13 (3) and 13 (4); Statute of the IC.T.Y., art. 14 (4)*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Tribunal"),

NOTING the appeals lodged by Hassan Ngeze on 9 February 2004, by Jean-Bosco Barayagwiza on 22 April 2004, and by Ferdinand Nahimana on 4 May 2004 against the Judgement rendered by Trial Chamber 1 on 3 December 2003;

CONSIDERING the composition of the Tribunal as set out in Document IT/222 of the International Tribunal for the former Yugoslavia, issued on 17 November 2003;

NOTING the "President's Assignment of Judge Andrésia Vaz to the Appeals Chamber and Judge Inés Weinberg de Roca to a Trial Chamber" of 24 February 2005 ("Tribunal President's Re-Assignment Order"), made by Judge Erik Møse, President of the Tribunal, which reads as follows :

> RECALLING that on 31 January 2003, the General Assembly elected eleven permanent judges to the Tribunal in conformity with Article 12 *bis* of its Statute;
>
> HAVING CONSIDERED Article 13 (3) of the Statute, which provides that the President, after consultation with the permanent judges of the Tribunal, shall assign two of the permanent judges elected in accordance with Article 12 *bis* of the Statute to be members of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia;
>
> TAKING INTO ACCOUNT Article 13 (4) of the Statute, according to which members of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Criminal Tribunal for Rwanda;

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## *Ordonnance portant remplacement d'un juge dans une affaire devant la Chambre d'appel 15 juillet 2005 (ICTR-99-52-A)*

(Original : Anglais)

Chambre d'appel

Juge : Theodor Meron, Président de Chambre

*Jean Bosco Barayagwiza, Ferdinand Nahimana et Hassan Ngeze – Chambre d'appel commune aux T.P.I.R. et T.P.I.Y., Remplacement d'un juge à la Chambre d'appel, Intérêt d'une bonne administration de l'affaire, Absence de retard dans le déroulement de l'affaire*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art.; Statut, art. 11 (3), 12* bis*, 13 (3) et 13 (4); Statut du T.P.I.Y., art. 14 (4)*

NOUS, THEODOR MERON, Président de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 (le «Tribunal»),

VU les appels interjetés par Hassan Ngeze le 9 février 2004, Jean-Bosco Barayagwiza le 22 avril 2004, et Ferdinand Nahimana le 4 mai 2004 contre le jugement rendu par la Chambre de première instance 1 le 3 décembre 2003;

VU la composition du Tribunal telle qu'elle est exposée dans le document IT/222 du Tribunal international pour l'ex-Yougoslavie, établi le 17 novembre 2003;

VU l'«Ordonnance du Président portant nomination de la juge Andrésia Vaz à la Chambre d'appel et de la juge Inés Weinberg de Roca à une Chambre de première instance» (l'«Ordonnance du Président du Tribunal portant réaffectation de juges»), rendue le 24 février 2005 par le juge Erik Møse, Président du Tribunal, qui est libellée comme suit :

> RAPPELANT que, le 31 janvier 2003, l'Assemblée générale a élu onze juges permanents du Tribunal conformément à l'article 12 *bis* du Statut du Tribunal;
>
> VU l'article 13 (3) du Statut, qui dispose que le Président, après avoir consulté les juges permanents du Tribunal, nomme deux des juges permanents élus conformément à l'article 12 *bis* du Statut à la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie;
>
> VU l'article 13 (4) du Statut, selon lequel les juges siégeant à la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie siègent également à la Chambre d'appel du Tribunal pénal international pour le Rwanda;

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TAKING ALSO INTO ACCOUNT Article 14 (4) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, according to which two of the judges elected in accordance with the Statute of the International Criminal Tribunal for Rwanda shall be assigned by the President of the Tribunal, in consultation with the President of the International Criminal Tribunal for the Former Yugoslavia, to be members of the Appeals Chamber and permanent judges of the International Criminal Tribunal for the Former Yugoslavia;

RECALLING that on 4 June 2003, Judge Mehmet Giiney and Judge Inés Weinberg de Roca were assigned to the Appeals Chambers of the International Criminal Tribunal for Rwanda and the international Criminal Tribunal for the Former Yugoslavia;

HAVING CONSULTED with the permanent judges of the International Crirninal Tribunal for Rwanda and the President of the international Criminal Tribunal for the Former Yugoslavia, and bearing in mind the need to ensure the interests of the Tribunal as a whole and, in particular, the need to ensure trial experience from the Tribunal in the work of the Appeals Chamber and appeals experience in the work of the Trial Chambers;

ASSIGNS Judge Andrésia Vaz to the Appeals Chambers of the International Crirninal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, and Judge Inés Weinberg de Roca to Trial Chamber III of the International Criminal Tribunal for Rwanda. These assignments shall take effect from 15 August 2005.

CONSIDERING that the case *Nahimana et al. v. The Prosecutor,* Case No. ICTR-99-52-A *("Nahimana")* is in its pre-appeal phase and that, thus, no hearing in this case has been held;

CONSIDERING further that it is in the interest of an effective management of the case to ensure that no undue delay will result from the implementation of the Tribunal President's Re-Assignment Order;

PURSUANT TO Articles 11 (3) and 13 (4) of the Statute of the Tribunal;

HEREBY ASSIGN, with effect from 15 August 2005, Judge Andrésia Vaz to replace Judge Inés Weinberg de Roca in the present case;

AND ORDER that in the case of *Nahimana,* the Appeals Chamber shall be constituted, as of 15 August 2005, as follows :

Judge Theodor Meron

Judge Mohamed Shahabuddeen

Judge Florence Mumba

Judge Fausto Pocar

Judge Andrésia Vaz

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

Done this 15th day of July 2005, At The Hague, The Netherlands.

[Signed] : Theodor Meron

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VU l'article 14 (4) du Statut du Tribunal pénal international pour l'ex-Yougoslavie, selon lequel deux des juges nommés conformément au Statut du Tribunal pénal international pour le Rwanda seront nommés par le Président dudit Tribunal, en consultation avec le Président du Tribunal pénal international pour l'ex-Yougoslavie, membres de la Chambre d'appel et juges permanents du Tribunal pénal international pour l'ex-Yougoslavie;

RAPPELANT que, le 4 juin 2003, le juge Mehmet Güney et la juge Inés Weinberg de Roca ont été nommés à la Chambre d'appel du Tribunal pénal international pour le Rwanda et du Tribunal pénal international pour l'ex-Yougoslavie;

AYANT CONSULTE les juges permanents du Tribunal pénal international pour le Rwanda et le Président du Tribunal pénal international pour l'ex-Yougoslavie, et compte tenu de la nécessité de veiller à l'intérêt du Tribunal dans son ensemble et, en particulier, de faire profiter, dans le cadre de leurs travaux respectifs, la Chambre d'appel de l'expérience des procès en première instance et les Chambres de première instance, de l'expérience de la procédure en appel;

NOMME la juge Andrésia Vaz à la Chambre d'appel du Tribunal pénal international pour le Rwanda et du Tribunal pénal international pour l'ex-Yougoslavie, et la juge Inés Weinberg de Roca à la Chambre de première instance III du Tribunal pénal international pour le Rwanda. Ces nominations prennent effet à compter du 15 août 2005.

ATTENDU que l'affaire *Nahimana et consorts c. Le Procureur,* Affaire n° ICTR-99-52-A (l'«affaire *Nahimana et consorts*») est actuellement en la phase de mise en état en appel et que, donc, aucune audience n'a été tenue dans cette affaire;

ATTENDU par ailleurs que l'intérêt d'une bonne administration de l'affaire commande que l'on veille à ce que la mise en œuvre de l'ordonnance du Président du Tribunal portant réaffectation de juges n'entraîne aucun retard indu;

VU les articles 11 (3) et 13 (4) du Statut du Tribunal;

NOMMONS la juge Andrésia Vaz en remplacement de la juge Inés Weinberg de Roca dans la présente affaire et, ce, à compter du 15 août 2005;

ET ORDONNONS qu'à compter du 15 août 2005, la Chambre d'appel, dans l'affaire *Nahimana et consorts,* sera composée des juges suivants :

Theodor Meron

Mohamed Shahabuddeen

Florence Mumba

Fausto Pocar

Andrésia Vaz

Fait en anglais et en français, la version anglaise faisant foi.

FAIT à La Haye (Pays-Bas), le 15 juillet 2005.

[Signé] : Theodor Meron

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## *Order of the Presiding Judge designating the Pre-appeal Judge 19 August 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Composition of the Appeals Chamber of the Tribunal, Designation of a Pre-Appeal Judge*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 108* bis

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the Judgement and Sentence rendered by Trial Chamber I on 3 December 2003;

CONSIDERING the* and the "*Acte d'appel*", filed by Ferdinand Nahimana on 4 May 2004; the "*Notice d'appel*" and "*Acte d'appel modifié*", filed by Jean-Bosco Barayagwiza on 22 April 2004 and 27 April 2004, respectively; and the "Defence Notice of Appeal" and "1st Amendment of Appeal Notice", filed by Hassan Ngeze on 9 February 2004 and 30 April 2004, respectively;

CONSIDERING the composition of the Appeals Chamber of the Tribunal as set out in Document IT/237, issued on 21 July 2005;

PURSUANT TO Rule 108 *bis* of the Rules of Procedure and Evidence of the International Tribunal;

DESIGNATE Judge Andrésia Vaz to serve as Pre-Appeal Judge in the joint case of *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. Prosecutor*, Case n° ICTR-99-52-A.

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

Done this 19th day of August 2005, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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* [Note of the editors] : The Decision cited was missing in the original Decision.

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## *Corrigendum to the "Order of the Presiding Judge designating the Pre-Appeal Judge 25 August 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – List error, Corrigendum*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Order of the Presiding Judge Designating the Re-Appeal Judge", filed on 19 August 2005;

CONSIDERING the counsel for the Appellants is incorrectly listed;

ORDER that the text "Counsel for the Appellants

Mr. Jean-Marie Biju Duval and Ms. Diana Ellis for Ferdinand Nahimana

Ms. Giacomo Barletta-Caldarera and Ms. Gabriele Della Morte for Jean-Bosco Barayagwiza

Mr. John C. Floyd III and Ms. Nathalie Leblanc for Hassan Ngeze

shall be replaced by

Counsel for the Appellants

Mr. Jean-Marie Biju-Duval for Ferdinand Nahimana

Mr. D. Peter Herbert for Jean-Bosco Barayagwiza

Mr. Bharat Chadha for Hassan Ngeze

CONSIDERING that Appellants' notices of appeals and appeals briefs are incorrectly listed;

ORDER that the text

"CONSIDERING the and the "*Acte d'appel*", filed by Ferdinand Nahimana on 4 May 2004; the "*Notice d'Appel*" and "*Acte d'appel modifié*", filed by Jean-Bosco Barayagwiza on 22 April 2004 and 27 April 2004, respectively; and the "Defence Notice of Appeal" and "1st Amendment of Appeal Notice", filed by Hassan Ngeze on 9 February 2004 and 30 April2004"

shall be replaced by

"CONSIDERING the "*Acte d'appel*" and confidential "*Mémoire d'appel* (Révisé)", filed by Ferdinand Nahimana on 4 May 2004 and 27 September 2004,

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## *Rectificatif à l'ordonnance intitulée «Order of the Presiding Judge Designating the Pre-Appeal Judge» 25 août 2005 (ICTR-99-52-A)*

(Original : Anglais)

Chambre d'appel

Juge : Theodor Meron, Président de Chambre

Jean Bosco Barayagwiza, Ferdinand Nahimana et Hassan Ngeze – Erreur d'énumération, Rectificatif

NOUS, THEODOR MERON, Président de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumés responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (le «Tribunal international»),

VU l'ordonnance intitulée *Order of the Presiding Judge Designating the Pre-Appeal Judge*, deposé le 19 août 2005,

CONSIDERANT qu'il y a erreur dans l'énumération des conseils des appelants;

ORDONNONS que le texte suivant :

Mr. Jean-Marie Biju Duval and Ms. Diana Ellis for Ferdinand Nahimana

Ms. Giacomo Barletta-Caldarera and Ms. Gabriele Della Morte for Jean-Bosco Barayagwiza

Mr. John C. Floyd III and Ms. Nathalie Leblanc for Hassan Ngeze

Soit remplacé par le texte ci-après :

Counsel for the Appellants

Mr. Jean-Marie Biju Duval for Ferdinand Nahimana

Mr. D. Peter Herbert for Jean-Bosco Barayagwiza

Mr. Bharat Chadha for Hassan Ngeze

CONSIDERANT que les avis d'appel et les mémoires de l'appelant des appelants sont mal énumérés;

ORDONNONS que le texte suivant :

*CONSIDERING the and the* "Acte d'appel*", filed by Ferdinand Nahimana on 4 May 2004; the* "Notice d'appel*" and* "Acte d'appel modifié*", filed by Jean-Bosco Barayagwiza on 22 April 2004 and 27 April 2004, respectively; and the "Defence Notice of Appeal" and "1st Amendment of Appeal Notice", filed by Hassan Ngeze on 9 February 2004 and 30 April 2004*

Soit remplacé par le texte ci-après :

*CONSIDERING the* "Acte d'appel*" and confidential* "Mémoire d'appel (Révisé)*", filed by Ferdinand Nahimana on 4 May 2004 and 27 September 2004,*

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respectively; the "Notice d'Appel" and "Acte d'appel modifié", filed by Jean-Bosco Barayagwiza on 22 April 2004 and 27 April 2004, respectively; the "Decision on Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", filed on 17 May 2005; and the confidential "Amended Notice of Appeal" and confidential "Appellant's Brief", filed by Hassan Ngeze on 9 May 2005 and 2 May 2005, respectively"

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

Done this 25th day of August 2005, At The Hague, The Netherlands.

[Signed] : Theodor Meron

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*respectively; the* "Notice d'Appel" *and* "Acte d'appel modifié", *filed by Jean-Bosco Barayagwiza on 22 April 2004 and 27 April 2004, respectively; the "Decision on 'Appelant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", filed on 17 May 2005; and the confidential "Amendcd Notice of Appeal" and confidential "Appellant's Brief", filed by Hassan Ngeze on 9 May 2005 and 2 May 2005, respectively*

Fait en français et en anglais, le texte anglais faisant foi.

Fait le 25 août 2005, à La Haye (Pays-Bas).

[Signé] : Theodor Meron

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## *Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to file his Notice of Appeal and his Appellant's Brief 6 September 2005 (ICTR-99-52-A)*

(Original : English)

Judge : Andrésia Vaz, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Time-limits, Starting date of the delay, Extension of time, Good Cause, Undue Delay, Right to fair proceedings of the Co-Appellants, Interests of Justice – Function of the Co-Counsel*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 111 and 116*

*Code of Professional Conduct for Defence Counsel; Practice Direction on the Length of Briefs and Motions on Appeal*

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* Emmanuel Ndindabahizi v. The Prosecutor, *Decision on* «Requête Urgente aux Fins de Prorogation de Délai du mémoire en Appel», *5 April 2005 (ICTR-2001-71)*

I, Andresia Vaz, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Commmitted in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), and Pre-Appeal Judge in this case[1],

NOTING the "Decision on Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further The to File the Appeals Brief and the Appeal Notice", rendered on 17 May 2005 ("Decision of 17 May 2005" and "Appellant", respectively), in which the Appeals Chamber found, with regard to the request for an extension of the time that

> "a 4-month period of time, starting from the moment the Appellant's legal Team is complete, should be sufficient to allow the preparation of an amended Notice of Appeal and of a new Appellant's Brief"[2],

[1] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August *2005* and Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, *25* August *2005.*

[2] Decision of 17 May *2005,* p. 4.

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NOTING that in the same decision, the Appeals Chamber ordered

> "the Appellant to file any amended Notice of Appeal and his new Appellant's Brief not later than 4 months after Co-Counsel has been assigned"[3];

NOTING the letter of 10 August 2005 addressed by the Appellant to the Pre-Appeal Judge in which the Appellant requests the Pre-Appeal Judge to confirm that the filing of the Appellant's Brief is due on 12 October 2005;

NOTING the Prosecution's "Response to letter of 10 August 2005", dated 16 August 2005 in which the Prosecution objects to the Appellant's request and submits that 23 September 2005 should be the date of filing of the Appellant's Brief;

NOTING the letter of 18 August 2005 in which the Appellant requests the President of the Appeals Chamber to confirm that the Appellant's Brief is due on 12 October 2005 and otherwise requests a status conference;

CONSIDERING that the operative part of the Decision of 17 May 2005 clearly states that the four-month period starts from the appointment of Co-counsel[4];

CONSIDERING, however, that the potential inconsistency between the expressions "from the moment the Appellant's Legal Team is complete" and "after Co-Counsel has been assigned" in the Decision of 17 May 2005 might have created doubts as to the starting date of the four-month period;

FINDING that, in light of this inconsistency, the four-month period should run from the moment the Appellant's Third Legal Assistant was appointed, to wit 12 June 2005;

BEING SEIZED OF the "Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Have Further Time to the Appeals Brief and the Appeal Notice", filed confidentially on 16 August 2005 ("Motion")[5], in which Jean-Bosco Barayagwiza requests an extension of time to file his Notice of Appeal and Appellant's Brief "on a date no later than the 12th of February 2006"[6] because of (i) unforeseen obstacles he encountered despite his efforts to comply with the timetable, specifically the difficulties related to the late appointment of Lead Counsel and of his third assistant – the latter being the only member of the Legal Team speaking both Kinyarwanda

[3] *Ibid.*, p. 5.

[4] Since the issue of the appointment of a Third Legal Assistant had not been raised by the Appellant prior to the Decision of 17 May 2005, the Appeals Chamber considered in this decision that the only member to be appointed to complete the Appellant's Legal Team was Co-Counsel. This is confirmed by footnotes 10 and 12 of the Decision of 17 July 2005.

[5] The Appeals Chamber reminds the parties that pursuant to the Practice Direction on the Length of Briefs and Motions on Appeal, issued on 16 September 2002 as modified, the motion are limited to 10 pages or 3,000 words. Paragraph 5 of the Practice Direction on the Length of Briefs and Motions on Appeal requires a party seeking an extension of the page limit to "provide an explanation of the exceptional circumstances that necessitate the oversized filling". The Appeals Chamber notes that the Motion exceeds such a limit and that no good cause has been shown to justify such enlargement. The Appeals Chamber will consider the Motion but urges the Appellant to abide by the Practice Direction on the Length of Briefs and Motions on Appeal and warns that it is entitled to ignore what goes beyond the relevant limit.

[6] While the Appellant puts forward two other requests regarding adequate time and facilities and "any further order or direction which the […] Appeals Chamber may deem necessary", the Appeals Chamber considers that they are all related to the request for an extension of time.

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and French[7] – and *to* the delay in obtaining relevant material and documents from the Registry and former Counsel[8], and (ii) specific difficulties such as the complexity of the case[9], the seriousness of the charges faced[10] and the unexpected unavailability of Lead Counsel due to holiday schedule and professional obligations relating to terrorist attacks in London[11];

NOTING the "Prosecutor's Response to 'Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for leave to Have Further Time to File the Appeals Brief and the Appeal Notice'", filed on 23 August 2005 ("Response")[12], in which the Prosecution opposes the Motion and submits that the arguments raised by the Appelant in his Motion have either been considered during the Status Conference on 1 April 2005 and in the Decision of 17 May 2005[13] or are irrelevant to the issue of extension of time[14], and that further delay would be manifestly unfair to co-appellants Ferdinand Nahimana and Hassan Ngeze ("Co-Appellants") because the Appellant will have been granted more time than the Co-Appellants to prepare his Appellant's Brief, and that it would unduly delay the appeals hearings[15];

NOTING the "Appellant's Preliminary Response to Prosecutions[sic] Reply to Appellant's Request to Further Time to Lodge Appeal Brief Dated 16th August 2005", filed on 29 August 2005 ("Reply"), in which the Appellant reiterates the arguments put forward in the Motion and adds that the Co-Appellants' Legal Teams were placed in a better situation than the Appellant's Legal Team "to fulfil their function within the prescribed time frame"[16];

NOTING ALSO that in the Reply "[a] request is made for a further five days in which to serve any additional relevant matters"[17];

NOTING the "Prosecutor's Urgent Motion for an Order that the "Appellant's Preliminary Response to Prosecution Reply [sic] to Appellant's Request to Appoint an Investigator" and the "Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request for further Time to Lodge Appeal Brief dated 16th August 2005

[7] Motion, paras. 17, 30, 39, 40.
[8] Motion, paras. 19-25, 38, 41.
[9] Motion, paras. 31, 33-37, 56-62.
[10] Motion, paras. 48-55.
[11] Motion, paras. 45-46.
[12] The Appeals Chamber notes that the Response also exceeds the 10 pages or 3,000 word limit set in the Practice Direction on the Length of Briefs and Motions on Appeal. However, the Appeals Chamber notes that the Response expressly addressed such enlargement. The Appeals Chamber further deems that, since it has considered the entirety of the Motion, it will also consider all of the Response but also recalls that the warning it addressed to the Appellant also applies to the Prosecution.
[13] Responses, paras. 8, 11-14, 25, 27, 33.
[14] Responses, paras. 4, 23.
[15] Responses, paras. 37-39.
[16] In support of this argument, the Appellant submits that the Co-Appellants' Legal team were familiar with the evidence and Tribunal's jurisprudence due to (i) their previous participation in trial proceedings in this case; (ii) Hassan Ngeze's Counsel's seniority as Duty Counsel at the ICTR and (iii) Ferdinand Nahimana's Counsel Fluency in French. He also contends that unlike the Co-Appellants, the Appellant is currently challenging the quality of representation that he received which requires careful consideration and additional investigation. See, Reply, paras. 19-23.
[17] Reply, para. 1.

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Be deemed as the Actual Replies of the Appellant and for rejection of the Requests for an extension of Time to File additional Replies", filed on 2 September 2005, in which the Prosecution requests "the Appeals Chamber […] to consider the filings as the actual replies and to reject the request for extension of time to file further replies"[18];

CONSIDERING that, if the Appellant sought an extension of time to file his reply, he should have filed a motion to this effect rather than file a reply and request therein a further delay;

CONSIDERING that it is in the interest of justice to avoid any further delay to the proceedings in this case;

CONSIDERING ALSO that one of the purposes of appointing a Co-Counsel is to ensure legal representation for the Appellant even when Lead Counsel is temporarily unavailable and that pursuant to the Code of Professional Conduct for Defence Counsel the Counsel and Co-Counsel are subject to the same duties, rights and obligations[19];

CONSIDERING that the Reply addresses the arguments of the Prosecution in its Response;

FINDING, therefore, that the Appellant need not be given a further five days to improve his Reply;

NOTING that the Rule 116 of the Rules of Procedure and Evidence ("Rules") provides that the "Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause";

CONSIDERING that the Appellant has already been granted a significant extension of time in the Decision of 17 May 2005[20];

CONSIDERING that the time limit pursuant to Rule 111 of the Rules already takes into consideration the complexity of cases that are litigated before the Appeals Chamber of the Tribunal[21];

CONSIDERING that in the Decision of 17 May 2005, due consideration was given by the Appeals Chamber to the difficulties arising from the Appointment of new Counsel and subsequent reorganization of the Legal Team, the seriousness of the charges, the substantial amount of material to be reviewed by Counsel and the significant extensions of time the Co-Appellants have been granted to file their Notices of Appeal and their Appellant's Briefs[22];

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[18] Prosecutor's Urgent Motion for an Order that the "Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request to Appoint an Investigator" and the "Appellant's Preliminary Response to Prosecution Reply [sic] to Appellant's Request for further Time to Lodge Appeal Brief dated 16th August 2005 Be deemed as the Actual Replies of the Appellant and for rejection of the Requests for an extension of Time to File additional Replies", filed on 2 September 2005, para. 3.

[19] Code of Professional Conduct for Defence Counsel, Article 1 (1).

[20] Decision of 17 May 2005, p. 5.

[21] See *Emmanuel Ndindabahizi v. The Prosecutor*, ICTR-2001-71-A, Decision on «*Requête Urgente aux Fins de Prorogation de Délai du mémoire en Appel*», 5 April 2005 ("*Ndindabahizi* Decision"), p. 3.

[22] Decision of 17 May 2005, pp. 3-4.

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CONSIDERING ALSO that a Counsel, when accepting assignment as Lead Counsel in a case before the Tribunal, is under to give absolute priority to observe the time limits as foreseen on the Rules[23];

CONSIDERING that the unexpected unavailability of Lead Counsel due to holiday schedule and other professional duties does not amount to good cause within the meaning of Rule 116 of the Rules[24];

PURSUANT TO Rule 116 of the Rules;

HEREBY

DENY the Motion;

ORDER the Appellant to file his Notice of Appeal and his Appellant's Brief not later than 12 October 2005;

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

Done this 6th day of September 205, at The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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## *Order Directing the Prosecution to Investigate Possible Contempt and False Testimony 6 September 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Hassan Ngeze – Jean de Dieu Kamuhanda – Additional Evidence, Contempt of Court, Perjury, Witnesses recanting their testimonies – Conditional cooperation of the Registrar – Investigations ordered*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 77 (C) (i), 91 (B) (i) and 115*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Oral decision (Rule 115 Contempt of False Testimony), 19 May 2005 (ICTR-99-54)*

[23] *Ndindabahizi* Decision, p. 3.

[24] As explained above, one of the reasons for appointing Co-Counsel is to ensure the continued representation of the Appellant even when Lead Counsel is temporarily unavailable.

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*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Beqa Beqaj, *Judgement on Contempt Allegations, 27 May 2005 (IT-03-66)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED OF the confidential "Prosecutor's Urgent Motion Pursuant to Rules 39 (iv), 54, and 107, for an Order, Pursuant to Rule 77 (C) (i) and Rule 91 (B) (i). Directing the Prosecutor to Investigate Certain Matters, With a View to the Preparation and Submission of Indictments for Contempt and False Testimony, Respectively", filed on 25 July 2005 ("Motion") in which the Prosecution requests an order from the Appeals Chamber authorizing Special Counsel to investigate possible contempt and false testimony[1] such as the order issued in the *Kamuhanda* case[2];

NOTING the "Appellant Hassan Ngeze's Response to the Prosecutor's Urgent Motion Pursuant to Rules 39 (iv). 54; and 107, for an Order, Pursuant to Rule 77 (C) (i) and Rule 91 (B) (i), Directing the Prosecutor to investigate Certain Matters, With a View to the Preparation and Submission of Indictments for Contempt and False Testimony, Respectively", filed confidentially on 3 August 2005 ("Response") in which the Appellant Hassan Ngeze ("Appellant") argues that the order requested by the Prosecution is unnecessary and improper because of (i) the dissimilarities between the current case and the *Kamuhanda* Case : (ii) the completion of the investigation with regard to Witnesses AFX and EB; (iii) the failure of other witness to allege that the Commanding Officer of the United Nations Detention Facility ("UNDF") approached and offered a bribe to change testimony; (iv) the violation of the "principles of fair justice" which would arise from further investigation and (v) the waste of Tribunal resources which would result from further investigation[3];

NOTING the "Prosecutor's Reply to 'Appellant Hassan Ngeze's Response to the Prosecutor's Urgent Motion Pursuant to Rules 39 (iv), 54 and 107, for an Order; Pursuant to Rule 77 (C) (i) and Rule 91 (B) (i), Directing the Prosecution to Investigate Certain Matters, With a View to the Preparation and Submission of Indictments for Contempt and False Testimony, Respectively'", filed confidentially on 8 August 2005, in which the Prosecution submits that (i) the attempt to subvert the course of justice by interfering with – or attempting to corrupt – witnesses who testified at trial is a matter common to both the *Kamuhanda* Case and the Appellant's case, which justifies a similar treatment by the Appeals Chamber; (ii) the Motion did not suggest any implication of the UNDF staff and (iii) the Motion was triggered by the Registrar's request of such an order.

[1] Motion, para. 1.

[2] *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-99-54-A, Oral decision (Rule 115 Contempt of False Testimony), 19 May 2005. See also, T. 19 May 2005, pp. 50-51.

[3] Response, paras. 1, 4, 5, 7, 9.

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NOTING that in the Motion, the Prosecution has brought to the attention of the Appeals Chamber that the cooperation of the Registrar and his office with Special Counsel to the Prosecutor is conditional on such an order being issued by the Appeals chamber[4];

NOTING that under Rule 77 (C) (i) of the Rules of Procedure and Evidence of the Tribunal ("Rules"),

> "[w]hen a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may […] direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt";

NOTING ALSO that under Rule 91 (B) (i) of the Rules,

> "[if] a Chamber has strong grounds for believing that a witness has knowingly and willfully given false testimony, it may [...] direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony";

NOTING that the Appeals Chamber, when deciding upon the Appellant's three motions[5] requesting admission of additional evidence pursuant to Rule 115 of the Rules, deferred its decision on the motion relating to the alleged new evidence by Witness EB until an investigation is carried out by the Prosecution on the question of the reliability of this alleged new evidence[6];

NOTING that the Appeals Chamber also expressed concern "about the sudden influx of witnesses wishing to recant their testimonies at trial"[7] and directed the Prosecution to decide whether to bring charges of contempt of court for perjury[8];

CONSIDERING that the discrepancies between testimony at trial given by Witnesses MX and EB and their written statements appended to the Motions for Leave to Present Additional Evidence may amount to contempt of court and false testimony and that it is precisely in the interest of justice to shed light on the justifications underpinning such discrepancies given the "crucial importance of the truthful testimony of witnesses and their protection"[9];

PURSUANT TO Rules 77 (C) (i) and 91 (B) (i) of the Rules;

HEREBY DIRECTS the Prosecution

to investigate allegations made in relation to the Motions for Leave to Resent Additional Evidence, to the effect that the Appellant or persons purporting to act on the Appellant's behalf may have attempted to interfere with the Witnesses AFX and EB

[4] Motion, para. 4.

[5] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed confidentially on 4 April 2005, Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed on 11 April 2005 and Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule115) of Witness EB, filed confidentially on 25 April 2005 and corrected on 28 April 2005 ("Motions for Leave to Present Additional Evidence").

[6] Decision on Appellant Hassan Ngeze's Motions for Admission on Additional Evidence on Appeal, filed confidentially on 24 May 2005, para. 43.

[7] *Ibid.*, para. 44.

[8] *Ibid.*, para. 45.

[9] *Prosecutor v. Beqa Beqaj*, IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, para. 60.

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who had given evidence in proceedings before this Tribunal, with a view to the preparation and submission of an indictment for contempt;

to investigate discrepancies emanating between testimony at trial given by Witnesses AFX and EB and their written statements appended to the Motions for Leave to Present Additional Evidence and the consequent possibility of false testimony with a view to the preparation and submission of an indictment for false testimony;

to exercise his discretion to take the eventual steps and measures which it deems necessary and appropriate under the circumstances to carry out the investigations as ordered herein by the Appeals Chamber.

Done in English and French, the English version being authoritative

Done this 6th day of September 2006, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Decision on "Joseph Nzirorera's motion for access to appeal briefs" 9 September 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Access to confidential material from another case, Relevance of the material sought, Judicial Notice – Discretionary power of the Chamber to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and the integrity of confidential information – Additional measures ordered*

*International Cases cited :*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Tihomir Blaškić, *Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the* Prosecutor v. Tihomir Blaškić*, 16 October 2002 (IT-95-14); Appeals Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 19 July 2002 (IT-95-14/2); Appeals Chamber,* The Prosecutor v. Miroslav Kvočka et al., *Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003 (IT-98-30/1); Appeals Chamber,* The Prosecutor v. Mladen Naletilić and Vinko Martinović, *Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in* Prosecutor v. Naletilić and Martinović*" and "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005 (IT-98-34)*

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THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

BEING SEISED OF "Joseph Nzirorera's Motion for Access to Appeal Briefs", filed on 8 July 2005 ("Applicant" and "Motion", respectively), whereby the Applicant requests access to the confidential Appellants' Briefs filed by the appellants Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze ("Appellants") in the present case ("Appellants' Briefs");

NOTING the "Prosecutor's Response to 'Nzirorera's Motion for Access to Appeal Briefs'", filed on 25 July 2005 ("Response"), in which the Prosecution states that it does not oppose the Motion, save for some assertions relating to the standard to be applied for granting access to the briefs[1];

NOTING that in his Motion, the Applicant explains that, in the case *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*[2], the Prosecution submitted on 30 June 2005 a "Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts" ("Prosecution Motion for Judicial Notice"), wherein it requested that the Trial Chamber take judicial notice of six adjudicated facts from the Trial Judgement in the present case, which adjudicated facts it asserts are not contested in the Appellants' Briefs[3];

NOTING that, in support of his application, the Applicant argues that access to the Appellants' Briefs is necessary to verify the representations made in the Prosecution Motion for Judicial Notice[4];

CONSIDERING that a party is always entitled to seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown[5];

CONSIDERING that

> "access to confidential material [from another case] may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case"[6]

and that

> "it is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least good chance that it would"[7];

CONSIDERING that

[1] The Prosecution specially argues that since the underlying motion is not before the Appeals Chamber, the standard to be applied in deciding that motion is irrelevant to the question whether he should be granted access to the briefs, Response, paras. 1, 2.

[2] ICTR-98-44.

[3] Motion, paras. 2-5, referring to Prosecution Motion for Judicial Notice, para. 30 and Annex B, p. 1.

[4] Motion, para. 5.

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"the relevance of the material sought by a party may be determined by showing the existence of a *nexus* between the applicant's case and the case from which such material is sought"[8];

CONSIDERING that the Applicant has sufficiently identified the confidential material to which he seeks access;

CONSIDERING that access to the Appellants' Briefs is likely to assist the Applicant's case by enabling him to verify whether the six facts of which the Prosecution requests judicial notice and claims were adjudicated in the present case are not contested by the Appellants in their briefs;

CONSIDERING therefore, that the Applicant has demonstrated a legitimate forensic purpose in relation to the said confidential material;

NOTING that, although the Appellants' Briefs of Appellants Ferdinand Nahimana and Hassan Ngeze have already been filed[9], the Appellant Jean-Bosco Barayagwiza has not yet filed his Appellant's Brief[10];

NOTING that the Appellant Ferdinand Nahimana filed, on 1 October 2004, a public version of his Appellant's Brief and that therefore, leave from the Appeals Chamber for access to that material is not required;

FINDING that the Applicant shall, if deemed necessary, submit a new request to the Appeals Chamber to gain access to Jean-Bosco Barayagwiza's Appellant's Brief when it is filed;

NOTING that, in his Motion, the Applicant undertakes to respect the protective measures with regard to any protected witness whose identity might be disclosed in the Appellants' Briefs to which he is seeking access[11];

RECALLING that

"once [the] Appeals Chamber determines that confidential material filed in another case may materially assist an applicant, the Appeals Chamber shall deter-

[5] *Prosecutor v. Tihomir Blaškić,* IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Tihomir Blaškić,* 16 May 2002 ("*Blaškić* Decision"), para. 14; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002 ("*Kordić and Čerkez* Order") p. 4; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003 ("*Kvočka et al.* Decision"), para. 5; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Decision on "Slobodan Praljak's Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Naletilić and Martinović*" and "Jadranko Prlić's Notice of Joinder to Slobodan Praljak's Motion for Access", 13 June 2005 ("*Naletilić and Martinović* Decision"), p. 5.

[6] *Blaškić* Decision, para. 14; *Kordić and Čerkez* Order, p. 4.

[7] *Kvočka et al.* Decision, para. 5.

[8] *Blaškić* Decision, para. 15; *Naletilić and Martinović* Decision, p. 6.

[9] Filed on 27 September 2004 and 2 May 2005 respectively.

[10] Barayagwiza's amended Notice of Appeal and new Appellant's Brief are due not later than 12 October 2005. *See* Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005.

[11] Motion, para. 7.

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mine which protective measures shall apply to said material as it is within the Appeals Chamber's discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and the integrity of confidential information"[12];

FOR THE FOREGOING REASONS,

GRANTS the Motion with respect to the Appellant's Brief filed by Hassan Ngeze[13];

ORDERS that :

(a) the Prosecution, Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze apply to the Appeals Chamber for additional protective measures, if required, within fifteen working days from this decision and identify, which, if any, portions of Hassan Ngeze's Appellant's Brief contain confidential information and must, therefore, be redacted;

(b) where no redactions or additional protective measures are requested within fifteen working days, the Registry shall give access to Hassan Ngeze's Appellant's Brief to the Applicant;

(c) where redactions or additional protective measures are requested within fifteen working days, the Registry shall withhold Hassan Ngeze's Appellant's Brief until the Appeals Chamber has issued a decision on the request :

(a) if the Appeals Chamber denies the request(s), the Registry shall be ordered to provide the Applicant, his Counsel, and any employees who have been instructed or authorised by his Counsel, with Hassan Ngeze's Appellant Brief to which the Appeals Chamber grants access;

(ii) if the Appeals Chamber grants the request(s), the party or parties applying for redactions shall be ordered to proceed with the authorised redactions or additional protective measures and, thereafter, shall provide the redacted Hassan Ngeze's Appellant's Brief to the Registry for provision to the Applicant, his Counsel and any employee who have been instructed or authorised by his Counsel.

(d) Hassan Ngeze's Appellant's Brief provided by the Registry shall remain subject to protective measures previously imposed by the Trial Chamber.The Applicant, his Counsel and any employees who have been instructed or authorised by the Applicant's Counsel to have access to Hassan Ngeze's Appellant's Brief shall not, without express leave of the Appeals Chamber finding that third-party disclosure is absolutely necessary for the preparation of the Applicant's case :

(i) disclose to any third party, the names of witnesses, their whereabouts or any information which would enable them to be identified and would breach the confidentiality;

(ii) contact any witness whose identity was subject to protective measures without first obtaining leave of the Appeals Chamber to do so upon dem-

[12] *Blaškić* Decision, para. 29; *Naletilić and Martinović* Decision, para. 7.

[13] Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), filed confidentially on 2 May 2005.

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onstrating that the witness may materially assist the Applicant's case and that such assistance is not otherwise reasonably available to him.

If, for the purpose of preparing his case, the Applicant requests and obtains from the Appeals Chamber the permission to disclose to third parties Hassan Ngeze's Appellant's Brief, any person to whom disclosure of Hassan Ngeze's Appellant's Brief in this case is made shall be informed that he or she is forbidden to copy, reproduce or publicise, in whole or in part, any part of the brief, or to disclose it or any information contained therein to any other person, and that he or she must return it to the Applicant or his Counsel as soon as it is no longer needed for the preparation of the case.

For the purposes of the foregoing paragraphs, third parties exclude : (i) the Applicant, (ii) Applicant's Counsel and any employees who have been instructed or authorised by the Applicant's Counsel to have access to the confidential material, (iii) personnel from the Tribunal, including members of the Prosecution.

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

Dated this 9th day of September 2005, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Decision on Hassan Ngeze's Application for Review of the Registrar's Decision of 12 January 2005 14 September 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Erik Møse, Presiding Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Human Rights, Right to mariage and to family life, Limitation to the right of inmates to consummate marriages, Interpretation of an Accused's right, Lack of legal basis, Law of the host nation, National Practice, Foreign Case-Law, Case-Law of Human Rights International Jurisdiction – Procedural equality – Authority and supervision over the Registrar of the President, Power of the President to review a Registry decision, Interests of justice – Application denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 58, 61, 63 and 66; Statute, art. 16 (1), 20 (1) and 23; Rules of Procedure and Evidence of the I.C.T.Y.; Statute of the I.C.T.Y.; Rules of Procedure and Evidence, the Detention Rules, the Regulations to Govern the Super-*

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*vision of Visits to and Communication with the Detainees of the I.C.T.Y.; House Rules for Detainees of the I.C.T.Y.*

*Directive for the Registry art. 8 (3) (c); Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal*

*African Charter on Human and Peoples Rights, art. 18*

*American Convention on Human Rights, art. 17 (2)*

*European Convention of Human Rights, art. 8, 12, 14 and 19*

*International Covenant on Civil and Political Rights, art. 17 and 23*

*Standard Minimum Rules for the Treatment of Prisoner (Approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977), art. 37, 51 and 79*

*Universal Declaration of Human Rights, art. 16 (1) and 29 (2)*

*UN GA Res. 45/111, 68th Plenary meeting, A/RES/45/111, 14 December 1990, Annex, Basic Principles for the Treatment of Prisoners*

*International and national Cases cited :*

*E.C.H.R. :* Campbell v. UK, *6 May 1978, nos 7819/77;* X and Y v. Switzerland, *3 October 1978, n° 8166/78;* Hamer v. UK, *13 December 1979, n° 7144/75;* Draper v. UK, *10 July 1980, n° 8186/78;* X v. UK, *8 October 1982, n° 9054/80;* McCotter v. UK, *1st September 1993, n° 18632/91;* E.L.H. and P.B.H. v. the United Kingdom, *22 October 1997, nos 32094/96 and 32568/96;* Kalashnikov v. Russia, *18 September 2001, n° 47095/99;* Aliev v. Ukraine, *29 April 2003, n° 41220/98*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Joseph Nzirorera, *The President's Decision on review of the decision of the Registrar withdrawing Mr. Andrew McCartan as lead counsel of the accused Joseph Nzirorera, 13 May 2002 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Pauline Nyiramusuhuko and Arsène Shalom Ntahobali, *The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decisions pertaining to the Assignment of an Investigator, 13 November 2002 (ICTR-97-21); Trial Chamber,* The Prosecutor v. Nahimana et al., *Judgement, 3 December 2003 (ICTR-99-52-T); Appeals Chamber,* Nahimana, Barayagwiza and Ngeze v. The Prosecutor, *Decision on Hassan Ngeze's Motion Appealing the Registrar's Denial of Marriage Facilities, 20 January 2005 (ICTR-99-52)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Dusko Tadić, *Judgement, 15 July 1999 (IT-94-1)*

*Israel : High Court of Justice,* Haim Lewis Weil v. State of Israel and others, *9 August 1987, 114/86, PD 41 (3), 477; Supreme Court,* Yigal Amir v. Prison Authorities, *7 March 2005, Decisions nos 4714/04 and 5614/04*

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*United States of America : United States Court of Appeals, Second Circuit,* Hernandez v. Coughlin, *3 March 1994, 18 F.3d at 133 (2nd Cir); Federal District Court,* Lyons v. Gilligan, *1974, 382 F. Supp. 198 (1974); United States Court of Appeals, Second Circuit, United States ex rel* Wolfish v. Levi, *24 January 1978, 573 F.2d 118*

THE PRESIDENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA;

BEING SEIZED OF "Appellant Hassan Ngeze's Application for Review of the Registrar's Decision of 12.01.05 Denying Permission to Get Married at the ICTR Premises Pending the Determination of his Appeal", filed on 28 January 2005 ("Application");

CONSIDERING the "Registrar's Decision Pursuant to Article 8 (3) (C) on the Request for Marriage and Other Reliefs", filed on 12 January 2005;

HEREBY DECIDES the Application.

## Introduction

1. Hassan Ngeze was convicted on 3 December 2003 for, amongst other crimes, genocide[1]. His conviction and sentence are presently under appeal. He seeks review of the Registrar's decision of 12 January 2005. This decision did not oppose Ngeze's request to get married while in the United Nations Detention Facility ("UNDF") in Arusha. However, his request for consummation of marriage and subsequent conjugal visits after the wedding was far-reaching and beyond the scope of the Registrar's authority as described by the applicable ICTR provisions. While the right to marry is recognized by international human rights instruments, elements that ordinarily form part of married life may be subject to limitation due to incarceration. No uniform national practice exists concerning the right of inmates to consummate marriages while they are under incarceration, and no such right exists under the domestic law of the host country, Tanzania.

## Submissions

2. In his Application, Ngeze maintains that the Registrar's decision contravenes human rights instruments and national laws. In particular, he submits that the law of the host nation recognizes that a marriage is only complete upon consummation. He further argues that as the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal ("the Detention Rules") allows visits by a spouse, by implication, they empower the Registrar to permit inmates to marry.

3. Ngeze also submits that the Registrar erred in finding that he lacked the legal authority to ensure conjugal visits absent an amendment to the Rules. The Registrar ought to have adopted a liberal rather than restrictive interpretation of the Detention

[1] *The Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003.

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Rules. The Registrar's decision was discriminatory as it denied ICTR detainees access to detention facilities which are provided to detainees before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Alternatively, it is contended that the Registrar wrongly held that he lacked the power to transfer Ngeze to the United Nations Detention Unit in The Hague. The Registrar is also alleged to have failed to pay adequate regard to Ngeze's status as an incarcerated person pending appeal.

## Deliberations

*Admissibility*

4. Pursuant to Rules 19 and 33 (A) of the Tribunal's Rules of Procedure and Evidence ("the Rules", the President exercises authority and supervision over the Registrar. As the Registrar enjoys a margin of discretion in conducting the day to day administration of the Registry without undue interference by presidential review, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. The Tribunal case law has established that an application for review by the President of a Registry decision on the basis that it is unfair procedurally or substantively is admissible if the Applicant has a protectable right or interest, or if it is otherwise in the interests of justice. In this regard, the decision sought to be challenged must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy[2].

5. The present request is found to be admissible, given the widespread recognition of the right to marry and to family life in several international human rights instruments and case law. The salient issue in this case is not the existence of these rights but their scope of application. The question whether ICTR detainees are entitled to marry, to consummate such marriages, and to conjugal visits while in the custody of the Tribunal has not to date been subject to presidential review.

*ICTR Provisions*

6. The constituent instruments of the Tribunal do not contain any provisions relating to family life. For instance, Articles 16 (1), 20 (1) and (3) of the Statute, Rules 58,

[2] While the circumstances in which the President may exercise that authority and supervision are not expressly set out in the Rules, the Tribunal's jurisprudence has articulated the power vested in the President to review the Registrar's decisions. See *Prosecutor v. Joseph Nzirorera,* "The President's Decision on review of the decision of the Registrar withdrawing Mr. Andrew McCartan as lead counsel of the accused Joseph Nzirorera", Case No. ICTR-98-44-T, 13 May 2002, p. 3; *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, "The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decisions pertaining to the Assignment of an Investigator", Case No. ICTR-97-21-T, 13 November 2002, para. 5 (authority based on inherent power of judicial bodies to ensure fairness when individual rights or protected interests are at issue). See also *Nahimana, Barayagwiza and Ngeze v. The Prosecutor,* "Decision on Hassan Ngeze's Motion Appealing the Registrar's Denial of Marriage Facilities", Appeals Chamber, Case No. ICTR-99-52-A, 20 January 2005 (declaring Applicant's motion before the Appeals Chamber to be improper and that appropriate recourse was instead presidential review of the Registrar's decision).

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61, 63 and 66 of the Detention Rules, and Article 8 (3) (C) of the Directive for the Registry are silent on the right to marry, to consummate such marriages, and to conjugal visits. More specifically, the provisions relating to prison visits do not regulate these matters[3]. This lack of an explicit legal basis led the Registrar to hold that he was not empowered to grant Ngeze's requests[4]. In my view, the silence of the ICTR provisions does not exclude the possibility that these rights be recognized. The fact that conjugal visits are allowed under the similar provisions of the ICTY confirms this interpretation[5]. Consequently, the Application raises the question whether other legal provisions confer these rights.

*Human Rights Instruments*

7. Human rights declarations and conventions adopted at the universal and regional level establish the right to family life, to marry and to found a family. Article 16 (1) of the Universal Declaration of Human Rights states that men and women of full age have the right to marry and to found a family. However, this right is not absolute and may be limited under the general provision in Article 29 (2)[6]. More precise rules concerning these rights are found in Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR), Articles 8 and 12 of the European Convention of Human Rights (ECHR), and Article 17 (2) of the American Convention on Human Rights. In the African Charter on Human and Peoples Rights, family life is protected in Article 18[7]. None of these provisions contain any formulations concerning consummation of marriage or conjugal visits.

8. As the Registrar's decision correctly noted, the jurisprudence concerning these rights in relation to detainees is still evolving. The case law of the Human Rights Committee concerning the ICCPR does not seem to have addressed the issues raised by the present Application. The European Commission and Court of Human Rights have generally not been receptive to expanding the scope of ECHR Article 12. In *Hamer v. UK* and *Draper v. UK*, referred to in the Registrar's decision, the Commission found that this provision gives prisoners the right to marry, and required the State to mitigate or eliminate any obstacles which would prevent parties from entering into an otherwise lawful marriage. However, on the question of whether inmates marrying in prison would enjoy any right to consummation, the Commission's approach was less facilitative. It noted that

[3] Ngeze has not cited any authority to support the view that visitation rights and conjugal rights are synonymous. International and national law suggest otherwise : *see* text below (paras. 7 to 13).

[4] Registrar's decision, paras. 4, 5, 18.

[5] The ICTY Statute, the Rules of Procedure and Evidence, the Detention Rules, the Regulations to Govern the Supervision of Visits to and Communication with the Detainees, and the House Rules for Detainees are all silent on the issue of conjugal visits.

[6] Article 29 (2) provides that limitations on the rights and freedoms recognised "must be determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

[7] Ngeze has also invoked Article 19 of the Charter. This provision establishes the general principle of equality and does not provide any guidance in the present context.

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> "[t]he essence of the right to marry … is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter a marriage in which they cannot cohabit"[8] .

9. Of particular interest is a judgment rendered by the European Court of Human Rights in 2003 relating to ECHR Article 8. In *Aliev v. Ukraine,* which related to a prisoner denied sexual contact with his wife during her visits, the Court stated :

> [W]hile detention is by its very nature a limitation on private and family life, it is an essential part of a prisoner's right to respect for family life that prison authorities assist in maintaining effective contact with his or her close family members … At the same time, the Court recognises that some measure of control of prisoners' contacts with the outside world is called for and is not of itself incompatible with the Convention …Whilst noting with approval the reform movements in several European countries to improve prison conditions by facilitating conjugal visits, the Court considers that the refusal of such visits may for the present time be regarded as justified for the prevention of disorder and crime within the meaning of … [Article 8 (2)] of the Convention. … In the circumstances of the present case the Court thus finds that the restriction of the applicant's wife's visits was proportionate to the legitimate aim pursued. … There has accordingly been no violation of Article 8 of the Convention[9].

10. According to this judgment, which was not mentioned in the Registrar's decision, it may be laudable to facilitate conjugal visits where this is practicable. However, there is not at present a general obligation to do so under the ECHR.

11. No case law suggests a different interpretation of the other human rights conventions. This is supported by two further considerations. First, even those international legal instruments which specifically address the rights of prisoners are silent on consummation and conjugal visits. For instance, the Standard Minimum Rules for the Treatment of Prisoners refers to the right of prisoners to communicate with their family at regular intervals, both by correspondence and by receiving visitors, but not to conjugal visits as such (Article 37). Similarly, mention is made of the benefits of prisoners' maintaining all desirable relations with family, again without referring to conjugal visits (Articles 51 and 79)[10].

12. Second, national practice on the issue of conjugal visits is far from uniform. There is considerable diversity according to factors such as the level of resources available to the national prison authorities in question, differing national perspectives on penal policy and security imperatives, as well as budgetary and administrative constraints. It is not possible to discern a general practice in this area. The Registrar's decision noted a number of decisions issued by courts in the United States of America

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[8] *Hamer v. UK, No 7144/75,* 24 DR 5 at 16 (1979) Com. Rep.; CM Res DH (81) 5; *Draper v. UK, No 8186/78,* 24 DR 72 at 81 (1980) Com Rep; CM Res DH (81) 4.

[9] *Aliev v. Ukraine, No 41220/98,* Judgment of 29 April 2003, paras. 187-190. See also, to the same effect, *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997, Decisions and Reports 91, p. 61; and *Kalashnikov v. Russia*, no. 47095/99, Court decision of 18 September 2001.

[10] Approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. See also UN GA Res. 45/111, 68th Plenary meeting, A/RES/45/111, 14 December 1990, Annex, *Basic Principles for the Treatment of Prisoners*.

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which recognise that although an inmate retains those rights that are not inconsistent with his status as a prisoner or with legitimate criminological objectives, the right to conjugal visits may be circumscribed[11]. A similar balancing process is also evident in the practice of other States[12].

13. The legal conclusion is therefore that international instruments and practice has not attained sufficient specificity to compel the conclusion that the Tribunal is obliged to facilitate the consummation of marriages and conjugal relationships of persons serving sentences for international crimes. Consequently, refusal to grant conjugal visits does not amount to a departure from internationally recognized minimum standards in this area.

*Other Submissions (Host Country, Equal Treatment, etc)*

14. Hassan Ngeze's contention that the Registrar failed to take account of Tanzanian national law must also fail. His argument in this respect is understood to allege that as a marriage, under Tanzanian law, requires consummation in order to be valid, the UNDF is, as part of its obligation to allow this marriage, therefore also by implication obliged to allow its consummation[13]. As noted in the Registrar's decision, there are

[11] Registrar's decision, paras. 14-15 (citing inter alia *Hernandez v. Coughlin* 18 F.3d at 133 (2nd Cir) (finding that although an inmate's right to marriage is constitutionally protected, the constitution does not create any protected guarantee to conjugal visitation privileges while incarcerated, that a general right to procreate is not inconsistent with a holding that there is no right to conjugal visits in prison, and that the rights of marital privacy, like the right to marry and procreate are necessarily and substantially abridged in a prison setting)). See also *Lyons v. Gilligan,* 382 F. Supp. 198 (1974), at 201-202 : "The absence of conjugal visiting in prison is not excessive punishment in itself or disproportional to plaintiff's crimes. It is merely a customary concomitant of the punishment of incarceration"; and *United States ex rel Wolfish v. Levi,* 439 F. Supp. at 143, per *Frankel J and Tarlton v. Clark,* 441 F.2d 384 (1971) at 203 : "New approaches to family visiting incorporating conjugal visiting are being taken in an increasing number of state prisons in our nation. While this trend is one of the indicators of whether "evolving standards of decency" have yet made deprivation of conjugal visiting a constitutional violation, this evolving reform in penological practices is not translatable into a … righ".

[12] See eg Haim Lewis Weil v. State of Israel and others, High Court of Justice 114/86, PD 41 (3), 477 (9 August 1987), and Israeli Supreme Court Decision in Yigal Amir v. Prison Authorities, Decision 4714/04 and Decision 5614/04, 7 March 2005, paras. 18-35 (dismissing an appeal from an administrative decision of the prison authorities' denial of a request for conjugal visits with fiancée).

[13] The validity of a marriage has historically been judged by the place where it is celebrated. (See e.g. Cheshire and North's Private International Law, 12th edn., Butterworths, 1992, at p. 572). However, it does not follow that the Tribunal must allow Ngeze to carry out all requirements of Tanzanian law to the letter. Lawful incarceration inevitably limits the exercise of certain rights. Concerning conjugal visits, the ECHR case law has established that detainees will be unable to exercise their right to marry in an identical fashion to other citizens. See *X and Y v. Switzerland,* No 8166/78, 13 DR 241 (1978), noting that there is no right of prisoners to conjugal relations with their spouse, even if the trend in certain countries may be in this direction. Where consummation and cohabitation are impracticable, it is for the parties to decide whether or not they wish to marry in such circumstances, rather than there being any particular obligation on the part of the relevant authorities to render the right to marry more meaningful. (See eg *the Hamer and Draper cases,* above, footnote 8).

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no provisions for consummation of marriages and conjugal visits for prisoners in Tanzania[14].

15. Hassan Ngeze contends that the Registrar's refusal to permit consummation of his marriage and conjugal visits thereafter denies him rights to which similarly-placed detainees in The Hague are entitled. This aspect of the Application is understood to allege, in substance, a breach by the Registrar of Article 20 (1) of the Tribunal Statute, which provides that all persons shall be equal before the Tribunal.

16. Article 20 focuses on procedural equality[15]. It is difficult to see how it can form a basis for comparing conditions of detention in Arusha and The Hague, respectively. Human rights provisions prohibiting discrimination do not mandate identical treatment between all individuals in the exercise of protected rights where objective and reasonable conditions exist to justify differential treatment[16]. In this regard, there are observable differences between the detention regimes in The Hague and Arusha. One such difference is that there are no facilities for conjugal visits at the UNDF in Arusha. The construction of such facilities would have budgetary and administrative implications. Another difference is that conjugal visits are permitted in Dutch prisons but not in Tanzanian prisons. The Tribunal's treatment of Ngeze therefore cannot be said to be discriminatory.

17. The ECHR case law has established that even if a State has an obligation to assist serving prisoners to maintain contact with their families[17], only in exceptional circumstances will that duty extend to transferring a prisoner from one jail to another[18]. The Registrar was accordingly under no duty to facilitate consummation or conjugal visits by acceding to Ngeze's request that he be transferred to The Hague. Such a transfer would also not be without budgetary implications for the Tribunal.

18. Nor did the Registrar commit any error by not according particular significance to the fact that Hassan Ngeze is currently at the UNDF pending appeal. The possibility that his conviction or sentence may in future be revised on appeal does not, as such, require a modification of the conditions of his detention.

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[14] Registrar's decision, para. 16; Application, Annex V, 1991/A. As previously noted, conjugal visits are not part of internationally recognized minimum standards in this area (see paras. 7 to 13, above). Accordingly, Tanzania is in no way obliged by international law to change its national practice in this area.

[15] See *e.g. Prosecutor v. Duško Tadić,* Judgement, Appeal Chamber, Case n° IT-94-1-A, 15 July 1999, paras. 43-56.

[16] For the purposes of ECHR Article 14, a difference in treatment is discriminatory if it "has no objective and reasonable justification, that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised." (See *inter alia Camp and Bourimi v. The Netherlands,* Judgment of 3 October 2000, para. 37. See also *Thlimmenos v. Greece* [GC], Judgment of 6 April 2000, para. 44 ("The right under Article 14 … is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification"). As for the ICCPR, *see B.d.B. v. Netherlands,* Human Rights Committee, Doc. A/44/40, p. 286 ("Article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results"). The relevant authorities enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *eg Karlheinz Schmidt v. Germany,* Judgment of 18 July 1994, Series A, no. 291-B, pp. 32-33).

[17] See *e.g. X v. UK No 9054/80,* 30 DR 113 (1982) and *McCotter v UK No 18632/91,* 15 EHRR CD 98 (1993).

[18] *Campbell v. UK Nos 7819/77,* Decision, 6 May 1978, paras. 30-32, unreported.

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**CONCLUSION**

19. Detainees at the UNDF have the right to marry. However, neither the ICTR legal provisions, human rights conventions nor other international instruments require consummation of marriage and conjugal visits during detention. Therefore, the Registrar's decision was not in violation of any international legal norms. The Registrar's decision does not amount to any unfairness which calls for presidential intervention.

FOR THE ABOVE REASONS, THE PRESIDENT

DENIES the Application.

Arusha, 14 September 2005.

[Signed] : Erik Møse

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## *Decision on Hassan Ngeze's "Request of an Extremely Urgent Status Conference Pursuant to Rule 65* Bis *of the Rules of Procedure and Evidence" 20 September 2005 (ICTR-99-52-A)*

Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

*Hassan Ngeze – Restrictive measures in the UNDF, Content of a Status Conference – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 65* bis *and 65* bis *(B)*

I, Andrésia Vaz, Pre-Appeal Judge in this case[1],

BEING SEIZED OF the "Request for an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", filed by Hassan Ngeze ("Appellant") on 22 August 2005 ("Motion"), in which the Appellant requests a status conference to challenge the restrictive measures to which he has been subjected by

[1] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

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the Commanding Officer of the United Nations Detention Facility ("Commanding Officer" and "UNDF", respectively);

NOTING the "Prosecutor's response to 'Request for an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence'", filed on 29 August 2005 ("Prosecution" and "Response", respectively), in which the Prosecution opposes the Motion because (i) the restrictive measures "cannot impede, in any way, the expeditiousness of the appeal proceedings"[2]; (ii) the challenge to the restrictive measures has already been referred to and rejected by the President pursuant to the relevant procedure[3]; (iii) the restrictive measures only involve private visits and communication and hence do not prevent the Appellant from preparing his pending appeal effectively[4];

NOTING the "Registrar's submissions under Rule 33 (B) of the Rules of Procedure and Evidence on Hassan Ngeze's Request of an Extremely Urgent Status Conference pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", filed on 2 September 2005 ("Registrar" and "Registrar's Submissions", respectively), in which the Registrar also opposes the Motion as (i) "the matters on which [the Motion] is premised do not fall in the preview of matters that should be covered by a Status Conference"[5]; (ii) the Appellant has not exhausted the administrative procedure[6]; (iii) the Appellant should move the Appeals Chamber by way of motion rather than by a request for a status conference[7];

NOTING the "Appellant Hassan Ngeze's Reply to the Prosecutor's response to Request for an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", filed on 5 September 2005 ("Reply"), in which the Appellant puts forward the "mental torture" inflicted on him by the UNDF administration as a result of his Motion, the lack of any written clarification from the Commanding Officer regarding the extension of the restrictive measures and of the lack of accountability of the Commanding Officer[8];

NOTING ALSO the "Reply to the Registrar's submissions under Rule 33 (B) of the Rules of Procedure and Evidence on Hassan Ngeze's Request of an Extremely Urgent Status Conference pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", filed by the Appellant on 12 September 2005 ("Reply to the Registrar's Submission");

NOTING that pursuant to Rule 65 *bis* (B) of the Rules of Procedure and Evidence, "the Appeals Chamber of an Appeals Chamber Judge may convene a status conference" to organize exchanges between the parties so as to ensure expeditious proceedings;

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[2] Response, para. 8.

[3] Response, para. 9, referring to Rules 64, 82, and 83 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal and to the Request for Reversal of the Prohibition of contact, 1 August 2005.

[4] Response, paras. 10, 11.

[5] Registrar's Submissions, para. 5. More specifically, the Registrar contends that the Motion does not "question juridical or semi juridical orders, that it does not involve exchanges between the parties and that the Registrar is not a party to proceedings.

[6] Registrar's Submissions, paras. 6-7.

[7] Registrar's Submissions, para. 8.

[8] Reply, paras. 2-8.

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NOTING that the Appellant has seized the Appeals Chamber to review the restrictive measures he complains of*[9];

CONSIDERING that the Appellant has not shown that a status conference to discuss restrictive measures he complains of would be useful to ensure that his case proceeds without any further unnecessary delay;

FINDING therefore, that it would not be helpful to convene a status conference with regard to the Motion,

HEREBY denies the Motion.

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

Dated this 20th day of September 2005, at The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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## *Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator 4 October 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shaha buddeen; Florence Ndepele Mwahcande Mumba; Fausto Pocar; Andrésia Vaz

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Right to be effectively represented by a competent counsel – Function of an appeal, Corrective measure in Appeal, Investigations at the appeal stage, Exceptional circumstances, Miscarriage of Justice, Due diligence, Unavailable information – Extension of time, Good Cause, Interests of Justice – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 91 and 115; Statute, art. 24; Statute of the I.C.T.Y., art. 25*

*Practice Direction on the Length of Briefs and Motions on Appeal; Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal*

* The end of the Sentence was missing in the original Decision.

[9] Appellant Hassan Ngeze's Request to Grant Him Leave to Bring his Complaints to the Appeals Chamber when the Normal Procedure [*sic*] under the Rules of Detention Fails to Offer Any Solution, filed on 29 August 2005.

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*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1s June 2001 (ICTR-96-4); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and 96-17); Appeals Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 (ICTR-99-52); Appeals Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 (ICTR-99-52); Appeals Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005 (ICTR-99-52)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Dražen Erdemović, *Judgement, 7 October 1997 (IT-96-22); Appeals Chamber,* The Prosecutor v. Dusko Tadić, *Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, 15 October 1998 (IT-94-1); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić et al., *Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken pursuant to Rule 94 (B), 8 May 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Mornir Nikolić, *Decision on Motion to Admit Additional Evidence, 9 December 2004 (IT-02-60/1); Appeals Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Judgement, 17 December 2004 (IT-95-14/2); Appeals Chamber,* The Prosecutor v. Stanislav Galić, *Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005 (IT-98-29)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEISED OF the "Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator", filed confidentially on 12 August 2005 ("Motion to Appoint an investigator")[1], in which Jean-Bosco Barayagwiza ("Appel-

[1] The Appeals Chamber reminds the Appellant that pursuant to paragraph 3 of the Practice Direction on the Length of Briefs and Motions on Appeal, issued on 16 September 2002 as amended ("Practice Direction"), motions are limited to 10 pages or 3,000 words. See also *Prosecutor v. Ferdinand Nahimana et al.,* ICTR-99-52-A, "Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief", 6 September 2005 ("Decision on Extension of Time"), p. 3, footnote 5. The Appeals Chamber notes that the Motion to Appoint an Investigator exceeds the limit by 20 pages and that no exceptional circumstances were show in advance to the Appeals Chamber justifying a request for enlargement as stipulated by paragraph 5 of the Practice Direction. The Appeals Chamber will consider the Motion in its full length in this instance but may not do so in the future if the Appellant does not conform with the Practice Direction.

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lant") requests the Appeals Chamber to order the Registrar to appoint an investigator to investigate allegations and evidence presented at trial along with the credibility of certain Prosecution witnesses, in order to present additional evidence to the Appeals Chamber pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules")[2];

NOTING the "Prosecutor's Response to 'Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator'", filed on 22 August 2005 ("Response"), in which the Prosecution opposes the Motion to Appoint an Investigator;

NOTING the "Appellant's Preliminary Response to Prosecution Reply to Appellant's Request to Appoint Investigator", filed on 29 August 2005 ("Reply")[3];

NOTING ALSO that in the Reply the Appellant requests five days to submit a further document consisting of a "full reply" to the Response[4];

BEING SEISED ALSO OF a motion in which the Prosecution requests the Appeals Chamber to consider the Reply as definitive and to reject the Appellant's request for an extension of time to file a further reply[5];

CONSIDERING that, if the Appellant wished to seek an extension of time to file a "full" reply, he should have first filed a motion to that effect before the deadline for filing a reply rather than file, out of time, a "preliminary reply" requesting more time to file a "full reply"[6];

CONSIDERING that it is in the interest of justice to avoid any further delay to the proceedings in this case;

CONSIDERING that the Appellant has not shown good cause for an extension of time to file a "full reply";

CONSIDERING ALSO that the Reply already addresses the arguments of the Prosecution in its Response;

FINDING, therefore, that the Appellant need not be given a further five days to file a further Reply;

NOTING that in support of his Motion to Appoint an Investigator, the Appellant alleges a "combination of wholly exceptional circumstances"[7], which, he contends, justify the Appeals Chamber ordering the Registrar to appoint an investigator[8];

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[2] Motion to Appoint an Investigator, paras. 1,36,37.

[3] The Appeals Chamber notes that pursuant to paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, issued on 16 September 2002 as amended («Practice Direction on Appeal Proceedings»), the Appellant's Reply was filed out of time. Nevertheless, the Appeals Chamber will recognize the Reply as validly filed under paragraph 16 of the Practice Direction on Appeal Proceedings

[4] Reply, para. 1.

[5] "Prosecutor's Urgent Motion for an Order that the 'Appellant's Preliminary Response to Prosecution Reply *[sic]* to Appellant's Request to Appoint an Investigator' and the 'Appellant's Preliminary Response to Prosecution Reply *[sic]* to Appellant's Request for Further Time to Lodge Appeal Brief dated 16th August 2005' Be Deemed as the Actual Replies of the Appellant And For Rejection of the Requests for an Extension of Time to File Additional Replies", filed on 2 September 2005 ("Motion for Denial of Extension of Time to Submit the Reply"), para. 3.

[6] Decision on Extension of Time, p. 4.

[7] He puts forward specially the late appointment of a Counsel and the disengagement of the Appellant from his trial. He also cites the incompetence of his Counsel throughout the trial and the Trial Chamber's failure to direct the Counsel to mount an effective Defence, both of which deprived the Appellant of his "right to be effectively represented by a competent counsel". See Motion, paras. 2,5-7, 12-34.

[8] *Ibid.,* para. 39.

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RECALLING the jurisprudence of the Tribunal that an appeal pursuant to Article 24 of the Statute of the Tribunal is not a *de novo* trial[9], and that the appeal is not an opportunity to remedy any "failures or oversights" by a party during the pre-trial and trial phases[10];

CONSIDERING that Rule 115 of the Rules provides for a corrective measure and that its purpose is to deal

> "with the situation *where a party is in possession of material* that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial"[11];

CONSIDERING that when applying Rule 115 of the Rules

> "[t]he applicant's duty to act with reasonable diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial chamber"[12];

CONSIDERING that investigations should be made during the pre-trial and trial stages, and that the Registrar will generally not fund investigations at the appeal stage[13];

CONSIDERING, however, that

> "in an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage if the moving party could show, for example, that it is in possession of specific information that needs to be further investigated in order to avoid a miscarriage of justice (in other words, the investigation at the appeal stage is not a fishing expedition), and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence"[14];

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[9] *Prosecutor v. Akayesu,* ICTR-96-4-A, Judgement, 1 June 2001, para.. 177; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* ICTR-96-10-A and ICTR 96-1 7-A, Judgement, 13 December 2004, para. 13. See also, *e.g.*. Article 25 of the Statute 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, *Prosecutor v. Tadic,* IT-94-1-A, Decision on Appellant's Motion for the Extension of the The-Limit and Admission of Additional Evidence, 15 October 1998, paras. 41,42 *("Tadic* Rule 115 Decision"); *Prosecutor* v. *Kordic and Cerkez,* IT-95-14/2-A, Judgement, 17 December 2004, paras. 13,2 1.

[10] *Prosecutor* v. *Drazen Erdemovic,* IT-96-22-A, Judgement, *7* October 1997, para. 15.

[11] *Prosecutor v. Ferdinand Nahimana et al.,* ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005 ("Decision on Ngeze's Motion for Investigation"), p. 3; *Prosecutor v. Ferdinand Nahimana et al.,* ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 ("Decision on Nahimana's Motion for Assistance"), para.. 2; *Prosecutor* v. *Zoran Kupreskic et al.,* IT-95-16-A, Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001, para. 5 (emphasis added).

[12] *Prosecutor* v. *Galic,* IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005, para. 13; *Tadic* Rule 115 Decision. para. 47; *Prosecutor* v. *Mornir Nikolic,* IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, para. 21.

[13] T. 9 March 2005 p. 9.

[14] Decision on Ngeze's Motion for Investigation, pp. 3, 4; Decision on Nahimana's Motion for Assistance, para. 3.

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FINDING that Appellant has not established that his is an exceptional case justifying ordering the Registrar to appoint an investigator at the appeal stage in that he does not show that he has specific information that needs to be further investigated in order to avoid a miscarriage of justice, or that this specific information was not available to him at trial or could not have been discovered through the exercise of due diligence, particularly in view of the Appellant's refusal to take part in the proceedings and to cooperate with appointed Counsel;

NOTING that, in the Reply, the Appellant submits "that the Chamber is entitled to take into account Article 91"[15] of the Rules but that the Appellant does not explain the manner in which this Rule could justify the relief sought;

CONSIDERING that in any event, the mere reference to Rule 91 of the Rules does not justify ordering the Registrar to appoint an investigator at the appeal stage;

HEREBY

GRANTS the Motion for Denial of Extension of Time to Submit the Reply;

DISMISSES the Motion to Appoint an Investigator.

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

Done this 4th day of October 2005, At The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Decision on "Joseph Nzirorera's second motion for access to appeal briefs" 27 October 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen : Florence Ndepele Mwachande Mumba; Fausto Pocar; Andrésia Vaz

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Disclosure of Appellant's Brief – Motion denied*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citi-

[15] Reply, para. 3. The Appeals Chamber notes that the Appellant does not mention Rule 91 of the Rules in his Motion.

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zens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

NOTING "Joseph Nzirorera's Motion for Access to Appeal Briefs" ("Applicant" and "First Motion", respectively), filed on 8 July 2005, whereby the Applicant requested access to the Appellants' Briefs filed by the Appellants Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze in the present case;

NOTING that the Prosecution did not oppose the First Motion[1];

NOTING the "Decision on Joseph Nzirorera's Motion for Access to Appeal Briefs'" issued on 9 September 2005 ("Decision") in which the Appeals Chamber, noting that the Appellant Jean-Bosco Barayagwiza had not yet filed his Appellant's Brief, *inter alia* found that

> "the Applicant shall, if deemed necessary, submit a new request to the Appeals Chamber to gain access to Jean-Bosco Barayagwiza's Appellant's Brief when it is filed"[2];

BEING SEISED OF "Joseph Nzirorera's Second Motion for Access to Appeal Briefs", filed on 17 October 2005 ("Second Motion"), whereby the Applicant, *inter alia*, renews his request for disclosure of the Appellant's Brief filed by the Appellant Jean-Bosco Barayagwiza in the present case[3];

NOTING that on 12 October 2005, the Appellant Jean-Bosco Barayagwiza filed a public (non-confidential) Appellant's Brief[4];

CONSIDERING that leave from the Appeals Chamber for access to a public filing is not required;

FOR THE FOREGOING REASONS,

DISMISSES the Second Motion.

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

Dated this 27th day of October 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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[1] Prosecutor's Response to "Nzirorera's Motion for Access to Appeal Briefs", filed on 25 July 2005, para. 1.

[2] Decision, p. 3.

[3] Second Motion, para. 7.

[4] Appellant's Appeal Brief, filed on 12 October 2005.

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## *Order on "Prosecutor's Application for Redaction of Certain Annexes from Hassan Ngeze's Appellant's Brief" 27 October 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen : Florence Ndepele Mwachande Mumba; Fausto Pocar; Andrésia Vaz

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Disclosure of protected witnesses' statements, Identifying information, Balance between the protection of the witness and the interests of the Accused – Motion granted*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber"),

NOTING the "Decision on 'Joseph Nzirorera's Motion for Access to Appeal Briefs'", issued on 9 September 2005 ("Decision"), in which the Appeals Chamber ordered that the Prosecution, Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze identify which, if any, portions of Hassan Ngeze's Appellant's Brief ("Appellant's Brief") contain confidential information and must, therefore, be redacted prior to its disclosure to Joseph Nzirorera ("Nzirorera"), an accused in another case[1], who requested access to the Appellants' Briefs to verify the representations made by the Prosecution in his case[2];

BEING SEISED OF the "Prosecutor's Application for Redaction of Certain Annexes from Hassan Ngeze's Appellant's Brief", filed confidentially on 16 September 2005 ("Prosecution" and "Application" respectively), whereby the Prosecution requests that Annexes 4 and 5 of the Appellant's Brief be redacted prior to the Appellant's Brief's disclosure to Nzirorera[3];

NOTING that, in support of his Application, the Prosecution explains that Annexes 4 and 5 consist of two protected witnesses' statements which identify the witnesses[4] and that these statements are not material for the purpose of Nzirorera's access to the Appellant's Brief[5];

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[1] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44.

[2] Decision, p. 4.

[3] Application, para. 2.

[4] Application, paras. 3-4.

[5] Application, paras. 6-11.

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CONSIDERING that the Prosecution has shown that these statements serve no forensic purpose to Nzirorera, and furthermore are not related to the six facts adjudicated at trial in this case, of which the Prosecution requests the Trial Chamber to take judicial notice in Nzirorera's case;

CONSIDERING that the need to protect the witnesses outweighs any interest Nzirorera might have in gaining access to Annexes 4 and 5 of the Appellant's Brief for preparing his case;

HEREBY ORDERS the Prosecution to provide the confidential Appellant's Brief with Annexes 4 and 5 redacted to the Registry;

DIRECTS the Registry to provide the confidential redacted Appellant's Brief to Nzirorera, his Counsel and any employee who has been instructed or authorised by his Counsel and RECALLS that the protective measures applicable to the Appellant's Brief, as set out in the Decision, are still in effect[6].

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

Dated this 27th day of October 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Order concerning Appellant Jean-Bosco Barayagwiza's Filings of 7 November 2005 14 November 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen : Florence Ndepele Mwachande Mumba; Fausto Pocar; Andrésia Vaz

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Proprio motu power of the Appeals Chamber, Time Limits – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 54, 107 and 108*

*Practice Direction on Formal Requirements for Appeals from Judgement*

[6] Decision, pp. 4-5.

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*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Decision on "Appellant Jean-Bosco Baraygwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005 (ICTR-99-52)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber"),

RECALLING that, pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules") read together with Rule 107 of the Rules, the Appeals Chamber may, *proprio motu*, issue such orders as may be necessary for the purposes of the preparation or conduct of the proceedings before it;

RECALLING ALSO that, pursuant to the Practice Direction on Formal Requirements for Appeals from Judgement,

> "[w]here a party fails to comply with the requirements laid down in this Practice Direction (…) the Appeals Chamber may, within its discretion, decide upon an appropriate sanction",

which can include an order for clarification or re-filing, rejection of a filing or dismissal of submissions therein[1];

NOTING that the Appellant Jean-Bosco Barayagwiza ("Appellant") has benefited from a substantial extension of time to file his Appellant's Brief and any amended Notice of Appeal[2];

NOTING the "Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief", issued on 6 September 2005 ("Decision on Extension of Time"), in which the Appeals Chamber ordered the Appellant, *inter alia*, to file his Notice of Appeal and Appellant's Brief no later than 12 October 2005[3];

NOTING that on 12 October 2005, the Appellant filed both his "Amended Notice of Appeal"and "Appellant's Appeal Brief";

NOTING that on 7 November 2005, the Appellant filed an "Amended Notice of Appeal" to which was appended a document entitled "Corrections to Appeal Brief", and a confidential "Appellant's Appeal Brief" ("Filings of 7 November 2005");

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[1] Practice Direction on Formal Requirements for Appeals from Judgement, issued on 4 July 2005 ("Practice Direction"), para. 13.

[2] *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "Decision on 'Appellant Jean-Bosco Baraygwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005, p. 5. In this decision, the Appeals Chamber granted the Appellant four months after the co-Counsel had been assigned to file any amended Notice of Appeal and his new Appellant's Brief.

[3] Decision on Extension of Time, p. 6.

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NOTING the "Extremely Urgent Prosecutor's Motion for Rejection of the Appellant Jean-Bosco Barayagwiza's Amended Notice of Appeal and Appellant's Brief dated 3 November 2005, and for an Order to expunge the same from the record", filed on 9 November 2005 ("Prosecution" and "Motion", respectively);

CONSIDERING that the Appellant has not referred to any provision of the Statute, Rules or Directives that would entitle him to further Notice of Appeal and Appellant's Brief after the prescribed time limit;

CONSIDERING that, absent leave of the Appeals Chamber, the parties may not vary their grounds of appeal outside the periods prescribed for filing their Notice of Appeal[4];

CONSIDERING that the Appellant has not filed a motion requesting the Appeals Chamber to grant leave to submit the Filings of 7 November 2005 and demonstrated good cause for the Appeals Chamber to authorise them[5];

PURSUANT to Rules 54 and 107 of the Rules :

HEREBY

REJECTS the Filings of 7 November 2005;

DIRECTS the Registry to return the Filings of 7 November 2005 to the Appellant and to expunge them from the record;

RECALLS that the forty-day time-period for the Prosecution to file its response started running from 12 October 2005; and

FINDS that the Motion is, therefore, rendered moot.

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

Dated this 14th day of November 2005, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Order replacing a Judge in a Case before the Appeals Chamber 18 November 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Replacement of a Judge, Composition of the Appeals Chamber*

[4] Rule 108 of the Rules; Practice Direction, paras. 2-3.
[5] *Ibid.*

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I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994,

NOTING the "Acte d'appel" filed by Ferdinand Nahimana on 4 May 2004; the "Notice d'Appel" and "Acte d'appel modifié" filed by Jean-Bosco Barayagwiza on 22 April 2004 and 27 April 2004, respectively; and the "Defence Notice of Appeal" and "1st Amendment of Appeal Notice", filed by Hassan Ngeze on 9 February 2004 and 30 April 2004, respectively against the Judgement and Sentence rendered by Trial Chamber I on 3 December 2003;

NOTING the expiration of the term of Judge Florence Mumba, a member of the Appeals Chamber, effective 16 November 2005;

CONSIDERING the composition of the Appeals Chamber as set out in document IT/242 of the International Tribunal for the former Yugoslavia, issued on 17 November 2005;

CONSIDERING that this case is in its pre-appeal phase and that, thus, no hearing in this case has been held;

HEREBY ASSIGN, with immediate effect, Judge Liu Daqun to replace Judge Florence Mumba in the present case;

AND ORDER that the Bench in *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, shall be composed as follows:

Judge Fausto Pocar

Judge Mohamed Shahabuddeen

Judge Liu Daqun

Judge Andrésia Vaz

Judge Theodor Meron

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

Done this 18th day of November 2005, At The Hague,The Netherlands.

[Signed]: Fausto Pocar

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## *Order replacing a Judge in a Case before the Appeals Chamber 24 November 2005 (ICTR-99-52-A)*

(Original: English)

Appeals Chamber

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Judge : Fausto Pocar, Presiding Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Replacement of a Judge, Composition of the Appeals Chamber*

I, FAUSTO POCAR, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994,

NOTING the "*Acte d'appel*" filed by Ferdinand Nahimana on 4 May 2004; the "*Notice d'Appel*" and "*Acte d'appel modifié*" filed by Jean-Bosco Barayagwiza on 22 April 2004 and 27 April 2004, respectively; and the "Defence Notice of Appeal" and "1st Amendment of Appeal Notice", filed by Hassan Ngeze on 9 February 2004 and 30 April 2004, respectively, against the Judgement and Sentence rendered by Trial Chamber I on 3 December 2003;

NOTING the "Order Replacing a Judge in a Case Before the Appeals Chamber" issued on 18 November 2005 in this case;

CONSIDERING the composition of the Appeals Chamber as set out in document IT/242 of the International Tribunal for the former Yugoslavia, issued on 17 November 2005;

CONSIDERING that this case is in its pre-appeal phase and that, thus, no hearing in this case has been held;

HEREBY ASSIGN, with immediate effect, Judge Mehmet Güney to replace Judge Liu Daqun in the present case;

AND ORDER that the Bench in *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, shall be composed as follows :

Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

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

Done this 24th day of November 2005,

At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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## *Order expunging from the record annexures "A" through "G" of appendix "A" to the consolidated respondent's brief filed on 22 November 2005*
## *30 November 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Function of the Pre-Appeal Judge, Content of an appendix or book of authorities – Filings rejected, Function of the Registrar, Expungement order*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 108* bis *(B); Practice Direction on the Length of Briefs and Motions on Appeal*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, Corrigendum *to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits, 15 November 2005 (ICTR-99-52)*

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case[1];

RECALLING that, pursuant to Rule 108 *bis* (B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Pre-Appeal Judge

[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, *Corrigendum* to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

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> "shall take any measures related to procedural matters, including the issuing of decisions, orders and directions with a view to preparing the case for a fair and expeditious hearing";

HAVING RECEIVED the Consolidated Respondent's Brief filed by the Prosecution on 22 November 2005 ("Consolidated Respondent's Brief");

NOTING the Pre-Appeal Judge's "Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits"[2] of 15 November 2005 allowing the Prosecution's request in part and authorising it to file a consolidated Respondent's Brief not exceeding two hundred (200) pages or 60,000 words, whichever is greater[3];

CONSIDERING that the Prosecution has complied with the page limit allowed for the Consolidated Respondent's Brief[4];

NOTING that two Appendixes (for a total of 41 pages) were filed together with the Consolidated Respondent's Brief;

NOTING that, pursuant to Paragraph 4 of the Practice Direction on the Length of Briefs and Motions on Appeal[5], "[a]ny appendix or book of authorities does not count towards the page limit";

NOTING that, pursuant to the same provision,

> "[a]n appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits and other relevant, non-argumentative material";

CONSIDERING that Annexures A through G of Appendix A contain legal and factual arguments as follows :

> Annexure A "Conspiracy : Nahimana-Barayagwiza-Ngeze" is a summary analysis prepared by the Prosecution of "some of the evidence" that allegedly demonstrates "a conspiracy among the three Appellants to commit genocide" and contains factual arguments[6];
>
> Annexure B "Details of the Trial Chamber's Findings and of the Record on Instances of Incitement in RTLM Prior to 6 April 1994" contains an analysis of the Trial Chamber's relevant findings in response to certain Appellants' assertions[7];
>
> Annexure C "Details of the Trial Chamber's Findings on Instances of Incitement in Kangura" contains factual arguments relative to some Trial Chamber's findings and related Appellants' assertions;
>
> Annexure D "Detailed Analysis of Nahimana's List of Mere 'Calls to Hatred or Violence', Allegedly Insufficient to Constitute Incitement" contains factual arguments relative to the issue in question;

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[2] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits, 15 November 2005 ("Decision of 15 November 2005").

[3] Decision of 15 November 2005, p. 4.

[4] The Consolidated Respondent's Brief contains 206 pages, 8 of which are used for the Table of Contents.

[5] Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002, as amended ("Practice Direction").

[6] Annexure A to the Consolidated Respondent's Brief, p. 1.

[7] See, *e.g.,* Annexure B to the Consolidated Respondent's Brief, paras. 5-8.

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Annexure E "Pre-6 April 1994 RTLM Broadcasts" contains summaries and analysis of the Trial Chamber's factual findings that allegedly demonstrate that "RTLM broadcasts made prior to 6 April 1994 contained calls for ethnic hatred and violence directed against Tutsis"[8];

Annexure F "Nahimana – Genocide" contains the Prosecution's analysis of the factual findings of the Trial Chamber that allegedly "demonstrate that RTLM broadcasts for which Nahimana was held culpable directly and substantially contributed to killings and other acts of violence underpinning his conviction, *inter alia*, for genocide"[9];

Annexure G "The Details of Nahimana's Relationship with RTLM" contains the Prosecution's factual arguments in response to an assertion made by the Appellant Ferdinand Nahimana in his Appellant's Brief;

FINDING that Annexures A through G of Appendix A to the Consolidated Respondent's Brief cannot be considered as appendixes under Paragraph 4 of the Practice Direction;

CONSIDERING that Annexure H of Appendix A "Chart of Factual Findings" and Appendix B "Authorities Cited" were filed in compliance with Paragraph 4 of the Practice Direction;

HEREBY

REJECT the filings of Annexures A through G of Appendix A to the Consolidated Respondent's Brief;

DIRECT the Registry to return the aforementioned Annexures to the Prosecution and to expunge them from the record;

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

Dated this 30th day of November 2005, At Arusha, Tanzania

[Signed] : Andrésia Vaz

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## *Scheduling Order concerning the Filing of Ferdinand Nahimana's Reply to the Consolidated Respondent's Brief 6 December 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

[8] Annexure E to the Consolidated Respondent's Brief, para. 1.
[9] Annexure F to the Consolidated Respondent's Brief, p. 1.

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*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Function of the Pre-Appeal Judge – Registrar's Representation – Language of the Tribunal, Language skills of the Defence Legal Team, Translation, Tribunal's Language Services Section – Extension of time limit*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 33 (B), 108* bis *(B) and 116 (B); Statute, art. 20 (4) (a)*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, Corrigendum *to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005 (ICTR-99-52)*

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case[1];

RECALLING that, pursuant to Rule 108 *bis* (B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Pre-Appeal Judge

> "shall take any measures related to procedural matters, including the issuing of decisions, orders and directions with a view to preparing the case for a fair and expeditious hearing";

HAVING RECEIVED the Consolidated Respondent's Brief filed by the Prosecution on 22 November 2005 ("Consolidated Respondent's Brief") in the English language;

NOTING the "Registrar's Representation Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding Language Skills of the Appellants' Defence Team Members in 'Nahimana *et al.*'" of 1 December 2005 informing the Appeals Chamber of the composition and language skills claimed by Defence team members of the respective Appellants in the present case and concluding that "all the Defence teams are well-equipped to handle legal matters in both English and French"[2];

[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

[2] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, "Registrar's Representation Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding Language Skills of the Appellants' Defence Team Members in 'Nahimana *et al.*'", 1 December 2005, para. 4.

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CONSIDERING, however, that Article 20 (4) (a) of the Statute of the Tribunal provides that in the determination of any charges against the accused, the accused shall be entitled to be

> "informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her" and that the Appellant does not understand the English language;

NOTING that Rule 116 (B) of the Rules provides that

> "[w]here the ability of the accused to make full answer and defence depends on the availability of a decision in an official language other than that in which it was originally issued, that circumstance shall be taken into account as a good cause under the present Rule"

justifying an extension of a time limit for a filing;

RECALLING, the Pre-Appeal Judge's Oral Decision that granted Ferdinand Nahimana the right to file his reply to the Consolidated Respondent's Brief no later than fifteen days after the French translation of the Consolidated Respondent's Brief is served on him and his Defence team[3];

NOTING that the Tribunal's Language Services Section has advised that the French translation of the Consolidated Respondent's Brief will be available by 31 March 2006;

FOR THE FOREGOING REASONS,

DIRECT the Registrar to expedite the translation of the Consolidated Respondent's Brief and to serve it on the Ferdinand Nahimana and his Counsel in the French language no later than 31 March 2006;

ORDER that, should Ferdinand Nahimana wish to file a reply to the Consolidated Respondent's Brief, he do so no later than fifteen days from the communication of the Consolidated Respondent's Brief in the French language.

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

Dated this 6th day of December 2005, At The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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[3] *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Status Conference, 9 March 2005, ("Oral Decision of 9 March 2005"), p. 7, lines 2-5.

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## *Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his marriage 6 December 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Andrésia Vaz; Theodor Meron

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Right of the Accused to marry, Consummation of the marriage, Discrimination between ICTY and ICTR prisoners – Right of the Accused to file a written complaint to the Registrar, Right to fair proceedings – Statutory duty of the Appeals Chamber to ensure the fairness of the proceedings on appeal, General power of revision of the Appeals Chamber – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rule 19; Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

BEING SEIZED OF "The Appellant Hassan Ngeze's Motion for Setting Aside the Decision of President Judge Erik Møse on his Application for Review of the Registrar's Decision of 12th January, 2005 and Allow his Request to Consummate his Marriage and to Have Conjugal Visits at the UNDF Centre in Arusha or in the Alternative, at The Hague", filed by Hassan Ngeze on 31 October 2005 ("Motion" and "Appellant", respectively), whereby the Appellant requests the Appeals Chamber to set aside the "Decision on Hassan Ngeze's Application for Review of the Registrar's Decision on 12 January 2005", rendered by the President of the Tribunal on 15 September 2005 ("President's Decision"), and to allow his request to consummate his marriage and to have conjugal visits at the United Nations Detention Facility ("UNDF") in Arusha or, in the alternative, in The Hague[1];

NOTING that the Prosecution has not filed a response;

[1] Motion, p. 2.

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NOTING the "Appellant Hassan Ngeze's Request for the Grant of Authorization to Marry and Other Consequential Reliefs at the ICTR Premises before the Determination of his Pending Appeal", filed by the Appellant before the Registrar on 7 October 2004;

NOTING the "Registrar's Decision Pursuant to Article 8 (3)(C) on the Request for Marriage and Other Reliefs" of 12 January 2005 ("Registrar's Decision"), whereby the Registrar did not oppose the Appellant's right to marry but concluded that

> "the Registry ha[d] no authority under the law to ensure that such marriage is consummated or to grant the conjugal visits that the Applicant is asking for"[2]

and that there were "no statutory provisions that empower" the Registrar

> "to transfer the Applicant to the UN Detention Centre of [the] ICTY at The Hague for the purpose of this marriage"[3],

leaving, however, the Applicant at liberty to appeal the Registrar's Decision since the issues raised therein were "of importance in the development of the Humanitarian law"[4];

NOTING the Appeals Chamber's "Decision on Hassan Ngeze's Motion Appealing the Registrar's Denial of Marriage Facilities" of 20 January 2005 that dismissed as frivolous "Appellant Hassan Ngeze's Motion for Setting Aside the Decision of the Registrar Dated 12th January 2005 Pursuant to Article 8 (3) (C) on the Request for Marriage and Other Reliefs and to Grant Leave to Marry at the ICTR Premises Before the Determination of his Pending Appeal" of 17 January 2005, pursuant to Rule 19 of the Tribunal's Rules of Procedure and Evidence ("Rules of Procedure") and Rule 83 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal[5] ("Rules of Detention");

NOTING the "Appellant Hassan Ngeze's Application for Review of the Registrar's Decision of 12.01.05 Denying Permission to Get Married at the ICTR Premises Pending the Determination of his Appeal" filed by the Appellant before the President of the Tribunal on 12 January 2005;

NOTING that the President's Decision confirmed the UNDF detainees' right to marry but concluded that no applicable legal provisions or instruments "require[d] consummation of marriage and conjugal visits during detention" and that, therefore, the Registrar's Decision did "not amount to any unfairness which call[ed] for presidential intervention"[6];

NOTING that the "Appellant Hassan Ngeze's Request for the Reconsideration by the Honorable President – ICTR of his Decision Dated September 14th 2005 Relating to Consummation of Marriage and Further to Permit his Would Be Wife to Contribute the Sum of US $ Seven Thousand (USD 7,000) with Return Tickets from Arusha to The Hague and Return to Arusha to Enable Solving the Registry Budgetary Problem in the Transferring the Appellant to The Hague Detention Center for his Wedding

[2] Registrar's Decision, para. 16.
[3] *Ibid.,* para. 18.
[4] *Idem.*
[5] Adopted on 5 June 1998.
[6] President's Decision, para. 19.

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Ceremony & Consummation and Short Conjugal Visit at The Hague Detention Center" of 21 September 2005 was denied by the President of the Tribunal on 30 September 2005, on the ground that the existence of new facts, such as the contribution by the Appellant to the cost of the consummation of marriage, did not constitute a sufficient ground for review[7];

NOTING that the Appellant challenges the President's Decision in light of "the significance of the issues raised" in his Motion, in particular those relating to

> "(i) [t]he concept of marriage and nullity; (ii) [p]risoners' right to marry, consummation and conjugal visits; (iii) [d]ifferential treatment and discrimination of ICTR prisoners"[8];

CONSIDERING that, pursuant to Rule 3 of the Rules of Detention, the Commanding Officer of the UNDF has primary responsibility for all aspects of the daily management of the Detention Unit and that, pursuant to Rules 82 and 83 of the Rules of Detention, where a detainee is not satisfied with the response of the Commanding Officer, he or she has the right to file a written complaint to the Registrar who shall forward it to the President of the Tribunal;

FINDING that, in the present case, this procedure was followed;

CONSIDERING that the Appeals Chamber has the statutory duty to ensure the fairness of the proceedings on appeal[9] and, thus, has jurisdiction to review decisions of the Tribunal's Registrar and President;

CONSIDERING, however, that the exercise of such jurisdiction should be closely related to the fairness of proceedings on appeal and should not be used as a substitute for a general power of review which has not been expressly provided by the Rules of Detention[10];

CONSIDERING that the Appellant has not identified any impact by the issues raised in his Motion on his right to fair proceedings;

FINDING that the detention conditions raised by the Appellant are not related to the fairness of proceedings on appeal and that, therefore, the Appellant's right to fair proceedings has not been infringed by the outcome of the President's Decision;

FINDING, therefore, that the Appellant has exhausted all available remedies and that the Appeals Chamber has no jurisdiction in this matter;

FOR THE FOREGOING REASONS,

DISMISSES the Motion.

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[7] Letter of the President of the Tribunal to Detainee Hassan Ngeze, "Reconsideration of the President's Decision of 14 September 2005", 30 September 2005.

[8] Motion, para. 5.

[9] *Ferdinand Nahimana et al. v. Prosecutor,* Case No. ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, paras. 4 and 7; *Ferdinand Nahimana et al. v. Prosecutor,* Case No. ICTR-99-52-A, Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005, p. 3. *See* also, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, para. 19.

[10] See, by analogy, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, para. 20.

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

Dated this 6th day of December 2005, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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## *Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's urgent motions for extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response 6 December 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Power of the Pre-Appeal Judge, Extension of page limits, Extension of time limits, Exceptional circumstances, Technical difficulties to transfer documents – Right of the Accused to fair proceedings, Principle of equality of arms between the parties – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 108* bis*, 113 and 116*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Decision on Ngeze's Motion for an Additional Extension of Time to File his Notice of Appeal and Brief, 6 February 2004 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief, 24 June 2004 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 August 2004 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005 (ICTR-99-52); Appeals Chamber,* Ferdinand Nahimana et al. v. The Prosecutor, *ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005 (ICTR-99-52)*

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I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case[1];

BEING SEIZED OF "The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for an Extension of Page Limits to the Defence Reply to the Consolidated Prosecution Response and an Extension of Time for Filing" filed by Jean-Bosco Barayagwiza on 21 November 2005 ("Appellant Barayagwiza" and "Barayagwiza's Motion", respectively), in which he seeks

> "an extension of pages for the Appellant's reply to 50 pages or 10,000 words, whichever is greater; and […] an extension of time to file the Defence reply to the Respondent's brief of a period of 21 days"[2],

or "an extension of 7 days"[3];

BEING ALSO SEIZED OF "The Appellant Hassan Ngeze's Extremely Urgent Motion for an Extension of Time for Filing the Appellant's Reply Brief under Rule 116 of the Rules of Procedure and Evidence & for an Extension of Page Limits to the Appellant's Reply Brief to the Consolidated Prosecution's Response under Paragraph 5 of Practice Direction on the Length of Briefs and Motions on Appeal (of 16th September 2002)" filed by Hassan Ngeze on 28 November 2005 ("Appellant Ngeze" and "Ngeze's Motion", respectively), in which he seeks an extension of

> "the time for filing the Appellant's Reply Brief to the Prosecutor's Consolidated Respondent's Brief […] for a period of 30 days"

and an extension of "the page limits of the Appellant's Reply Brief up to 60 pages or 18,000 words, whichever is greater"[4];

NOTING the "Prosecutor's Response to 'The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for an Extension of Page Limits [*sic*] to the Consolidated Prosecution Response and an Extension of Time for Filing'" filed on 22 November 2005 ("Prosecution" and "Prosecution Response to Barayagwiza's Motion", respectively), in which the Prosecution does not oppose the Appellant's request for an extension of time, but submits that the request for an extension of the page limit should be dismissed[5];

NOTING that Appellant Barayagwiza has not filed a reply to the Prosecution Response to Barayagwiza's Motion;

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[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

[2] Barayagwiza's Motion, para. 1 and p. 3.

[3] *Id.*, para. 15.

[4] Ngeze's Motion, p. 2.

[5] Prosecution Response to Barayagwiza's Motion, para. 6.

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NOTING the "Prosecutor's Response to 'The Appellant Hassan Ngeze's Extremely Urgent Motion for an Extension of Time for Filing the Appellant's Reply Brief under Rule 116 of the Rules of Procedure and Evidence & for an Extension of Page Limits to the Appellant's Reply Brief to the Consolidated Prosecution's Response under Paragraph 5 of Practice Direction on the Length of Briefs and Motions on Appeal (of 16th September 2002)' and Request for Clarification Regarding the Time Limits Applicable to All Three Appellants' Brief in Reply in this Joint Appeal" filed on 5 December 2005 ("Prosecution Response to Ngeze's Motion"), in which the Prosecution submits that Appellant Ngeze has failed to show good cause for his requests regarding the extension of both page and time limits[6] and requests clarification of the time limits applicable to all three Appellants' Briefs in Reply in this joint appeal[7];

NOTING that Appellant Ngeze has not yet filed a reply to the Prosecution Response to Ngeze's Motion;

RECALLING the Pre-Appeal Judge's "Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits" of 15 November 2005 allowing in part the Prosecution's request for an extension of the page limit for the Consolidated Respondent's Brief[8];

CONSIDERING that the "Appellant Jean Bosco Barayagwiza's Response to the Prosecutor's Extremely Urgent Motion for Extension of Page Limits" filed on 16 November 2005, is moot in light of the 15 November 2005 Decision;

NOTING the "Consolidated Respondent's Brief" filed by the Prosecution on 22 November 2005 ("Consolidated Respondent's Brief");

RECALLING also the Pre-Appeal Judge's "Order Expunging from the Record Annexures A through G of Appendix A to the Consolidated Respondent's Brief Filed on 22 November 2005" of 30 November 2005;

CONSIDERING that in accordance with paragraph 1 (c) of the Practice Direction on the Length of Briefs and Motions on Appeal,

> "[t]he reply brief of an appellant in an appeal from a final judgement of a Trial Chamber shall not exceed 30 pages or 9,000 words, whichever is greater"[9];

CONSIDERING that, in conformity with paragraph 5 of the Practice Direction, a party seeking authorisation to exceed the page limits

> "must provide an explanation of the exceptional circumstances that necessitate the oversized filing";

NOTING that both Appellants Barayagwiza and Ngeze submit that they have to make extensive replies to the Consolidated Respondent's Brief, because, given the nature of the charges against them, they will have to analyse Prosecution's allegations made with respect of the three co-Appellants in this case[10];

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[6] Prosecution Response to Ngeze's Motion, paras. 4, 9, 15.

[7] *Id.*, paras. 16-18.

[8] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits, 15 November 2005 ("Decision of 15 November 2005").

[9] Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002, as amended ("Practice Direction").

[10] Barayagwiza's Motion, paras. 6 and 10; Ngeze's Motion, para. 4.

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NOTING also that both Appellants invoke the principle of equality of arms between the parties and recall that the Decision of 15 November 2005 allowed the Prosecution exceed the page limit for the Consolidated Respondent's Brief by 30 pages[11];

NOTING that the Prosecution submits that Barayagwiza's Motion was "premature and based on conjecture"[12], since it was brought before the Consolidated Respondent's Brief was filed and that Appellant Barayagwiza has not shown any good cause in support of his request;

CONSIDERING that, pursuant to paragraphs 5 and 6 of the Practice Direction on Formal Requirements for Appeals from Judgement[13], a Respondent's Brief should contain statements and arguments for each ground of appeal presented by one or several appellants, while an Appellant's brief in reply should be limited to arguments in reply to the Respondent's brief;

CONSIDERING that the Prosecution has had to respond to three Appellant's Briefs containing "a considerable and diverse number of alleged errors"[14], while the Appellants only have to reply to the arguments in the Consolidated Respondent's Brief responding to the arguments in their Appellant's Briefs;

CONSIDERING that, in the circumstances of the present case, the Appellants have not shown that their right to fair proceedings and the principle of equality of arms will be breached unless they are granted an extension of page limits;

CONSIDERING, in addition, that the effectiveness of an appellant's brief in reply does not depend on its length but on the clarity and persuasiveness of the arguments and that the Appeals Chamber may, if it considers it necessary, request elaboration of a matter in a further written brief or during oral argument of the appeal[15];

FINDING that, although this appeal raises important legal and factual issues adjudicated in the Trial Judgement, the Appellants have not demonstrated the existence of exceptional circumstances that would justify their request for an extension of the page limit;

FURTHER CONSIDERING that, pursuant to Rule 113 of the Tribunal's Rules of Procedure and Evidence ("Rules"), an appellant's brief in reply should be filed within fifteen days after the filing of the Respondent's brief;

CONSIDERING that Rule 116 of the Rules, read together with Rule 108 *bis*, empowers the Pre-Appeal Judge to "grant a motion to extend a time limit upon a showing of good cause";

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[11] Barayagwiza's Motion, paras. 3 and 11; Ngeze's Motion, paras. 1, 9 and 11.

[12] Prosecution Response to Barayagwiza's Motion, para. 4.

[13] Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005.

[14] Decision of 15 November 2005, p. 3.

[15] *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005, p. 3; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 August 2004, p. 3; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief, 24 June 2004, p. 3.

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NOTING that, in support of his request for an extension of time, Appellant Barayagwiza argues that the facilities for communication with his legal team are limited, making it impossible for him

> "to present effective instructions without extra time which recognises the significant barriers to speedy communication"[16];

NOTING that Prosecution does not oppose Appellant Barayagwiza's request for an extension of time up to 21 days[17], but does oppose Appellant Ngeze's respective request for an extension of time up to 30 days[18];

NOTING also the Letters from Appellant Barayagwiza's Counsel filed on 24 and 25 November 2005, informing the Pre-Appeal Judge of technical difficulties encountered by Counsel while receiving the Consolidated Respondent's Brief on 22, 23 and 24 November 2005, and seeking permission "to file [the] reply within 21 days of 28th November 2005", the date on which, in Counsel's submission, Appellant Barayagwiza was served with a copy of the Consolidated Respondent's Brief;

NOTING, however, the communication received from the Tribunal's Appeals Unit Court Management Section ("CMS") on 28 November 2005, informing the Pre-Appeal Judge (i) that the Consolidated Respondent's Brief was received by the CMS on 22 November 2005 "after working hours"; (ii) that a hard copy of the Consolidated Respondent's Brief was served on Appellant Barayagwiza on 24 November 2005; and (iii) that, while some technical difficulties occurred during transmission of the same document to Appellant Barayagwiza's Counsel, the latter received the full document on 24 November 2005;

CONSIDERING that Appellant Barayagwiza and his Counsel were served with the Consolidated Respondent's Brief two days after it had been filed;

CONSIDERING also that the requested extension is reasonable in light of difficulties referred to by Appellant Barayagwiza in maintaining communication with his Defence team;

FINDING that Appellant Barayagwiza has shown good cause for his request to extend the time limit to file his reply to the Consolidated Respondent's Brief up to 21 days;

NOTING that Appellant Ngeze submits that granting his request for extension of time "will not prejudice the Prosecutor" in light of the Pre-Appeal Judge's Oral Decision allowing Ferdinand Nahimana to file his reply to the Consolidated Respondent's Brief no later than fifteen days after the French translation is served on Ferdinand Nahimana and his Defence team[19];

CONSIDERING, however, that, apart from the reference to the "advanced stage of proceedings"[20], Appellant Ngeze has not presented any further arguments that would show good cause for extending the time limit for the filing of his reply to the Consolidated Respondent's Brief up to 30 days;

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[16] Barayagwiza's Motion, paras. 13-14.

[17] Prosecution Response to Barayagwiza's Motion, para. 6.

[18] Prosecution Response to Ngeze's Motion, para. 9.

[19] *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Status Conference, 9 March 2005 ("Oral Decision of 9 March 2005"), p. 7, lines 2-5.

[20] Ngeze's Motion, p. 3.

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RECALLING that the Pre-Appeal Judge has already considered that, in the circumstances of this joined case, it is reasonable to extend the deadline for the filing of the other Appellants' replies[21];

NOTING the Pre-Appeal Judge's "Scheduling Order Concerning Filing of Ferdinand Nahimana's Reply to the Consolidated Respondent's Brief" of 6 December 2005 directing the Registrar to expedite the translation of the Consolidated Respondent's Brief and serve it on Ferdinand Nahimana and his Counsel in the French language not later than 31 March 2006, as well as ordering Ferdinand Nahimana to file his reply to the Consolidated Respondent's Brief no later than 15 days from the communication of the translated Consolidated Respondent's Brief[22];

CONSIDERING that it is fair and reasonable to grant an extension of the time limits for filing of Appellant Ngeze's brief in reply in the circumstances where the time limits for filing of the Appellant's brief in reply is suspended until 31 March 2005 for Ferdinand Nahimana and where an extension of the respective time limits is granted to Appellant Barayagwiza;

CONSIDERING also that, in the present circumstances and taking into account the date of the present decision, a reasonable extension of the time limits for filing of Appellants Barayagwiza's and Ngeze's respective replies to the Consolidated Respondent's Brief will not cause any prejudice to the other parties;

FOR THE FOREGOING REASONS,

DISMISS Appellants Baraygwiza's and Ngeze's respective requests for an extension of the page limit for the their briefs in reply;

GRANT, in part, Appellants Barayagwiza's and Ngeze's respective requests for an extension of the time limit to file their replies to the Consolidated Respondent's Brief; and

ORDER that Appellants Barayagwiza's and Ngeze's replies be filed no later than 15 December 2005.

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

Dated this 6th day of December 2005,

At The Hague, The Netherlands.

[Signed] : Andrésia Vaz

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[21] *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Decision on Ngeze's Motion for an Additional Extension of Time to File his Notice of Appeal and Brief, 6 February 2004, p. 3; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003, p. 4.

[22] *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Scheduling Order Concerning Filing of Ferdinand Nahimana's Reply to the Consolidated Respondent's Brief, 6 December 2005, p. 3.

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# *Decision on Hassan Ngeze's Motion for a Psychological Examination 6 December 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Andrésia Vaz; Theodor Meron

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Rights of detained persons, Psychological examination, Denial by the UNDF Authorities of visitors access to the Accused, Restrictive measures imposed on the Appellant to his external contacts, Complaint procedure for the detention conditions, Complaint to the Commanding Officer of the UNDF, Written complaint without censorship to the Registrar – Fairness of the proceedings –* Proprio Motu *power of the Appeals Chamber, Jurisdiction of the Appeals Chamber – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 74* bis *and 107; Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 28, 31, 32, 82 and 83*

*International Cases cited :*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Miroslav Kvočka et al., *Decision on Defense Motion to Obtain the Assignment of Experts for the Accused Miroslav Kvočka, 12 May 2000 (IT-98-30/1); Trial Chamber,* The Prosecutor v. Miroslav Kvočka et al., *Decision on Defense Request for Assignment of Experts for the Accused Dragoljub Prcać, 18 May 2000 (IT-98-30/1); Trial Chamber,* The Prosecutor v. Miroslav Kvočka et al., *Decision on Defense Request for Assignment of Medical and Psychiatric Experts for the Accused Zoran Zigić, 21 June 2000 (IT-98-30/1); Trial Chamber,* The Prosecutor v. Miroslav Kvočka et al., *Decision on Defense Additional Motion for Psychological Evaluation of the Accused Dragoljub Prcać, 14 December 2000 (IT-98-30/1); Appeals Chamber,* The Prosecutor v. Milan Milutinovic et al., *Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87); Trial Chamber,* The Prosecutor v. Pavle Strugar, *Decision on the Defence Motion for a Medical Examination of the Accused pursuant to Rule 74* bis *of the Rules, 19 December 2003 (IT-01-42);*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively),

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BEING SEIZED OF "The Appellant Hassan Ngeze's Urgent Motion to Order the Registrar to Arrange for an Urgent Psychological Examination and Treatment of the Appellant Hassan Ngeze under Rule 74 *bis* of the Rules of Procedure and Evidence by Experts on Account of the Mental Torture Suffered by him at the UNDF", filed by Hassan Ngeze on 24 October 2005 ("Motion" and "Appellant", respectively), whereby the Appellant requests the Appeals Chamber "[t]o order the Registrar to arrange for the psychological examination and treatment" of the Appellant "by external experts"[1];

NOTING that, in the Appellant's submission, the following factors justify such request : (i) the unreasonable denial by the UNDF Authorities of his "important visitors['] " access to him[2]; (ii) the existence of restrictive measures imposed on the Appellant with regards to his external contacts[3]; and (iii) the fact that he has daily contact with people who "refused to testify and corroborate […] his alibi during the trial proceedings"[4];

NOTING that the Appellant argues that the aforementioned factors result for him in "unbearable pain and anguish […] which requires urgent psychological examination and treatment"[5];

NOTING that the Prosecution has not filed a Response;

NOTING that pursuant to Rule 74 *bis* of the Rules of Procedure and Evidence ("Rules") read together with Rule 107 of the Rules, the Appeals Chamber

> "may, *proprio motu* or at the request of a party, order a medical, including psychiatric examination or a psychological examination of the accused";

CONSIDERING that the rights of detained persons and conditions of their detention are regulated by the Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal[6] ("Detention Rules");

CONSIDERING that, pursuant to Rules 28 and 31 of the Detention Rules, the medical officer is responsible for the physical and mental health of the detainees and the administration of any treatment or medication to them;

NOTING that Rule 32 of the Detention Rules provides for the procedure to be followed in cases where the medical officer

> "considers that the physical or mental health of a detainee has been or will be adversely affected by any condition of his detention";

NOTING that, according to Rules 82 and 83 of the Detention Rules, where a detainee is not satisfied with the conditions of his or her detention, he or she is entitled to "make a complaint to the Commanding Officer or his representative at any time" and, in case of an unsatisfactory response, to "make a written complaint, without censorship, to the Registrar, who shall forward it to the President";

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[1] Motion, p. 2.
[2] *Ibid.*, para. 1.
[3] *Ibid.*, para. 2.
[4] *Ibid.*, para. 3.
[5] *Ibid.*, p. 3.
[6] Adopted on 5 June 1998.

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NOTING the Appellant's Urgent Letter to the Commanding Officer of UNDF of 4 January 2005 "Re : Prisoner Hassan Ngeze Concerns Addressed to the Commanding Officer and the Tribunal Authorities" annexed to the Motion, in which the Appellant informs the UNDF Commanding Officer of his understanding of his co-detainees' involvement in the present case and refers to his request for an investigation of an alleged conspiracy plan against him by his co-appellants followed by a Report from the Chief of the Court Management Section[7];

NOTING that the Appellant does not mention any complaint filed by him to the Registrar in relation to these issues;

CONSIDERING that the issue of the Appellant's right to contact with the outside world has been resolved by the President's Decision on "Request for Reversal of the Prohibition of Contact" of 1st August 2005[8] ("President's Decision") that dismissed the Appellant's request to review the prohibition of contact resulting from the restrictive measures[9] imposed following the Prosecution's request of 5 July 2005[10], but did not preclude the Commanding Officer from allowing the visit of the Appellant's two children under the age of fourteen, based on humanitarian reasons[11];

NOTING that the restrictive measures have been further extended for additional periods of 30 days pursuant to the Prosecution's requests of 4 August, 2 and 29 September 2005[12];

NOTING that the "Appellant Hassan Ngeze's Urgent Request for Receiving Visits, Phone Call (in & out) from his Children, Family, Relatives and Friends", filed by the Appellant on 5 October 2005, is currently pending before the President[13];

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[7] Motion, Annex 2, p. 4.

[8] *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Request for Reversal of the Prohibition of Contact, Office of the President, 1st August 2005.

[9] *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Request for Reversal of the Prohibition of Contact, 12 July 2005.

[10] *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Request for Urgent Restrictive Measures in the Case Prosecutor v. Hassan Ngeze, Pursuant to Rule 64 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 5 July 2005.

[11] President's Decision, p. 3. It appears that the Commanding Officer allowed the Appellant to talk to one of his children on 5 October 2005 (Interoffice Memorandum to Mr. Hassan Bubacar Jallow, Prosecutor, from Mr. Saidou Guindo, UNDF Commanding Officer, Ref. ICTR-JUD-11-5-3-148, "Report on Measures Taken and the Implementation of the Restriction against Prisoner Hassan Ngeze", 5 October 2005, paras. 3-4).

[12] *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Request for an Extension of the Urgent Restrictive Measures in the Case Prosecutor v. Hassan Ngeze, pursuant to Rule 64 [of] Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 4 August 2005; *Hassan Ngeze v. The Prosecutor,* Case No. ICTR-99-52-A, Request for a Further Extension of the Urgent Restrictive Measures in the Case Prosecutor v. Hassan Ngeze, pursuant to Rule 64 [of] Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 2 and 29 September 2005 respectively.

[13] See also, *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Request for Receiving Visits, Phone Calls (in & out) from his Children, Family, Relatives and Friends", 12 October 2005.

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NOTING that the "Appellant Hassan Ngeze's Motion for Necessary Orders against the UNDF Authorities for Imposing Restrictive Measures during 4th November to 12th November 2005 without any Request of the Prosecutor", filed by the Appellant on 14 November 2005, is currently pending before the President;

NOTING that the "Appellant Hassan Ngeze's Extremely Urgent Motion for Reversal of Request of the Prosecutor on Prohibition of Contacts Pursuant to Rule 64 of the Rules of Detention" filed on 21 November 2005 is also currently pending before the President;

FINDING that the complaint procedure for the detention conditions has not been duly followed by the Appellant and that he has not yet exhausted the remedies made available to him by the Detention Rules;

FINDING also that, had the procedure of the Detention Rules been followed, the Appeals Chamber would only have jurisdiction to review a Registrar's or President's decision if the issues in question were closely related to the fairness of the proceedings on appeal[14];

CONSIDERING that medical, psychological, and psychiatric examinations pursuant to Rule 74 *bis* are typically ordered to establish the Accused's fitness to stay in custody, his ability to stand trial[15], his mental state at the time of the acts charged, as well as sentencing considerations such as ability to be reintegrated in society[16];

FINDING that the Appellant has not demonstrated that any of these concerns are implicated, and specifically has not demonstrated any threat to the fairness of the proceedings on appeal;

FINDING therefore, that the Appellant has not demonstrated the need for an independent psychological examination under Rule 74 *bis*;

FINDING that, in these circumstances and at this stage, the Appeals Chamber sees no reason to order a psychological or psychiatric examination of the Appellant pursuant to Rule 74 *bis* of the Rules,

FOR THE FOREGOING REASONS,

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[14] *Ferdinand Nahimana et al. v. The Prosecutor,* Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December, p. 4; *Ferdinand Nahimana et al. v. The Prosecutor,* Case No. ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, paras. 4 and 7; *Ferdinand Nahimana et al. v. The Prosecutor,* Case No. ICTR-99-52-A, Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005, p. 3. See also, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, para. 19.

[15] *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on the Defence Motion for a Medical Examination of the Accused pursuant to Rule 74 *bis* of the Rules, p. 2.

[16] *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Decision on Defense Motion to Obtain the Assignment of Experts for the Accused Miroslav Kvočka, 12 May 2000, pp. 2-3; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Decision on Defense Request for Assignment of Experts for the Accused Dragoljub Prcać, 18 May 2000, p. 2; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Decision on Defense Request for Assignment of Medical and Psychiatric Experts for the Accused Zoran Zigić, 21 June 2000, p. 2; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Decision on Defense Additional Motion for Psychological Evaluation of the Accused Dragoljub Prcać, 14 December 2000, p. 2.

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DISMISSES the Motion.

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

Dated this 6th day of December 2005, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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## *Corrigendum to the "Decision on Jean Bosco Barayagwiza's and Hassan Ngeze's urgent motions for extension of page and time limits for their replies to the consolidated prosecution response" 7 December 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Resignation from the appeal proceedings by the Co-Counsel, Tribunal's Defence Counsel and Detention Management Section*

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1st January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case[1];

NOTING the Pre-Appeal Judge's "Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for Their Replies to the Consolidated Prosecution Response" filed on 6 December 2005 at The Hague ("Decision", "Appellant Barayagwiza's Motion" and "Appellant Ngeze's Motion", respectively), which dismissed Appellants Barayagwiza's and Ngeze's requests for an extension of the page limit to their Appellant's briefs in reply, but granted an extension of the time limit for the same;

[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

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NOTING that the "Reply to the Prosecutor's Response of 5th December and Response to the Registrar's Submission Dated 1st December 2005" ("Reply", "Prosecutor's Response" and "Registrar's Submission", respectively) was filed by Hassan Ngeze on 5 December 2005 in Arusha but received at The Hague only on 6 December 2005 after the Decision had been filed;

NOTING that the Decision stated that the "the Appellant Ngeze has not yet filed a reply to the Prosecution Response to Ngeze's Motion"[2];

CONSIDERING that, with regard to the Prosecution Response, the Reply simply reiterates the arguments put forward in Appellant Ngeze's Motion;

NOTING that, in response to the Registrar's Submission, Appellant Ngeze refers to the resignation from the appeal proceedings tendered by his Co-Counsel effective 30 November 2005[3];

CONSIDERING that this matter was brought by Appellant Ngeze to the attention of the Tribunal's Defence Counsel and Detention Management Section in his Letter of 1st December 2005[4] and that the Appeals Chamber has not yet been informed of any further development in relation to this matter;

CONSIDERING also that the Decision took note of the Registrar's Submission but did not base its findings thereon;

FINDING, therefore, that even if the Reply had been received by the Pre-Appeal Judge before the Decision was filed, the outcome of the Decision would have been the same;

FOR THE FOREGOING REASONS,

ORDER that the third paragraph on page 3 of the Decision be changed as follows : "NOTING the "Reply to the Prosecutor's Response of 5th December and Response to the Registrar's Submission Dated 1st December 2005" filed by Hassan Ngeze on 5 December 2005;

ALSO ORDER that the third line of the second paragraph on page 7 of the Decision be changed as follows : "[...] is suspended until 31 March 2006 […]" instead of "[…] is suspended until 31 March 2005 […]".

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

Dated this 7th day of December 2005, At Arusha, Tanzania.

[Signed] : Andrésia Vaz

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[2] Decision, p. 2.

[3] Reply, paras. 7-11.

[4] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Letter *Re* : Resignation of Behram Shroff, Co-Counsel, 1st December 2005.

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## *Decision on Hassan Ngeze's request to grant him leave to bring his complaints to the appeals chamber 12 December 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Complaint procedure for the detention conditions – Statutory duty of the Appeals Chamber to ensure the fairness of the proceedings on appeal, Jurisdiction to review decisions of the Registrar, Jurisdiction to review decisions of the President – Motion denied*

*International Instrument cited :*

*Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 3, 82 and 83*

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1st January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case[1];

BEING SEIZED OF the "Appellant Hassan Ngeze's Request to Grant him Leave to Bring his Complaints to the Appeals Chamber When the Normal Procedure under the Rules of Detention Fails to Offer Any Solution" filed by Hassan Ngeze on 29 August 2005 ("Request" and "Appellant", respectively), in which the Appellant requests the Appeals Chamber to allow him

> "to bring his complaints concerning his marriage and unlawfully restrictive measures imposed on him by the Commanding Officer"

of the United Nations Detention Facility in Arusha ("UNDF") before the Appeals Chamber"[2];

NOTING that the Prosecution has not filed a response to the Appellant's Request;

NOTING that, pursuant to Rule 3 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority

[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, Corrigendum to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

[2] Request, p. 2.

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of the Tribunal ("Detention Rules")[3], the Commanding Officer of the UNDF has primary responsibility for all aspects of the daily management of the Detention Unit and that, pursuant to Rules 82 and 83 of the Detention Rules, when a detainee is not satisfied with the response of the Commanding Officer, he or she has the right to make a written complaint to the Registrar who shall forward it to the President of the Tribunal;

CONSIDERING that the Appeals Chamber has the statutory duty to ensure the fairness of the proceedings on appeal[4] and, thus, has jurisdiction to review decisions of the Tribunal's Registrar and President, but that the exercise of such jurisdiction should be closely related to issues involving the fairness of proceedings on appeal and should not be used as a substitute for a general power of review which has not been expressly provided by the Detention Rules[5];

NOTING that since filing the Request, the Appellant has brought before the Appeals Chamber two motions concerning his marriage[6] and the conditions of his detention[7];

CONSIDERING that the issues related to the Appellant's complaints concerning the consummation of his marriage have been resolved by the "Decision on Hassan Ngeze's Application for Review of the Registrar's Decision on 12 January 2005", rendered by the President of the Tribunal on 15 September 2005 ("President's Decision") and by the Appeals Chamber's Decision on Consummation of Marriage, in which the Appeals Chamber found that

> "the Appellant ha[d] exhausted all available remedies and that the Appeals Chamber ha[d] no jurisdiction in this matter"[8];

[3] Adopted on 5 June 1998.

[4] *Ferdinand Nahimana et al. v. Prosecutor,* Case No. ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005 ("*Nahimana et al.* Decision of 3 May 2005"), paras. 4 and 7; *Ferdinand Nahimana et al. v. Prosecutor,* Case No. ICTR-99-52-A, Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005 ("*Nahimana et al.* Decision of 25 April 2005"), p. 3. *See* also, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("*Milutinović et al.* Decision of 13 November 2003"), para. 19.

[5] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005 ("Decision on Consummation of Marriage"), p. 4; *Milutinović et al.* Decision of 13 November 2003, para. 20.

[6] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, "The Appellant Hassan Ngeze's Motion for Setting Aside the Decision of President Judge Erik Møse on his Application for Review of the Registrar's Decision of 12th January, 2005 and Allow his Request to Consummate his Marriage and to Have Conjugal Visits at the UNDF Centre in Arusha or in the Alternative, at The Hague", 31 October 2005.

[7] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, "The Appellant Hassan Ngeze's Urgent Motion to Order the Registrar to Arrange for an Urgent Psychological Examination and Treatment of the Appellant Hassan Ngeze under Rule 74 *bis* of the Rules of Procedure and Evidence by Experts on Account of the Mental Torture Suffered by him at the UNDF", 24 October 2005.

[8] Decision on Consummation of Marriage, p. 4.

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FINDING, therefore, that the Appellant's request to bring before the Appeals Chamber his complaints concerning various issues related to his right to marry and consummate his marriage has become moot;

RECALLING that, with regard to his complaints concerning the conditions of his detention, including the restrictive measures, the Appeals Chamber found that

> "the complaint procedure for the detention conditions has not been duly followed by the Appellant and that he has not yet exhausted the remedies made available to him by the Detention Rules"

and that,

> "had the procedure of the Detention Rules been followed, the Appeals Chamber would only have jurisdiction to review a Registrar's or President's decision if the issues in question were closely related to the fairness of the proceedings on appeal"[9];

ALSO RECALLING that the Appellant has filed several motions on issues related to the conditions of his detention at the UNDF and that these motions are pending before the President of the Tribunal[10];

CONSIDERING that if, after having followed the established procedure, the Appellant considers that his right to fair proceedings is infringed by measures imposed on him at the UNDF, he can raise the matter with the Appeals Chamber, which has the statutory duty to ensure the fairness of the proceedings on appeal[11];

FOR THE FOREGOING REASONS,

DISMISS the Appellant's Request in its entirety.

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

Dated this 12th day of December 2005, At Arusha, Tanzania.

[Signed] : Andrésia Vaz

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[9] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005 ("Decision on Psychological Examination"), p. 4.

[10] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, "Appellant Hassan Ngeze's Urgent Request for Receiving Visits, Phone Calls (in & out) from his Children, Family, Relatives and Friends", 5 October 2005; *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, "Appellant Hassan Ngeze's Motion for Necessary Orders against the UNDF Authorities for Imposing Restrictive Measures during 4th November to 12th November 2005 without any Request of the Prosecutor", 14 November 2005; *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, "Appellant Hassan Ngeze's Extremely Urgent Motion for Reversal of Request of the Prosecutor on Prohibition of Contacts Pursuant to Rule 64 of the Rules of Detention", 21 November 2005; *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, "Appellant Hassan Ngeze's Extremely Urgent Motion for Reversal of Request of the Prosecutor on Prohibition of Contacts Pursuant to Rule 64 of the Rules Detention", 22 November 2005.

[11] See, *Nahimana et al.* Decision of 3 May 2005, paras. 4 and 7; *Nahimana et al.* Decision of 25 April 2005, para. 3.

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## *Decision on Hassan Ngeze's Request for a Status Conference 13 December 2005 (ICTR-99-52-A)*

(Original : English)

Appeals Chamber

Judge : Andrésia Vaz, Pre-Appeal Judge

*Jean Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze – Condition of detention, Complaint procedure for the detention condition, Status Conference, Purpose of a status conference, Responsibility of the Registry, Statutory duty of the Appeals Chamber, to ensure the fairness of the proceedings on appeal, Jurisdiction to review decisions of the Registrar, Jurisdiction to review decisions of the President, General power of review of the Appeals Chamber – Motion dismissed*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 65* bis *(A)*

*Directive for the Registry of the Tribunal art. 38; Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 3, 82 and 83*

*International Case cited :*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Milan Milutinović et al., *Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 (IT-05-87)*

I, ANDRÉSIA VAZ, Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1st January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) and Pre-Appeal Judge in this case[1];

BEING SEIZED OF the "Appellant Hassan Ngeze's Request of an Extremely Urgent Status Conference Pursuant to Article 38 of the Directive for the Registry" filed on 16 November 2005 ("Appellant" and "Request", respectively), in which the Appellant requests the Appeals Chamber to convene a status conference in order to enable him to address the problems that he allegedly faces at the United Nations Detention Facility ("UNDF")[2];

[1] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; *Ferdinand Nahimana et al. v. The Prosecutor,* ICTR-99-52-A, *Corrigendum* to the Order of the Presiding Judge Designating the Pre-Appeal Judge, 25 August 2005.

[2] Request, p. 2.

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NOTING that the Prosecution has not filed a response to the Appellant's Request;

NOTING that the Appellant requests convening a status conference under Article 38 of the Directive for the Registry of the Tribunal ("Directive for Registry");

CONSIDERING that Article 38 of the Directive for Registry does not grant an accused a right to status conferences on request but rather delineates the responsibilities of the Registry when a Chamber decides to order a status conference;

CONSIDERING that, pursuant to Rule 65 *bis* (A) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the purpose of a status conference is "to organise exchanges between the parties so as to ensure expeditious trial proceedings";

RECALLING the Pre-Appeal Judge's "Decision on Hassan Ngeze's 'Request of an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence'" of 20 September 2005, denying the Appellant's request to convene a status conference to discuss the restrictive measures imposed on him[3];

NOTING that the Appellant submits that the problems he is currently facing at the UNDF "hinder[] the efficient preparation of the pending appeal"[4];

CONSIDERING that the Appellant does not explain in what way the alleged physical and psychological problems faced by him at the UNDF affect the preparation of his appeal, especially in the circumstances where the restrictive measures imposed on him do not prevent him from communicating with his Counsel;

CONSIDERING that, pursuant to Rule 3 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention")[5], the Commanding Officer of the UNDF has the primary responsibility for all aspects of the daily management of the UNDF and that, pursuant to Rules 82 and 83 of the Rules of Detention, when a detainee is not satisfied with the response of the Commanding Officer, he or she has the right to file a written complaint with the Registrar who shall forward it to the President of the Tribunal;

RECALLING that, in its "Decision on Hassan Ngeze's Motion for a Psychological Examination" of 6 December 2005 ("Decision of 6 December 2005"), the Appeals Chamber found that "the complaint procedure for the detention conditions has not been duly followed by the Appellant and that he has not yet exhausted the remedies made available to him by the Detention Rules"[6];

RECALLING the Pre-Appeal Judge's "Decision on Hassan Ngeze's Request to Grant him Leave to Bring his Complaints to the Appeals Chamber" of 12 December 2005[7];

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[3] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze's "Request of an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", 20 September 2005 ("Decision of 20 September 2005"), p. 3.

[4] Request, para. 1.

[5] Adopted on 5 June 1998.

[6] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005 ("Decision on Psychological Examination"), p. 4.

[7] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze's Request to Grant him Leave to Bring his Complaints to the Appeals Chamber, 12 December 2005 ("Decision of 12 December 2005).

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ALSO RECALLING that, as the Appellant acknowledges[8], several of his motions on issues related to the conditions of his detention at the UNDF are currently pending before the President[9];

CONSIDERING that the Appeals Chamber has the statutory duty to ensure the fairness of the proceedings on appeal[10] and, thus, can review decisions of the Tribunal's Registrar and President, but that

> "the exercise of such jurisdiction should be closely related to issues involving the fairness of proceedings on appeal and should not be used as a substitute for a general power of review which has not been expressly provided by the Detention Rules"[11];

CONSIDERING that the Appellant has not shown that a status conference to discuss the alleged problems faced by him at the UNDF would be necessary to ensure expeditious proceedings on appeal in the present case[12];

FINDING, therefore, that there is no need to convene a status conference under Rule 65 *bis* of the Rules with regard to the Request,

FOR THE FOREGOING REASONS,

DISMISS the Request.

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

Dated this 13th day of December 2005, At The Hague, The Netherlands.

[Signed] : Andrésia Vaz

***

[8] Request, para. 3.

[9] *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Appellant Hassan Ngeze's Urgent Request for Receiving Visits, Phone Calls (in & out) from his Children, Family, Relatives and Friends, 5 October 2005; *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Appellant Hassan Ngeze's Motion for Necessary Orders against the UNDF Authorities for Imposing Restrictive Measures during 4th November to 12th November 2005 without any Request of the Prosecutor, 14 November 2005. See also motions filed by the Appellant subsequently to the Request : *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Appellant Hassan Ngeze's Extremely Urgent Motion for Reversal of Request of the Prosecutor on Prohibition of Contacts Pursuant to Rule 64 of the Rules of Detention, 21 November 2005; *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Appellant Hassan Ngeze's Extremely Urgent Motion for Reversal of Request of the Prosecutor on Prohibition of Contacts Pursuant to Rule 64 of the Rules Detention, 22 November 2005.

[10] *Ferdinand Nahimana et al. v. Prosecutor,* Case No. ICTR-99-52-A, Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, paras. 4 and 7; *Ferdinand Nahimana et al. v. Prosecutor,* Case No. ICTR-99-52-A, Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005, p. 3. See also, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR.73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003 ("*Milutinović et al.* Decision of 13 November 2003"), para. 19.

[11] Decision of 12 December 2005, pp. 2-3; *Ferdinand Nahimana et al. v. The Prosecutor*, ICTR-99-52-A, Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005, p. 4; *Milutinović et al.* Decision of 13 November 2003, para. 20.

[12] See also, Decision of 20 September 2005, p. 3.

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# *The Prosecutor v. Jérôme BICAMUMPAKA, Casimir BIZIMUNGU, Justin MUGENZI and Prosper MUGIRANEZA*

## Case N° ICTR-99-50

***Case History : Jérôme Bicamumpaka***

- Name : BICAMUMPAKA
- First Name : Jérôme
- Date of Birth : 1957
- Sex : male
- Nationality : Rwandan
- Former Official Function : Minister of Foreign Affairs

- Date of Indictment's Confirmation : 12 May 1999 [1]
- Counts : genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 6 April 1999, in Cameroon
- Date of Transfer : 31 July 1999
- Date of Initial Appearance : 17 August 1999
- Pleading : not guilty
- Date Trial Began : 6 November 2003

***

***Case History : Casimir Bizimungu***

- Name : BIZIMUNGU
- First Name : Casimir
- Date of Birth : unknown
- Sex : male
- Nationality : Rwandan
- Former Official Function : Minister of Health

[1] The text of the indictment is reproduced in the 1999 *Report*, p. 266. The text of the Decision to confirm the indictment is reproduced in the 1999 *Report*, p. 334.

# *Le Procureur c. Jérôme BICAMUMPAKA, Casimir BIZIMUNGU, Justin MUGENZI et Prosper MUGIRANEZA*

## Affaire N° ICTR-99-50

***Fiche technique : Jérôme Bicamumpaka***

- Nom : BICAMUMPAKA
- Prénom : Jérôme
- Date de naissance : 1957
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Ministre des affaires étrangères
- Date de la confirmation de l'acte d'accusation : 12 mai 1999 [1]
- Chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 6 avril 1999, au Cameroun
- Date du transfert : 31 juillet 1999
- Date de la comparution initiale : 17 août 1999
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 6 novembre 2003

***

***Fiche technique : Casimir Bizimungu***

- Nom : BIZIMUNGU
- Prénom : Casimir
- Date de naissance : inconnue
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Ministre de la santé

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 267. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 335.

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- Date of Indictment's Confirmation : 12 May 1999 [2]
- Counts : genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 11 February 1999, in Kenya
- Date of Transfer : 23 February 1999
- Date of Initial Appearance : 3 September 1999
- Pleading : not guilty
- Date Trial Began : 6 November 2003

***

***Case History : Justin Mugenzi***

- Name : MUGENZI
- First Name : Justin
- Date of Birth : 1949
- Sex : male
- Nationality : Rwandan
- Former Official Function : Minister for Trade
- Date of Indictment's Confirmation : 12 May 1999 [3]
- Counts : genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 6 April 1999, in Cameroon
- Date of Transfer : 31 July 1999
- Date of Initial Appearance : 17 August 1999
- Pleading : not guilty
- Date Trial Began : 6 November 2003

***

***Case History : Prosper Mugiraneza***

- Name : MUGIRANEZA
- First Name : Prosper
- Date of Birth : 1957

[2] The text of the indictment is reproduced in the 1999 *Report*, p 266. The text of the Decision to confirm the indictment is reproduced in the 1999 *Report*, p. 334.

[3] The text of the indictment is reproduced in the 1999 *Report*, p 266. The text of the Decision to confirm the indictment is reproduced in the 1999 *Report*, p. 334.

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- Date de la confirmation de l'acte d'accusation : 12 mai 1999 [2]
- Chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 11 février 1999, au Kenya
- Date du transfert : 23 février 1999
- Date de la comparution initiale : 3 septembre 1999
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 6 novembre 2003

***

***Fiche technique : Justin Mugenzi***

- Nom : MUGENZI
- Prénom : Justin
- Date de naissance : 1949
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Ministre du commerce
- Date de la confirmation de l'acte d'accusation : 12 mai 1999 [3]
- Chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 6 avril 1999, au Cameroun
- Date du transfert : 31 juillet 1999
- Date de la comparution initiale : 17 août 1999
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 6 novembre 2003

***

***Fiche technique : Prosper Mugiraneza***

- Nom : MUGIRANEZA
- Prénom : Prosper
- Date de naissance : 1957

[2] Le texte de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 267. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 335.

[3] Le texte de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 267. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 335.

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- Sex : male
- Nationality : Rwandan
- Former Official Function : Minister of Civil Service

- Date of Indictment's Confirmation : 12 May 1999 [4]
- Counts : genocide, complicity in genocide, conspiracy to commit genocide, direct and public incitement to genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 6 April 1999, in Cameroon
- Date of Transfer : 31 July 1999
- Date of Initial Appearance : 17 August 1999
- Pleading : not guilty
- Date Trial Began : 6 November 2003

[4] The text of the indictment is reproduced in the 1999 *Report*, p. 266. The text of the Decision to confirm the indictment is reproduced in the 1999 *Report*, p. 334.

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- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Ministre de la fonction publique et du travail
- Date de la confirmation de l'acte d'accusation : 12 mai 1999 [4]
- Chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date et lieu de l'arrestation : 6 avril 1999, au Cameroun
- Date du transfert : 31 juillet 1999
- Date de la comparution initiale : 17 août 1999
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 6 novembre 2003

[4] Le texte de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 267. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil* 1999, p. 335.

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## *Decision on Prosper Mugiraneza's Extremely Urgent Motion to Vary of Interview with Jean Kambanda 19 January 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Interview of an Accused Witness, Conditions for interview, Presence of the opposing party during the interviews, Integrity and transparency of the process – Motion denied*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness, 2 October 2003 (ICTR-99-50)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Extremely Urgent Motion to Vary Conditions of Interview with Jean Kambanda" filed on 18 January 2005 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to Mugiraneza's Extremely Urgent Motion of 17 January 2005 to Vary Conditions of Interview with Jean Kambanda" filed on 18 January 2005 (the "Response");

NOW DECIDES THE MOTION

### PROCEDURAL HISTORY

1. On 2 October 2003 the Chamber issued a Decision (the "*First Decision*") granting the Defence Motion for access to potential Prosecution Witness Jean Kambanda in order to interview him, provided that (i) Jean Kambanda consents to such interview, and (ii) in order to protect the integrity of the proceedings, a representative of the Prosecution may be present during the interview[1]. Jean Kambanda subsequently made it known that he was willing to be interviewed by the Defence, however on the condition that such interview take place in the absence of a representative of the Pros-

[1] *Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness (TC), 2 October 2003.

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ecution[2]. The Defence applied for a variation of the conditions laid down in the *First Decision*, this application being decided by the Chamber on 24 August 2004 (the "*Second Decision*")[3]. Having reviewed the *First Decision* in light of the changed circumstances, the Chamber varied the conditions for the interview as follows :

> ORDERS that the Defence for Prosper Mugiraneza be allowed to interview Jean Kambanda without a representative of the Office of the Prosecutor being present.
>
> INSTRUCTS the Registrar to make all necessary arrangements for the interview of Jean Kambanda by the Defence for Prosper Mugiraneza and to designate a representative who will attend the interview.

SUBMISSIONS

2. The Defence informs the Chamber that, following the Chamber's Order of 24 August 2004, on 17 January 2005 it attempted to interview Prosecution Witness Jean Kambanda, who is currently imprisoned in Mali following his conviction by the Tribunal, in the presence of a representative of the Registry pursuant to the terms of the Order. According to the Defence, Jean Kambanda refused to be interviewed by the Defence in the presence of a representative of the Tribunal. This information has been confirmed by the Registry[4].

3. The Defence now moves the Chamber to vary the *Second Decision* to authorise Defence Counsel to meet with and interview Jean Kambanda alone.

4. The Prosecution objects to the Motion. It notes that the conditions for interview suggested by the Defence are at the whim of Jean Kambanda. It submits that in the absence of a representative of the Registry, Defence Counsel cannot guarantee that no improper influence will be placed on the Witness. It recalls the *First Decision*, where the Chamber held that

> "the presence of the opposing party during such interviews in necessary to protect the integrity and transparency of the process"[5].

5. The Prosecution recalls that the Chamber ordered proper arrangements to be made prior to the interview of Jean Kambanda, and now surmises that this was not done. The Prosecution submits that whether or not Jean Kambanda was willing to be interviewed under the conditions laid down by the Chamber should have been established before the mission to Mali was undertaken.

---

[2] Letter from Jean Kambanda to Monsieur Jean-Pelé Fomété, *Conseiller Juridique de la Section de l'Administration des Chambres*, 3 December 2003, attached to "Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access to Jean Kambanda", filed on 12 December 2003.

[3] *Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access to Jean Kambanda (TC), 24 August 2004

[4] Email communication from M. Matar Diop, Deputy Chief, Court Management Section to Mr. Chile Eboe-Osuji, Senior Legal Officer, Chambers Support Section, 17 January 2005.

[5] *Response*, paras. 5-6.

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**Having deliberated**

6. The Chamber in the *Second Decision* reviewed the circumstances surrounding the application by the Defence and set conditions which were intended to be fair to both parties and to preserve the integrity of the proceedings. The Chamber has again reviewed the circumstances of the instant application and finds no compelling reason to vary those conditions as suggested by the Defence. It is not for a witness to dictate to the Tribunal the conditions under which he or she is willing to be interviewed, but rather for the Chamber to ensure that the fairness and transparency of the judicial process is safeguarded.

THEREFORE THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 19 January 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

***

## *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses 2 February 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Measures to protect victims and witnesses, Identity of the witness; Objective basis of the witness' fear, Burden of the proof, Seeking party, Independent justifying elements – Motion granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 69, 69 (A), 73 (A) and 75; Statute, art. 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision on Defence Request for Protection of Witnesses, 25 August 2004 (ICTR-2001-76)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Chamber");

BEING SEIZED of

(i) "Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 14 December 2004 (the "Motion");

(ii) the "Confidential Exhibits to Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 14 December 2004 (the "Exhibits");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 20 December 2004 (the "Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Evidence (the "Rules"), particularly Rules 69 and 75 of the Rules;

NOW DECIDES the Motion solely on the basis of the written briefs of the Parties pursuant to Rule 73 (A) of the Rules.

## Submissions of the Parties

*The Defence Motion*

1. The Defence for Prosper Mugiraneza seeks an order for measures for the protection of Defence witnesses on the ground that they fear retaliation or other harm as a consequence of the evidence they might give before this Tribunal.

2. In the interests of brevity and in support of its request for protective measures, the Defence for Mugiraneza seeks to adopt the Prosecution Motion for Protection of Witnesses filed on 9 March 2000 as well as the briefs and exhibits filed in support of the Prosecution Motion. The Defence for Mugiraneza adopts the Affidavit of Remi Abdulraham[1] which was filed in support of the Prosecution Motion and also files a copy of the affidavit of the investigator working in Mugiraneza's Defence team (confidential Exhibit D), both of which pertain to the need for witness protection.

3. The Defence submits that although the documents filed by the Prosecution which it adopts in the present Motion are now more than four years old, the Chamber should presume that the circumstances described in these documents have not changed materially since the Prosecution has not brought any such change to its notice.

4. The Defence further points out that the Chamber has heard evidence showing that witnesses before this Tribunal may face adverse consequences which the Chamber must take seriously. The Defence also contends that witnesses were pressured to make public statements and faced adverse actions when they did not do so. The Defence also cites certain transcripts from this Trial in support of this contention.

5. According to the Defence, such protective measures are required not only for witnesses and potential witnesses residing in Rwanda and Africa but also for witnesses resident in other places such as Europe or any other continent. The Defence submits that although such witnesses who are not resident in Africa may themselves be

[1] This is part of the record as RP-784-86.

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immune from direct intimidation or danger, they have friends and relatives in more dangerous locations.

6. The Defence points out that the relief sought is reasonable and that the Prosecutor had been granted identical relief in a similar situation.

*The Prosecution Response*

7. The Prosecution submits that it does not oppose the Motion in principle, subject to a number of observations.

8. The Prosecution states that the Defence has sought to shift the burden of proof by alleging that the Prosecution must indicate whether circumstances have changed since 2000. The Prosecution contends that it discharged the burden of proving the prevailing circumstances when it filed its Motion for protective measures in 2000. Accordingly, the Prosecution argues that the burden of proving whether the same circumstances continue to exist at present is upon the Defence.

9. The Prosecution responds to paragraph 9 (g) of the Motion by submitting that it is self-evident that the Chamber's permission will suffice to allow the photographing, audio and/or video recording, or sketches of any Defence witnesses.

**Having deliberated**

10. By virtue of Article 21 of the Statute and Rule 75 of the Rules, the Tribunal is under an obligation to order appropriate measures to protect victims and witnesses provided these measures do not compromise the rights of the accused.

11. The existing jurisprudence clearly mandates that the witnesses for whom protective measures are sought must have a real fear for their own safety or that of their family. This fear must have an objective basis and measures are therefore generally granted on a case-by-case basis[2].

12. The Chamber notes that Confidential Exhibit D establishes that possibilities of retaliation or intimidation exist against Defence witnesses who have been contacted to testify before this Tribunal if protective measures are not put in place. The Chamber further notes that this *Affidavit* is dated 18 October 2004.

13. Nevertheless, the Chamber deems it necessary to comment upon the overall approach of the Defence for Mugiraneza to obtain an order for protective measures for Defence witnesses. The Chamber recalls that the burden of proving that circumstances exist which demand the protection of witnesses lies on the party seeking such protection. It is the Chamber's view that the Defence cannot merely adopt documents filed previously by the Prosecution in support of its own Motion and then shift the onus onto the Prosecution to show that the circumstances therein have changed. It is for the Defence to clearly delineate the dangers that its witnesses and potential witnesses face and the situation which warrants such protective measures. Decisions given by other Trial Chambers clearly indicate that the Defence must provide inde-

[2] *Prosecutor v. Aloys Simba*, ICTR-01-76-I, "Decision on Defence Request for Protection of Witnesses (TC)", 25 August 2004, para. 5. ("*Simba*").

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pendent justifying elements attesting to the fears of its witnesses instead of merely relying on the specific circumstances of Prosecution witnesses[3].

14. Having noted that Confidential Annex C establishes the existence of exceptional circumstances under Rule 69 (A) of the Rules, the Chamber further notes that the Prosecution does not oppose the Motion in principle. The Chamber also notes that such measures have been granted by other Trial Chambers as a matter of abundant caution aimed at providing a secure environment for witnesses[4].

15. With respect to the Defence request in paragraph 9 (h) of its Motion not to be required to supply more information than the Prosecution is required to supply under the Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses dated 15 October 2003, the Chamber recalls the wording of its Order which differs from the Motion :

> "Orders that the Witness information sheet or sheets, as the case may be, that are served to the Defence, along with the witness's statement, should contain the following identifying information, if such information is contained in the original witness information sheets :
>
> (i) Full Names (including family, first and nicknames and pseudonym)
>
> (ii) Date and place of birth
>
> (iii) Names of Parents
>
> (iv) Ethnic group
>
> (v) Religion
>
> (vi) Address in April in 1994
>
> (vii) Occupation in April 1994"

The Chamber decides that it is appropriate to use a similar formulation for purposes of deciding the current Motion.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following terms :

The Chamber orders that :

(a) The names, addresses, whereabouts of or and other identifying information concerning potential Defence witnesses should be sealed by the Registry and are not to be included in any records of the Tribunal.

(b) The names, addresses, whereabouts of, and other identifying information concerning all potential Defence witnesses should be communicated only to the Victims and Witness Support Unit by the Registry in accordance with the established procedure and only to implement protective measures for these individuals.

(c) To the extent that any names, addresses, whereabouts of, and any other identifying information concerning such potential Defence witnesses currently existing in records of the Tribunal, such information should be expunged from those documents.

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[3] *Simba*, para. 6.

[4] *Prosecutor v. Bagosora*, "Decision on Bagosora Motion for Protection of Witnesses (TC)", 1 September 2003, para. 3.

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(d) The names, addresses, whereabouts of and other identifying data of potential Defence witnesses found in the supporting material or any other information on file with the Registry, or any other information that may reveal the identity of such potential Defence witnesses shall not be disclosed to the public or to the media during or after the Trial until the Chamber decides to further revise this prohibition.

(e) The Prosecution shall not share, discuss or reveal, 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 Defence witnesses to any person or entity other than persons working on the immediate Prosecution team.

(f) The Prosecution shall designate to the Chamber and the Defence all persons working on the immediate Prosecution team who will have access to any information which may reveal or lead to the identification of Defence witnesses. The Prosecution shall also inform the Chamber in writing of any changes in the team composition and shall ensure that all members departing from this team remit all materials that reveal or could lead to the identification of Defence witnesses.

(g) No photographing, audio or video recording or sketching of any Defence witnesses shall be allowed without leave of the Chamber and the Parties.

(h) The disclosure to the Prosecution of the names, addresses, whereabouts of and other identifying data which reveals or may identify Defence witnesses, and any other information in the supporting material on file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the Prosecution in a redacted form until such a mechanism is in place and in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial unless the Chamber decides otherwise pursuant to Rule 69 (A) of the Rules.

(i) The Defence is required to submit the following identifying data pursuant to Paragraph (h) if such information is contained in the original witness information sheets

  (i) Full Names (including family, first and nicknames and pseudonym);

  (ii) Date and place of birth;

  (iii) Names of Parents;

  (iv) Ethnic group;

  (v) Religion;

  (vi) Address in April in 1994;

  (vii) Occupation in April 1994.

(j) The Prosecutor shall make a written request, on reasonable notice to the Defence, to the Trial Chamber or Judge thereof, to contact any protected potential Defence witness or any relative of such person. The Defence shall undertake all necessary arrangements to facilitate the interview with such a person at the direction of the Trial Chamber or a Judge thereof with the consent of such a protected person or the parents or guardians of that person if that person is under the age of 18.

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(k) The Defence shall designate a pseudonym for each Defence witness, which will be used to refer to each such witness in Tribunal proceedings, communications and discussions between the Parties to the Trial, and the public until such time as the Chamber decides otherwise.

Arusha, 2 February 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence 2 February 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Measures of protection of victims and witnesses, Effect of the measures of protection in other proceedings, Disclosure obligations of the Prosecutor, Routine disclosure of closed session testimony – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 68, 69, 73 (A), 75, 75 (F) and 75 (F) (ii)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Ferdinand Nahimana et. al., *Decision on Disclosure of Transcripts and exhibits of Witness X, 3 June 2004 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Prosecutor's* ex-parte *and Extremely Urgent Motion to Access Closed Session Transcripts in Case No. ICTR-96-3-A to Disclose to Case No. ICTR-98-42-T, 23 September 2004 (ICTR-98-42)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of the "Prosecutor's Request For An Order Of Disclosure Of Closed Session Transcripts And Sealed Prosecution Exhibits Pursuant To Rules 69

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And 75 Of The Rules Of Procedure And Evidence", filed on 10 December 2004 (the "Motion");

RECALLING the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses", dated 22 September 2000 (the "Decision of 22 September 2000");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rules 69 and 75 of the Rules;

NOW DECIDES the matter solely on the basis of the Prosecutor's written brief pursuant to Rule 73 (A) of the Rules.

**Prosecutor's Submissions**

1. Pursuant to Rules 68 of the Rules, the Prosecutor is requesting the Chamber to amend the Decision of 22 September 2000, in order to disclose the sealed portion of the testimony of Witness D who testified in the case of *The Prosecutor* v. *Bizimungu et. al.* (ICTR-99-50-T) to Defence Counsel in *The Prosecutor v. Muvunyi* (ICTR-2000-55A) where the said witness is scheduled to testify for the Prosecution.

2. The amendment to the Witness Protection Orders is being requested to facilitate the process of disclosure and the appearance of the witness before Trial Chamber 1. The Prosecution also submits that the disclosure of the said documents is necessary to facilitate the preparation of the Defence case and assess witness credibility.

3. The Prosecutor also requests that parties or persons accessing these documents should provide a written undertaking to comply with the Protection orders issued in respect of this Witness.

**Deliberations**

4. Rule 75 (F) reads as follows :

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

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

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

5. Given the terms set out in Rule 75 (F) (ii), particularly the reference to "any disclosure obligation under the Rules", the Chamber is of the view that the Prosecution should fulfil its disclosure obligations under the Rules notwithstanding applicable protective orders, and that upon such disclosure, the party receiving the materials is then bound *mutatis mutandis* by the terms of the applicable protective measures in accordance with the provisions of Rule 75 (F).

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6. The Chamber recalls that according to the jurisprudence of the Tribunal[1], Rule 75 (F) is intended to create a mechanism for the routine disclosure of closed session testimony without the need for Parties to make individual applications to the Trial Chamber which ordered the protective measures.

7. The Chamber therefore finds that the obligation to make disclosures under Rule 75 (F) is automatic, and that the instant application is unnecessary.

FOR THE FOREGOING REASONS, THE CHAMBER

DISMISSES the Prosecutor's Motion.

Arusha, 2 February 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1st December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material" 4 February 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka and Justin Mugenzi – Interlocutory Appeal, Discretionary power of the Trial Chamber to grant a certification of appeal, Conditions for a Certification of Appeal, Cumulative conditions, Fairness of the proceedings, Significant issues – Interpretation of the Rules; – Rights of the Accused to a fair trial – Disclosure obligation of the Prosecutor, Defence Counsel and Detention Management Section, Commissioning of an electronic disclosure system, Duty of the Defence to conduct investigations, Interests of Justice – Motion denied*

*International Instruments cited :*

[1] *Prosecutor v. Nahimana et. al.* Case N° ICTR-99-52-T "Decision on Disclosure of Transcripts and exhibits of Witness X", (TC) 3 June 2004 paras. 4 and 5; *Prosecutor* v. *Nyiramasuhuko et al.* Case N° ICTR-98-42-T, "Decision on the Prosecutor's ex-parte and Extremely Urgent Motion to Access Closed Session Transcripts in Case N° ICTR-96-3-A to Disclose to Case N° ICTR-98-42-T" (TC) of 23 September 2004.

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*Rules of Procedure and Evidence, rules 66 (A) (ii), 68 (A), 68 B), 73 and 73 (B); Statute, art. 19 and 21*

*International and National Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42);* Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material, 1 December 2004 (ICTR-99-50)*

*Canadian Supreme Court : Supreme Court of Canada,* R. v. Stinchcombe, *[1991] 3 S.C.R. 326, 7 November 1991*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

RECALLING the "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material" filed on 1 December 2004 (the "Impugned Decision");

BEING SEISED OF "Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material" filed on 13 December 2004 (the "Motion");

HAVING RECEIVED AND CONSIDERED :

(i) The "Prosecutor's Response to Bicarnumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material" filed on 15 December 2004 (the "Response");

(ii) Bicamumpaka's Reply to "Prosecutor's Response Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material" filed on 27 December 2004 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular Rule 68 (B) of the Rules;

HEREBY DECIDES the Motion on the basis of written briefs filed by the Parties pursuant to Rule 73 of the Rules

## Submissions of the Defence

*Relief Sought*

1. The Defence for Bicamumpaka seeks, pursuant to Rule 73, certification for an interlocutory appeal of the Chamber's 1 December 2004 "Decision on the motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material".

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*Supporting Arguments*

2. The Defence for Bicamumpaka argues that under Rule 73 (B), the Chamber may grant certification for an interlocutory appeal where the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Trial Chamber, an immediate resolution may materially advance the proceedings.

3. The Defence argues that the Chamber erred in the Impugned Decision when it ruled that Commander Nkole's reference to 35,000 documents and 5000 witness statements relate to the entire event referred to as "the 1994 Rwandan Genocide" and therefore may not have direct relevance to the Government II case. According to the Defence, it is clear from the Indictment that the Accused are charged with superior responsibility for the events in Rwanda between April and July 1994 – the "1994 Rwandan Genocide".

4. The Defence agrees with the Chamber's interpretation that Rule 68 (B) does not create new disclosure obligations for the Prosecutor. However, the Defence argues that the Rule provides the Defence with a right of access to the exculpatory material held by the Prosecutor, and that the Prosecutor's discretion in selecting material to comply with Rule 66 (A) (ii) does not preclude the existence of witness statements that are relevant and exculpatory to the Defence.

5. The Defence contends that the Chamber erred in holding that the reference to "without prejudice" in Rule 68 (B) indicates that "Relevant Material" also has to be exculpatory, and that the Rule merely allows the Prosecutor to use modern technology to discharge its disclosure obligations. According to the Defence, such an interpretation contradicts the plain meaning, as well as the purpose and structure of Rule 68 (B). The Defence argues that "without prejudice" in Rule 68 (B) means that the fact that the Prosecutor makes relevant material available to the Defence, does not affect the positive duty to disclose exculpatory material under Rule 68 (A).

6. The Defence argues that the Chamber's interpretation is inconsistent with the intent evidenced in the recent amendment of Rule 68 and would render the Rule superfluous and the amendment redundant. It is the Defence's submission that the amendment to the title of Rule 68 to refer to two distinct categories of evidence - namely "Evidence" and "Other Relevant" material clearly suggests that the drafters intended for the Defence to have electronic access to relevant material. The Defence argues that exculpatory evidence is a subset of, but distinct from, relevant evidence.

7. The Defence submits that it appears from Witness Nkole's testimony that the Prosecutor is in possession of 35,000 documents and 5,000 witness statements that could be potentially exculpatory, and that it is only by allowing the Defence to electronically access and search this collection that it could determine which evidence is exculpatory and therefore subject to disclosure under Rule 68 (A).

8. The Defence further submits that access to this collection of material will ensure that these proceedings are conducted in a fair and expeditious manner, by making sure that the Defence is afforded a real possibility to adequately prepare its case.

9. The Defence cites the Canadian Supreme Court case of *R v. Stinchcombe*[1] and submits that the Prosecutor does not have a proprietary interest in evidence that he

[1] *Stinchcombe v. The Queen* [1991] 3 SCR 326, p. 333.

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collects during investigation, but rather holds such evidence in trust to be utilized in the interests of justice.

10. The Defence argues that Rule 68 (B) is a new rule. There are no decisions interpreting it. It is likely to be invoked in future by other accused persons. For these reasons, the Defence contends that appellate resolution would significantly affect the fair and expeditious conduct of this and other proceedings before the Tribunal.

11. The Defence also argues that an immediate resolution of the issue will materially advance the proceedings because the collection of materials include broadcasts of Radio Rwanda and RTLM which are necessary for the Defence to substantiate some alibis and attack the credibility of some Prosecution witnesses.

12. The Defence contends that, contrary to the Chamber's holding in the Impugned Decision, the Motion is not frivolous because the Defence has on several occasions met with representatives of the Prosecutor's office and agreed that the interpretation of Rule 68 (B) is material and the Prosecutor in fact agreed to grant the Defence access to the relevant material.

*The Prosecutor's Response*

13. The Prosecutor opposes the Motion and urges the Trial Chamber to refuse certification to appeal.

14. The Prosecutor argues that the jurisprudence of the Tribunal makes it clear that certification to appeal under Rule 73 (B) is to be granted only sparingly[2]. According to the Prosecutor, in determining whether or not to grant certification for an interlocutory appeal, both the ICTR and the International Criminal Tribunal for Yugoslavia (ICTY) have taken the following factors into account : the importance of the issue; whether or not the Appeals Chamber has provided guidance on the issue; and whether there are conflicting approaches among Trial Chambers. The Prosecutor further submits that an appeal would be appropriate only if these factors are truly significant[3].

15. The Prosecutor submits that Bicamumpaka's appeal has no prospects of success and that it fails to meet the requirements for certification under Rule 73 (B)[4].

16. The Prosecutor further submits that the Chamber neither committed an error of law nor did it abuse its discretion in deciding that Rule 68 (B) did not create a new disclosure obligation for the Prosecutor.

*The Defence Reply*

17. The Defence replies that the Prosecutor's response is wrong in law and in fact. The Defence argues that the response contradicts the Prosecutor's stated position in a letter dated 2 December 2004 from the Defence Counsel and Detention Management Section (DCDMS) transmitting the Prosecutor's request to notify all Defence teams of the commissioning of an electronic disclosure system (EDS) at the Office of the

[2] Prosecutor's response to Bicamumpaka's request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material", filed 15 December 2004, para. 5.

[3] *Ibid.*, para. 7.

[4] *Ibid.,* paras. 12 & 15.

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Prosecutor (OTP) and encouraging Defence teams to register to use the facility[5]. Among other things, the DCDMS letter quotes the following paragraph from the Prosecutor's request :

> Subsequent to the adoption of Rule 68 (B) in the ICTR Rules of Procedure and Evidence, this office has developed and commissioned the Electronic Disclosure System ("EDS") to facilitate electronic disclosure to the Defence of materials in the possession of the OTP that "may be relevant" to their respective cases[6].

18. The Defence argues that based on the contents of this letter, Defence teams in other cases not bound by the Impugned Decision, will presumably have electronic access to materials in the possession of the Prosecutor.

19. The Defence argues that the Chamber's interpretation of Rule 68 (B) is inconsistent with judicial rules of interpretation and cannons of construction. The interpretation is inconsistent with the structure of Rule 68, and does not follow the plain language of the Rule which only re-emphasizes the Prosecutor's positive obligation to disclose exculpatory material pursuant to Rule 68 (A). By limiting access to relevant material, argues the Defence, the Chamber's interpretation is prejudicial to Mr. Bicamumpaka because it undermines the court's truth seeking objectives and contravenes the right to a fair trial guaranteed under Articles 19 and 21 of the Statute.

20. The Defence argues that the Prosecutor's assertions in paragraphs 7 and 12 of the Response support granting certification to appeal the Impugned Decision[7].

21. The Defence submits that in view of the Prosecutor's failure to oppose the original motion, the Chamber's exercise of discretion in the Impugned Decision was erroneous because it only considered *suo moto* objections to access relevant material.

23. The Defence replies that, contrary to the Prosecutor's pleading in paragraph 14 of the Response, the denial of fees of a motion that was unopposed by the non-moving Prosecutor is a significant issue supporting the granting of certification to appeal.

## Deliberations

24. The Chamber recalls Rule 73 (B) of the Rules which provides as follows :

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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[5] Bicamumpaka's Reply to "Prosecutor's Response to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material", filed on 23 December 2004, Annex 1 para. 1.

[6] Bicamumpaka's Reply to "Prosecutor's Response to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material", filed on 23 December 2004, Annex 1 para. 2 (1).

[7] Paragraphs 14 and 15 above.

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25. The Chamber recalls the Decision in *Prosecutor* v. *Nyiramasuhuko* that the general rule is that decisions rendered on motions brought under Rule 73 (B) are without interlocutory appeal[8]. However, the Rule confers a discretion on the Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled.

26. First, for the Chamber to exercise its discretion in favour of certification, the applicant must show that

> "the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".

The Chamber considers that the use of the word "significantly" implies that the drafters of the Rule intend to exclude minor or trivial issues that may rise in the course of a trial from certification to appeal. Examples of "significant" issues within the meaning of Rule 73 (B) include those that affect the rights of the Accused to a fair trial or, upon which a decision whether or not to certify an appeal may lead to a different result at the end of the trial.

27. Second, the Trial Chamber must be satisfied that immediate resolution by the Appeals Chamber of the issue involved in the decision "may materially advance the proceedings". The Chamber considers that the use of the word "and" in Rule 73 (B) implies that the two conditions set out above are cumulative and an applicant needs to satisfy both of them in order for the Chamber to exercise its discretion in favour of certification.

28. The Chamber notes that these are the only two conditions it must consider in deciding whether or not to certify an appeal. All other considerations such as whether there was an error of law or abuse of discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. They are irrelevant to the decision for certification and will not be considered by the Chamber.

29. The Chamber will now consider the Defence arguments in support of the conditions under Rule 73 (B). With respect to the first condition, the Chamber recalls the Defence submission that Rule 68 (B) is a new provision, there are no decisions interpreting it, and it is likely to be invoked by other accused persons in this and other trials before the Tribunal. The Prosecutor responds that in deciding whether or not to certify an appeal, the Chamber must consider the importance of the issue; whether or not the Appeals Chamber has provided guidance on the issue; and whether there are conflicting approaches among Trial Chambers. The Chamber is satisfied that Rule 68 (B) is new, and there are no decisions interpreting it. In view of the significance of the Prosecutor's disclosure obligation in proceedings before the Tribunal, it is likely that Rule 68 (B) will be invoked by many other accused persons in future. For these reasons, the Chamber is satisfied that a definitive interpretation of Rule 68 (B) by the Appeals Chamber would significantly affect the fair and expeditious conduct of the current proceedings. The Chamber considers that the first limb of the disjunctive first condition for certification to appeal having been satisfied, there is no need to consider the alternative limb *i.e.* whether the issue will affect the outcome of the trial.

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[8] *The Prosecutor v. Ntahobali and Nyiramasuhuko,* Case n° ICTR 97-21-T, "Decision on Ntahobal's and Nyiramasuhuko' Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, para. 14.

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30. With respect to the second condition, the Chamber recalls the Defence contention that it needs access to the material in the Prosecutor's possession in order to prepare its case and because the material includes broadcasts of Radio Rwanda and RTLM which are necessary for the Defence to substantiate some alibis and attack the credibility of some Prosecution witnesses. The Chamber recalls its finding in the Impugned Decision that Rule 68 (B) does not create a new disclosure obligation for the Prosecutor[9]. The Chamber also notes that while it agrees with the *dicta* of the Supreme Court of Canada in *R v. Stinchcombe* that the fruits of the Prosecutor's investigation should be used in the interests of justice, this does not absolve the Defence from its obligation to conduct its own investigations and to prepare its case. The Chamber wishes to restate its finding in the Impugned Decision that Rule 68 (B)

> "does not give the Defence the right to conduct an unrestricted search of the electronic databases of the Prosecution"[10].

The Chamber is not satisfied that merely stating that the collection of material in the Prosecutor's database may "potentially" include exculpatory material and that the Defence needs this material to prepare its case, is sufficient for the Defence to show that appellate resolution will materially advance the proceedings. The Chamber is therefore not satisfied that the Defence has fulfilled the second requirement for certification under Rule 73 (B).

31. The Chamber concludes that the conditions under Rule 73 (B) have not been satisfied and is therefore unable to grant certification to appeal the Impugned Decision. However, the Chamber wishes to express its displeasure at the fact that not only did the Prosecutor fail to file a response to the original motion filed on 6 July 2004 after seeking for and being granted an extension of time within which to do so, but also that in its Response to the present motion filed as late as 15 December 2004, the Prosecutor chose to ignore the Defence assertion that the Parties had commenced negotiations with a view to granting the Defence electronic access to relevant material. The Chamber considers it inappropriate that the Prosecutor issued instructions to the DCDMS on or before 2 December 2004, to notify Defence teams of the commissioning of the electronic disclosure system, but chose not to so notify the Chamber even though there was a pending motion seeking electronic access to the same material which was the subject matter of the new disclosure system.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 4 February 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[9] *The Prosecutor v. C. Bizirnungu et al.*, Decision on the Motion of Bicamurnpaka and Mugenzi for Relevant Material, 1 December 2004. para. 9.

[10] *Ibid.*

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## *Decision on Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66*
## *4 February 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Prosper Mugiraneza – Disclosure obligation of the Prosecutor, Late disclosure, Prejudice by the Defence, Diligent action – Frivolous motion, abuse of process – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 66, 66 (A) (ii), 73 (A) and 73 (E)*

*International Cases cited :*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Zejnil Delalić et al., *Decision on Motion by the Defendants on the Production of Evidence by the Prosecution, 8 September 1997 (IT-96-21); Trial Chamber,* The Prosecutor v. Tihomir Blaškić, *Decision on Prosecutor's Request for Authorization to Delay Disclosure of Rule 70 information, 6 May 1998 (IT-95-14)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66" filed on 4 October 2004 (the "Motion");

CONSIDERING

i) The "Prosecutor's Response to Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66", filed on 11 October 2004 (the "Prosecution Response");

ii) "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66" filed on 15 October 2004 (the "Defence Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 66 of the Rules;

NOW DECIDES the Motion solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 (A) of the Rules.

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## *Décision relative à la requête de Prosper Mugiraneza intitulée «Motion for Appropriate Relief for Violation of Rule 66» 4 février 2005 (ICTR-99-50-T)*

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Présidente de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

*Prosper Mugiraneza – Obligation de communication du Procureur, Communication tardive, Préjudice à la défense, Action diligente – Motion frivole, Abus de procédure – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 66, 66 (A) (ii), 73 (A) et 73 (E)*

*Jurisprudence internationale citée :*

*T.P.I.Y. : Chambre de première instance,* Le Procureur c. Zejnil Delalić et autres, *Décision Relative à la Requête de Défendeurs Concernant la Production d'éléments de Preuve par l'accusation, 8 septembre 1997 (IT-96-21); Chambre de première instance,* Le Procureur c. Tihomir Blaškić, *Decision on Prosecutor's Request for Authorization to Delay Disclosure of Rule 70 information, 6 mai 1998 (IT-95-14)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II, composée des juges Khalid Rachid Khan, Président de Chambre, Lee Gacuiga Muthoga et Emile Francis Short (la «Chambre»),

SAISI de la requête de Prosper Mugiraneza intitulée «*Motion for Appropriate Relief for Violation of Rule 66*» déposée le 4 octobre 2004 (la «Requête»),

i) La Réponse du Procureur a la Requête de Prosper Mugiraneza intitulée «*Motion for Appropriate Relief for Violation of Rule 66*», déposée le 11 octobre 2004 (la «Réponse du Procureur»),

ii) La Réplique de Prosper Mugiraneza à la Réponse du Procureur à la Requête de Prosper Mugiraneza intitulée «*Motion for Appropriate Relief for Violation of Rule 66*» déposée le 15 octobre 2004 (la «Réplique de la Défense»),

VU Le Statut du Tribunal (le «Statut») et le *Règlement de procédure et de preuve* (le «Règlement»), notamment l'article 66 du Règlement,

STATUANT SUR LA REQUÊTE sur la seule base des mémoires des Parties en application de l'article 73 (A) du Règlement.

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**Submissions of the Parties**

*The Defence*

1. In its Motion, the Defence submits that the Motion is the

> "latest in a series of Motions filed by Mugiraneza seeking relief for the repeated violations by the Office of the Prosecutor of the disclosure requirements in Rule 66"[1].

The Defence enumerated specific instances where the Prosecution violated its disclosure obligations under Rule 66 (A) (ii), thereby requesting the Chamber to intervene to prevent future systematic violations of the said Rule.

2. The Defence submits that in the past the Prosecution has disclosed documents envisaged under Rule 66, only when the Defence moved the Trial Chamber by Motion to order the Prosecution to comply with its disclosure obligations or when the Prosecution "stumbles on them by pure happenstance". In order to prevent this, the Defence suggests that the Chamber should take strong action against the Prosecution for contemptuous conduct each time it violates the Rules, or that the Chamber hold that "late disclosure amounts to *no* disclosure", if the Prosecution does not provide an acceptable explanation. (Defence emphasis)

*Prosecution Response*

3. The Prosecution, relying on the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") Decisions in *Delalic*[2], and in *Blaskic*[3], submits that it has diligently complied with its disclosure obligations, particularly those of Rule 66. The Prosecution argues that after commencement of the trial, the application of Rule 66 (A) (ii) should be within reason.

4. The Prosecution submits that the Defence does not seek any identifiable redress, rather the Defence catalogues what the Prosecution submits are "his imagined infractions by the Prosecutor for matters that are foreclosed"[4]. The Defence has not indicated any prejudice that the Chamber should redress.

5. The Prosecution submits that the Defence has failed to ground its Motion under any provision of the Rules or to show any *mala fides* on the part of the Prosecution. The Prosecution thus prays that the Chamber dismiss the Motion and sanction the Defence under Rules 73 (F) and 46 of the Rules.

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[1] See the Motion at paragraph 1.

[2] *Prosecutor v. Delalic et al*, Case N° IT-96-21, Decision on Motion by the Defendants on the Production of Evidence by the Prosecution, [TC], 8 September 1997, para. 10 (the *Delalic* Decision).

[3] *Prosecutor v. Blaskic*, Case N° IT-95-14, Decision on Prosecutor's Request for Authorization to Delay Disclosure of Rule 70 information, [TC], 6 May 1998 at paras. 6 and 7, which ruled, "[t]he obligation of the Prosecutor to disclose certain documents to the Defence, including prior witness statements, as required by Rule 66 (A), is *general and permanent*".

[4] See the Prosecutor's Response at para. 4.

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**Arguments des parties**

*La Défense*

1. La Défense soutient que cette requête est la

> «toute dernière d'une série de requêtes introduites par Mugiraneza aux fins d'obtenir réparation pour violations répétées de la part du Bureau du Procureur des prescriptions de l'article 66 du Règlement en matière de communication des pièces»[1].

Citant des cas précis de manquement du Procureur à ses obligations de communication des pièces telles que prévues à l'article 66 (A) (ii), la Défense sollicite l'intervention de la Chambre pour désormais prévenir toute violation systématique dudit article.

2. La Défense affirme que le Procureur n'a communiqué des documents conformément à l'article 66 que lorsqu'elle a demandé par requête à la Chambre de première instance d'ordonner au Procureur de respecter ses obligations de communication des pièces ou lorsque le Procureur «tombe sur lesdits documents tout à fait par hasard». Pour éviter cela, la Défense est d'avis que la Chambre devrait prendre des mesures sévères à l'encontre du Procureur pour comportement outrageux, chaque fois qu'il viole le Règlement ou considérer que «toute communication tardive équivaut à la non communication», si le Procureur ne fournit pas d'explication valable. (Souligné par la Défense).

*Réponse du Procureur*

3. Invoquant les décisions du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») dans *Delalic*[2], et dans *Blaskic*[3], le Procureur affirme s'être toujours acquitté de ses obligations de communication de pièces, notamment celles prescrites à l'article 66 du Règlement. Le Procureur soutient qu'après l'ouverture du procès, l'application de l'article 66 (A) (ii) doit se faire de manière raisonnable.

4. Le Procureur fait valoir qu'au lieu de préciser la nature de la réparation qu'elle sollicite, la Défense égrène un chapelet de manquements que le Procureur estime n'être que «des infractions imaginaires sur des questions forcloses»[4] [traduction]. La Défense n'a indiqué aucun préjudice que la Chambre devrait réparer.

5. Le Procureur soutient que la Défense n'a fondé sa requête sur aucune disposition du Règlement et qu'elle n'a pas prouvé qu'il y a eu mauvaise foi de la part du Procureur. Il prie donc la Chambre de rejeter la requête et de sanctionner la Défense conformément aux articles 73 (F) et 46 du Règlement.

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[1] Voir la *Requête*, para. 1.

[2] *Le Procureur c. Delalic et consorts,* affaire n° IT-96-21, Décision relative à la requête des défendeurs concernant la production d'éléments de preuve par l'accusé (chambre de première instance), 8 septembre 1997, para. 10 (la décision *Delalic).*

[3] *Le Procureur c. Blaskic,* affaire n° IT-95-14, Décision relative à la requête du Procureur aux fins d'un report de la communication des informations visées à l'article 70 du *Règlement de procédure et de preuve* (chambre de première instance), 6 mai 1998, paras. 6 et 7 qui a conclu que «l'article 66 (A) du Règlement impose au Procureur l'obligation de communiquer certaines pièces à la Défense, y compris les déclarations préalables des témoins. II s'agit là d'une obligation générale et permanente».

[4] Voir la Réponse du Procureur, para. 4.

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*Defence Reply*

6. In relation to the alleged disclosure violation committed by the Prosecution, the Defence reiterates its request for relief, adding that,

> "[T]imely disclosure is important for reasons other than cross-examination, although it is important for that reason. Timely disclosure allows the defence to shape a defence to meet the Prosecutor's evidence [and that] without timely disclosure the defence cannot plan investigations and cannot plan strategy." The Defence argues that by ordering the Prosecution to adhere to its disclosure obligations, the Chamber would be preventing a "trial by ambush"[5].

**Having deliberated**

7. The Chamber notes that in its Motion, the Defence argues that the Prosecution has violated its disclosure obligations under Rule 66 (A) (ii) by filing late a number of transcripts of testimonies and written statements of its witnesses which were made months, and in some cases years, before the Prosecution disclosed them to the Defence. The Defence thus requests the Chamber to sanction the Prosecution for its alleged violation of its disclosure obligations under Rule 66.

8. The Chamber further notes that the Defence submits that the instant Motion is the

> "latest in a series of Motions filed by Mugiraneza seeking relief for the repeated violations by the Office of the Prosecutor of the disclosure requirements in Rule 66".

The Chamber is of the opinion that, if the series of Motions the Defence alludes to were dealt with by the Chamber, then this instant Motion is unnecessary.

9. While the Chamber is mindful of the importance of the Prosecutor's obligation to meet its disclosure obligations under the Rules, it also wishes to emphasize that breaches of this obligation should be addressed promptly.

10. The Chamber observes that the Defence in its Motion has not demonstrated any prejudice it has suffered but has merely enumerated a list of the alleged violations of disclosure obligations by the Prosecution. Furthermore, it failed to act diligently by promptly filing a Motion when the alleged disclosure obligations by the Prosecution occurred, but waited until almost one year after commencement of the trial. The Chamber is of the opinion that parties should act diligently and expeditiously whenever there is an alleged violation of the Rules.

11. Accordingly, the Chamber holds that the Motion is belated and that any Decision it makes now will be of no immediate relevance either to the Parties or to the Court. Consequently, the Chamber declares the Defence request moot.

[5] See the Defence's Reply at para. 7.

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*Réplique de la Défense*

6. S'agissant de l'accusation de manquement du Procureur à son obligation de communication des pièces, la Défense réitère sa demande de réparation, en ajoutant que,

> «La communication dans le délai imparti est importante pour d'autres raisons que le contre-interrogatoire, même si elle l'est tout autant en la matière. La communication dans le délai imparti permet à la Défense de monter une stratégie pour contrer les éléments de preuve à charge [et que] sans communication des pièces à temps, la Défense ne peut ni planifier ses enquêtes ni élaborer sa stratégie.» [traduction]. La Défense fait valoir qu'en ordonnant au Procureur de respecter ses obligations en matière de communication des pièces, la Chambre éviterait tout «effet de surprise»[5] [traduction].

**Apres en avoir délibéré**

7. La Chambre relève que dans sa requête, la Défense avance que le Procureur ne s'est pas acquitté de ses obligations en matière de communication des pièces prescrites à l'article 66 (A) (ii) car il a déposé tardivement plusieurs transcriptions de témoignages et déclarations écrites de ses témoins qui avaient été recueillies des mois, voire des années auparavant dans certains cas, avant leur communication à la Défense. La Défense demande donc à la Chambre de sanctionner le Procureur pour les présumées violations de ses obligations de communication des pièces en application de l'article 66.

8. La Chambre relève en outre l'argument de la Défense selon lequel la présente requête est la

> «toute dernière d'une série de requêtes introduites par Mugiraneza aux fins d'obtenir réparation pour violations répétées par le Bureau du Procureur des prescriptions de l'article 66 du Règlement en matière de communication des pièces».

La Chambre estime que si elle a déjà statué sur la série de requêtes dont parle la Défense, la présente requête est en conséquence sans objet.

9. La Chambre est certes consciente de ce qu'il est important que le Procureur s'acquitte de ses obligations de communication des pièces fixées par le Règlement mais elle tient également à souligner le fait que tout manquement à ces obligations doit être traité avec diligence.

10. La Chambre constate que dans sa requête, la Défense n'a pas prouvé qu'elle ait subi de préjudice mais s'est contentée de dresser une liste de manquements présumés du Procureur à ses obligations en matière de communication des pièces. Par ailleurs, au lieu de faire diligence en déposant aussitôt une requête lorsque le Procureur a commis les prétendues violations en matière de communication des pièces, la Défense s'est contentée d'attendre un an après l'ouverture du procès. La Chambre estime que les parties doivent agir diligemment en cas de violation présumée du Règlement.

11. En conséquence, la Chambre conclut que la requête est présentée tardivement et que toute décision qu'elle prendrait maintenant n'aurait aucune importance immédiate pour les Parties ou pour la Chambre elle-même. Elle déclare donc sans objet la requête de la Défense.

[5] Voir la Réplique de la Défense, para. 7.

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12. The Chamber, therefore, does not find it necessary to go into the merits of the enumerated instances of the Prosecution's alleged violations of its obligations under Rule 66.

13. The Chamber finds that the arguments presented in the Motion lack merit to such an extent that the Motion is frivolous and that its filing constitutes an abuse of process.

FOR THE ABOVE REASONS, THE TRIBUNAL

DECLARES the Motion moot;

DIRECTS the Registry, pursuant to Rule 73 (E), not to pay fees and costs associated with the filing of this Motion.

Arusha, 4 February 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Order for the Transfer of Detained Witnesses from Rwanda (Rule 90* bis*) 14 February 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Detained witnesses, Transfer of the witness to the United Nations Detention Facility, Conditions for the transfer of the witness to the United Nations Detention Facility, Information to the Registry*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A), 90* bis*, 90* bis *(A) and 90* bis *(B)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Extremely Urgent *Ex Parte* Motion for an Order for the Transfer of Two Detained Witness Pursuant to rules 90 *bis* and 73 (A) of the Rules of Procedure and Evidence", filed on 10 February 2005 (the "Motion").

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12. La Chambre juge donc superfétatoire d'examiner au fond la série des manquements présumés du Procureur à ses obligations prescrites à l'article 66 du Règlement.

13. La Chambre conclut que les arguments présentés dans la Requête sont si peu fondés qu'ils rendent la Requête fantaisiste et que son dépôt constitue un abus de procédure.

PAR CES MOTIFS, LE TRIBUNAL

DÉCLARE la Requête sans objet;

ENJOINT au Greffe, conformément à l'article 73 (E) (*sic*) du Règlement, de surseoir au paiement des honoraires et frais afférents au dépôt de cette Requête.

Arusha, le 4 février 2005.

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Ordre de transfèrement de témoins détenus au Rwanda Article 90* bis *du Règlement de procédure et de preuve 14 février 2005 (ICTR-99-50-T)*

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Présidente de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi et Prosper Mugiraneza – Témoins détenus, Transfert de témoins au Quartier Pénitentiaire des Nations Unies, Conditions pour le transfert de témoins au Quartier Pénitentiaire des Nations Unies, Information du Greffe*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73 (A), 90* bis*, 90* bis *(A) et 90* bis *(B)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA, (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II, composée des juges Khalida Rachid Khan, Président de Chambre, Lee Gacuiga et Emile Francis Short, (la «Chambre»),

SAISI de la requête unilatérale du Procureur intitulée, «Prosecutor's Extremely Urgent *Ex Parte* Motion for an Order for the Transfer of Two Detained Witnesses Pursuant to rule 90 *bis* and 73 (A) of the Rules of Procedure and Evidence», depose le 10 février 2005, (la «Requête»),

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**Submissions**

1. The Prosecution requests the Trial Chamber, pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence (the "Rules"), to order the temporary transfer of Witnesses GJQ and GTC from the Republic of Rwanda, where they are currently detained.
2. The Prosecution provides the following assurances to the Chamber :
   (i) The presence of the witnesses is not required for any criminal proceedings in the Republic of Rwanda during the period they are required to be present at the Tribunal as Prosecution Witnesses;
   (ii) The transfer of the witnesses will not extend beyond the period of their detention as forseen by the Republic of Rwanda.
3. The Prosecution provides as an Annex a letter from the Ministry of Justice in Rwanda addressed to the Deputy Prosecutor of the Tribunal confirming that Witnesses GJQ and GTC are available to give testimony before the Tribunal, pursuant to the requirements of Rule 90 *bis* of the Rules of Procedure and Evidence[1].

**Deliberations**

4. The Trial Chamber notes that pursuant to the provisions of Rule 90 *bis* (A) of the Rules :
   i) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.

5. Pursuant to Rule 90 *bis* (B) of the Rules, a Trial Chamber shall issue a transfer order only after prior verification that the following conditions are met :

   ii) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
   iii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State;

On the basis of representations made by the Prosecution and the Annex provided, which include a letter from the Ministry of Justice in Rwanda, the Chamber finds that the requirements set out in Rule 90 *bis* of the Rules for the temporary transfer of detained witnesses have been satisfied.

7. The Chamber is aware that the Registry requires significant advance notice in order to properly facilitate the transfer of detained witnesses from Rwanda to Arusha, and also some flexibility in the timing, which must be worked out in consultation with the Governments of Rwanda and Tanzania. The Chamber thus considers it appropriate that such flexibility be incorporated into the order for transfer, whilst remaining strictly within the maximum limits allowed. From the date of transfer, the Chamber

[1] Confidential letter dated 10 February 2005.

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**Argument du procureur**

1. Le Procureur prie la Chambre de première instance, conformément à l'article 90 *bis* du *Règlement de procédure et de preuve* (le «Règlement»), d'ordonner le transfèrement temporaire des témoins GJQ et GTC de la République du Rwanda, où ils sont actuellement détenus.

2. Le Procureur offre les garanties suivantes à la Chambre :

i) La présence des témoins n'est pas nécessaire dans une procédure pénale en cours en République du Rwanda pour la période durant laquelle ils doivent se trouver au Tribunal pour déposer à charge;

ii) Le transfèrement des témoins n'est pas susceptible de prolonger la durée de leur détention telle qu'elle est prévue par la République du Rwanda.

3. Le Procureur joint en annexe une lettre adressée au Procureur adjoint du Tribunal par le Ministère rwandais de la Justice, confirmant que les témoins GJQ et GTC sont disponibles pour témoigner devant le Tribunal conformément aux prescriptions de l'article 90 *bis* du Règlement[1].

**Délibérations**

4. La Chambre note que l'article 90 *bis* (A) du Règlement est ainsi libellé :

i) Toute personne détenue dont la comparution personnelle en qualité de témoin est ordonnée par le Tribunal sera transférée temporairement au quartier pénitentiaire relevant du Tribunal, sous condition de son retour au terme du délai fixé par le Tribunal.

5. Aux termes de l'article 90 *bis* (B) du Règlement, une Chambre de première instance ne peut délivrer un ordre de transfert qu'après avoir vérifié au préalable que les conditions suivantes sont réunies :

ii) La présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'État requis pour la période durant laquelle elle est sollicitée par le Tribunal;

iii) Son transfert n'est pas susceptible de prolonger la durée de sa détention telle que prévue par l'État requis;

6. Sur la base des arguments avancés par le Procureur et de l'annexe jointe à sa requête, notamment, une lettre du Ministère rwandais de la Justice, la Chambre conclut que les conditions prescrites à l'article 90 *bis* du Règlement en vue d'un transfèrement temporaire des témoins détenus sont réunies.

7. La Chambre est consciente que le Greffe doit être informé suffisamment en avance afin d'organiser dans de bonnes conditions le transfèrement des témoins détenus du Rwanda à Arusha, tout en étant tenu à une certaine souplesse dans le choix, en consultation avec les Gouvernements rwandais et tanzanien, de la date du transfèrement. Elle estime donc que l'ordre de transfèrement doit traduire cette souplesse, dans le strict respect des délais maximums impartis. Elle décide que les témoins déte-

[1] Lettre confidentielle datée du 10 février 2005.

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decides that the detained witnesses to be transferred should remain at the United Nations Detention Facility in Arusha (the "UNDF") for the shortest period practically possible to ensure that their testimony is taken, and in any event for a period not exceeding one month without further prior approval.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

ORDERS the Registry, pursuant to Rule 90 *bis* of the Rules, to temporarily transfer Detained Witnesses GJQ and GTC to the UNDF, at an appropriate time prior to their anticipated testimony during the trial session set to recommence on 1 March 2005. Their return travel should be facilitated as soon as practically possible after the end of their testimony. In any event, without prior approval from the Chamber, their return into Rwandan custody should be facilitated at a time not later than one month from the date of transfer to the UNDF;

REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registry in the implementation of this Order.

Arusha, 14 February 2005.

[Signed] : Khalida Rachid Khan, Lee Gacuiga Muthoga, Emile Francis Short

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## *Decision on Prosper Mugiraneza's Motion for Leave to Appeal from the Trial Chamber's Decision of 3 November 2004 24 February 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Prosper Mugiraneza – Certification of interlocutory appeals, Exceptional nature of the procedure – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 73 (B)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasukuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV*

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nus qui doivent être transférés séjourneront au quartier pénitentiaire des Nations Unies à Arusha à compter de la date de leur transfèrement, et ce, pour une période dont la durée sera aussi courte que possible, afin de pouvoir déposer, et ne pourra en tout état de cause, être supérieure à un mois, sauf autorisation préalable.

PAR CES MOTIFS, LA CHAMBRE,

ORDONNE au Greffe, conformément à l'article 90 *bis* du Règlement, de procéder au transfèrement temporaire des témoins détenus GJQ et GTC au quartier pénitentiaire des Nations Unies à Arusha au moment opportun, avant leur déposition attendue durant la session du procès qui doit reprendre le 1er mars 2005. Leur retour devra être organisé aussitôt que possible après qu'ils auront déposé. En tout état de cause, sauf autorisation préalable de la Chambre, le retour des témoins au Rwanda, pour y être remis aux autorités devra avoir lieu au plus tard dans un délai d'un mois à compter de la date de leur transfèrement au quartier pénitentiaire,

PRIE les Gouvernements rwandais et tanzanien de prêter leur collaboration au Greffe en vue de l'application de la présente Ordonnance.

Arusha, le 14 février 2005.

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Décision relative à la requête de Prosper Mugiraneza en autorisation d'interjeter appel de la décision de la Chambre de première instance rendue le 3 novembre 2004 24 février 2005 (ICTR-99-50-T)*

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Présidente de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

*Prosper Mugiraneza – Autorisation d'interjeter appel, Procédure de nature exceptionnelle – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73 (B)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Pauline Nyiramasuhuko *et consorts, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of*

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*and QBZ Inadmissible", 18 March 2004 (ICTR-97-21); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on His Motion for Dismissal for Violation of his Right to Trial Without Undue Delay, 3 November 2004 (ICTR-99-50)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion for Certification to Appeal from the Trial Chamber's Decision of 3 November 2004 on Prosper Mugiraneza's Motion for a Hearing or Other Relief on His Motion for Dismissal for Violation of his Right to Trial Without Undue Delay" filed on 10 November 2004 (the "Motion");

CONSIDERING the "Prosecution's Response to Prosper Mugiraneza's Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September [*sic*] 2004 on Prosper Mugiraneza's Motion for a Hearing or Other Relief on His Motion for Dismissal for Violation of his Right to Trial Without Undue Delay Dated 9 November 2004" filed on 17 November 2004 (the "Response");

RECALLING the Trial Chamber's Decision of 3 November 2004 (the "Impugned Decision")[1];

**Arguments of the parties**

*Defence Submissions*

1. The Defence seeks certification to appeal the Impugned Decision pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (the "Rules") in relation to the following five issues :

i. Whether the Trial Chamber erred in failing to apply the five-part test set out by the Appeals Chamber in its Decision of 27 February 2004;

ii. Whether the Trial Chamber erred in failing to issue a reasoned Decision considering all parts of the five-part test set out by the Appeals Chamber in its Decision of 27 February 2004;

iii. Whether the Chamber erred in Paragraph 32 of its Decision by giving evidentiary value to "proof put forward by the Prosecutor that the delay in this case, if any, was not attributable to the OTP" when other than a few quotations from the record related to systematic causes for delay, the Prosecutor put forward no evidence in its response;

[1] *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on His Motion for Dismissal for Violation of his Right to Trial Without Undue Delay (TC), 3 November 2004.

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*Witnesses RV and QBZ Inadmissible', 18 mars 2004 (ICTR-98-42); Chambre de première instance,* Le Procureur c. Casimir Bizimungu et consorts, *Décision relative à la requête de Prosper Mugiraneza demandant l'audition de sa requête en rejet de l'acte d'accusation pour violation du droit de l'accusé d'être jugé sans retard excessif, ou toute autre mesure appropriée, 3 novembre 2004 (ICTR-99-50)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée des juges Khalida Rachid Khan, Président de Chambre, Lee Gacuiga Muthoga et Emile Francis Short (la «Chambre»),

SAISI de la requête de Mugiraneza intitulée *Prosper Mugiraneza's Motion for Certification to Appeal from the Trial Chamber's Decision of 3 November 2004 on Prosper Mugiraneza's Motion for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Rights to Trial Without Undue Delay,* déposée le 10 novembre 2004 (la «Requête»),

VU la réponse du Procureur intitulée *Prosecutor's Response to Prosper Mugiraneza's Motion for Certification to Appeal from the Trial Chamber's Decision of* 3 *September* [sic] *2004 on Prosper Mugiraneza's Motion for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Rights to Trial Without Undue Delay Dated 9 November2004,* déposée le 17 novembre 2004 (la «Réponse»),

RAPPELANT la décision rendue le 3 novembre 2004 par la Chambre de première instance (la «décision contestée»[1]),

**Argument des parties**

*Arguments de la Défense*

1. En vertu du paragraphe (B) de l'article 73 du Règlement de procédure et de preuve (le «Règlement»), la Défense demande l'autorisation d'interjeter appel de la décision contestée relativement aux cinq questions suivantes :

i. La Chambre de première instance a-t-elle commis une erreur en n'appliquant pas le critère en cinq points énoncé dans la décision rendue par la Chambre d'appel le 27 février 2004 ?

ii. La Chambre de première instance a-t-elle commis une erreur en s'abstenant de rendre une décision motivée prenant en compte tous les éléments du critère en cinq points énoncé par la Chambre d'appel dans la décision qu'elle a rendue le 27 février 2004 ?

iii. La Chambre de première instance a-t-elle commis une erreur au paragraphe 32 de sa décision en admettant comme preuve qu'il ressort «des faits présentés par le Procureur que le retard enregistré en l'espèce n'est pas imputable au Bureau du Procureur» alors que dans sa réponse, celui-ci n'a produit aucun élément de preuve, se bornant à citer quelques passages du dossier de l'instance concernant les causes systémiques à l'origine du retard ?

[1] *Le Procureur c. Casimir Bizimungu et consorts,* affaire n° ICTR-99-50-T, Décision relative à la requête de Prosper Mugiraneza demandant l'audition de sa requête en rejet de l'acte d'accusation pour violation du droit de l'accusé d'être jugé sans retard excessif, ou toute autre mesure appropriée, rendue par la Chambre de première instance le 3 novembre 2004.

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iv) Whether the Trial Chamber erred in law in Paragraph 33 of its Decision by basing its decision on whether the delay prejudiced Mugiraneza to the extent that it prevented a fair trial rather than whether the delay in the trial violated Mugiraneza's independent right to a trial without undue delay;

v) Whether the Trial Chamber erred in law in Paragraph 33 of its Decision by holding that the accused must show prejudice in order to be entitled to relief for violation of his right to a trial without undue delay[2].

2. The Defence submits that the Trial Chamber should certify leave to appeal on these issues since it has already found in a previous Decision that the issues raised meet the requirements of Rule 73 (B) and certified it for appeal. It submits that nothing has changed.

*Prosecution Submissions*

3. The Prosecution opposes the Motion, and requests the Trial Chamber not to grant certification to appeal the Impugned Decision.

4. The Prosecution submits that the jurisprudence of the Tribunal makes it clear that certification under Rule 73 (B) is to be granted only sparingly. It cites a Decision in the *Nyiramasuhuko* case to support this contention[3]. According to the Prosecution's interpretation of this Decision, the factors that tribunals have taken into account in determining whether an interlocutory appeal is called for is (i) the importance of the issue; (ii) Whether or not the Appeals Chamber has provided any guidance on the issue; And (iii) whether there are conflicting approaches among Trial Chambers[4].

5. It is submitted by the Prosecution that the Defence's main contention is that the Trial Chamber grounded the Impugned Decision on an erroneous understanding of the Appeals Chamber Decision of 27 February 2004. The Prosecution objects to this contention.

6. The Prosecution submits that the issue has already been dealt with by the Trial Chamber in the Impugned Decision, and the proceedings would not be materially advanced by certifying this appeal.

**Having deliberated**

7. Rule 73 (B) governing the certification of interlocutory appeals provides as follows :

[2] *Motion*, para. 1.

[3] *Prosecutor v. Pauline Nyiramasukuko et al.*, Case N° ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (AC), 18 March 2004, paras. 14-15.

[4] *Response*, para. 15.

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iv) La Chambre de première instance a-t-elle commis une erreur de droit au paragraphe 33 de sa décision en se demandant si le retard a causé un préjudice à Mugiraneza au point de rendre impossible la tenue d'un procès équitable plutôt que de rechercher à savoir si ce retard a violé le droit distinct qu'a celui-ci d'être jugé sans retard excessif?

v) La Chambre de première instance a-t-elle commis une erreur de droit au paragraphe 33 de sa décision en concluant que l'accusé doit démontrer qu'il a subi un préjudice pour avoir droit à réparation à raison de la violation de son droit d'être jugé sans retard excessif?

2. La Défense soutient que la Chambre de première instance[2] devrait l'autoriser à interjeter appel de ces questions vu que, dans une décision antérieure, celle-ci a déjà conclu que les questions soulevées remplissaient les conditions énoncées au paragraphe (B) de l'article 73 du Règlement et a autorisé le recours. Elle soutient que rien n'a changé.

*Arguments du Procureur*

3. Le Procureur s'oppose à la requête et prie la Chambre de première instance de ne pas autoriser le recours contre la décision contestée.

4. Le Procureur soutient qu'il ressort clairement de la jurisprudence du Tribunal qu'aux termes du paragraphe (B) de l'article 73 du Règlement, l'autorisation d'interjeter appel ne doit être accordée qu'avec parcimonie. À l'appui de cette affirmation, il cite une décision rendue dans l'affaire *Nyiramasuhuko*[3]. Selon son interprétation de cette décision, pour déterminer s'il y a lieu d'autoriser un appel interlocutoire, les tribunaux ont pris en compte les facteurs suivants : i) l'importance de la question; ii) la Chambre d'appel a-t-elle donné ou non des directives sur la question; iii) y a-t-il ou non contrariété d'avis entre des Chambres de première instance[4].

5. Le Procureur soutient que le grief principal de la Défense est que la Chambre de première instance a fondé la décision contestée sur une interprétation erronée de la décision rendue le 27 février 2004 par la Chambre d'appel. Il rejette une telle affirmation.

6. Le Procureur fait valoir que la question a déjà été réglée par la Chambre de première instance dans la décision contestée et qu'autoriser le présent recours ne pourrait concrètement faire progresser la procédure.

## Après en avoir délibéré

7. Le paragraphe (B) de l'article 73 régissant la certification des appels interlocutoires est libellé comme suit[5] :

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[2] Requête, para. 1.

[3] *Le Procureur c. Pauline Nyiramasuhuko et consorts,* affaire n° ICTR-97-21-T, Décision relative aux requêtes de Ntahobali et de Nyiramasuhuko aux fins de certification d'appel de la décision relative à la requête en urgence de la Défense tendant à voir déclarer irrecevables certaines parties de la déposition des témoins RV et QBZ, rendue le 18 mars 2004 par la Chambre d'appel, paras. 14 et 15.

[4] Réponse, para. 15.

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> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The Rule is clear with regard to the exceptional nature of the procedure. In the *Nyiramasuhuko* case cited by the Prosecution, the bench stated[5] :

> As a general observation, it must be noted that the general rule in Rule 73 (B) remains this : 'Decisions rendered on such motions are without interlocutory appeal'. This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases, or allowed only in very limited circumstances. Rule 73 (B) of the Rules provides, however, that in exceptional circumstances, the Trial Chamber may – not must – allow interlocutory appeals of such decisions. The Decision of the Chamber in this case is in conformity with the jurisprudence of the Appeals Chamber and the Trial Chamber approves of its reasoning.

9. The Defence argues the substance of its intended appeal in some detail. Rule 73 (B) has been interpreted by the Trial Chamber on several occasions. The Trial Chamber reminds the Defence that it is not the substance of the appeal which guides the Chamber in determining whether or not certification should be allowed. For certification to be granted two criteria must be met : the issue as stake must significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and an immediate resolution of this issue by the Appeals Chamber should materially advance the proceedings. Furthermore, the onus for making this demonstration rests with the applicant.

10. The Trial Chamber determines that an immediate resolution of this issue by the Appeals Chamber would not materially advance the proceedings. The Trial Chamber has already reconsidered its Decision of 2 October 2003 pursuant to the guidance given by the Appeals Chamber in its Decision on 4 October 2004. The issue is settled.

11. The Trial Chamber does not find that the conditions for certification under Rule 73 (B) have been met and denies the application.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 24 February 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[5] *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at para. 14 [original footnotes omitted].

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> Les décisions concernant de telles requêtes ne sont pas susceptibles d'appel interlocutoire, à l'exclusion des cas où la Chambre de première instance a certifié l'appel après avoir vérifié que la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

8. Ce paragraphe affirme clairement le caractère exceptionnel de cette procédure. Dans l'affaire *Nyiramasuhuko* citée par le Procureur, les juges ont déclaré ce qui suit :

> À titre d'observation générale, on retiendra que la règle générale énoncée à l'article 73 (B) reste la suivante : «Les décisions concernant de telles requêtes ne pourront pas faire l'objet d'un appel interlocutoire». Cette règle rappelle celle qui, dans certaines grandes juridictions internes, n'autorise pas d'appel interlocutoire en matière pénale ou ne les autorise qu'à titre exceptionnel. Aux termes de l'article 73 (B) du Règlement toutefois, la Chambre peut – et non doit – autoriser les appels interlocutoires de telles décisions. La décision rendue par la Chambre de première instance en l'espèce est conforme à la jurisprudence établie par la Chambre d'appel, et la Chambre de première instance en approuve le raisonnement.

9. La Défense expose en détail la substance du recours qu'elle envisage. À diverses occasions, la Chambre de première instance a interprété le paragraphe (B) de l'article 73. Celle-ci rappelle à la Défense que ce n'est pas la substance du recours qui la guide dans sa décision d'accorder ou non l'autorisation d'interjeter appel. Pour que le recours soit autorisé, deux critères doivent être satisfaits : la question en jeu doit compromettre sensiblement l'équité et la rapidité du procès ou son issue, et son règlement immédiat par la Chambre d'appel devrait concrètement faire progresser la procédure. En outre, il incombe au requérant d'en rapporter la preuve.

10. La Chambre de première instance conclut qu'un règlement immédiat de cette question par la Chambre d'appel ne ferait pas concrètement progresser la procédure. La Chambre de première instance a déjà réexaminé sa décision du 20 octobre 2003 conformément à l'avis donné par la Chambre d'appel dans sa décision du 4 octobre 2004. La question est réglée.

11. La Chambre de première instance conclut que ne sont pas réunies les conditions auxquelles le paragraphe (B) de l'article 73 du Règlement subordonne la certification d'un appel et rejette la requête.

PAR CES MOTIFS,

REJETTE la requête dans son intégralité.

Fait à Arusha, le 24 février 2005.

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[5] *Le Procureur c. Pauline Nyiramasuhuko*, affaire n° ICTR-97-21-T, Décision relative aux requêtes de Ntahobali et de Nyiramasuhuko aux fins de certification d'appel de la décision relative à la requête en urgence de la Défense tendant à voir déclarer irrecevables certaines parties de la déposition des témoins RV et QBZ, rendue le 18 mars 2004, para. 14 [notes de bas de page originales omises].

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## *Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 24 November 2004 Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible Rule 73 of the Rules of Procedure and Evidence 25 February 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Conditions for certification of interlocutory appeals, Exceptional nature of the procedure, Advance of the proceedings – Admissibility of evidence, Function of the Trial Chamber to admit evidence – Motion denied*

*International and national Instruments cited :*

*Rules of Procedure and Evidence, rules 73, 73 (A) and 73 (B)*

*Criminal Justice Act 1987 of England and Wales; Criminal Procedure and Investigations Act 1996 of England and Wales*

*International and national Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42); Appeals Chamber,* Pauline Nyiramasuhuko v. The Prosecutor, *Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence, 4 October 2004 (ICTR-98-42)*

*Canada : Supreme Court,* R. v. Mills, *26 June 1986, [1986] 1 S.C.R. 863*

*United Kingdom : Court of Appeal of England and Wales,* R. v. Gunawardena, *1990, [1990] 91 Cr App R 55*

*United Stated of America : Supreme Court,* Cobbledick v. US, *26 February 1940, 309 U.S. 323 (1940); Supreme Court, F*irestone Tire & Rubber Co v. Risjord, *13 January 1981, 101 S Ct 669 (1981)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

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BEING SEIZED of "Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 24 November 2004 'Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible'", filed on 2 December 2004 (the "Motion");

CONSIDERING the "Prosecutor Response to Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 24 November 2004 'Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible", filed on 10 December 2004 (the "Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") particularly Rule 73 of the Rules;

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

## Submissions of the Parties

*The Defence Motion*

1. The Defence moves the Chamber to certify an interlocutory appeal pursuant to Rule 73 on the Chamber's Decision of 24 November 2004 in which it held that the testimony of Witnesses DCH and GTA with regard to the killing of John Vuningoma would be disregarded only in respect of murder as a crime against humanity (Count 6). The Defence notes that the instant request pertains only to the latter issue and not the remainder of the Chamber's Decision.

2. The Defence submits that the Chamber's Decision to disregard the testimony of Witnesses GTA and DCH in respect of the killing of John Vuningoma only as regards the charge of murder, is inconsistent with the Chamber's finding that the Indictinent does not sufficiently particularise the allegations regarding the killing of the latter. It is further submitted that the evidence relating to the killing of John Vuningoma must therefore be disregarded in respect of all Counts which it is alleged to support.

3. The Defence contends that certification of an interlocutory appeal on the single issue raised in the instant motion meets the cumulative requirements of Rule 73 (B). It is argued that the specific question of the admissibility of evidence being raised for appellate resolution significantly affects the conduct of the proceedings and the outcome of the trial and that the resolution of that question will materially advance the proceedings.

*The Prosecution's Response*

4. The Prosecution opposes the Motion. The Prosecution recalls that the jurisprudence of this Tribunal States that certification under Rule 73 (B) should only be granted in exceptional circumstances as stated in the 18 March 2004 Decision in P*rosecutor v. Nyiramasuhuko*[1].

[1] *Prosecutor* v. *Nyiramasuhuko.* ICTR-97-21-T. Decision on Ntahobali's and Nyiramasuhuko Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at para. 14.

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5. The Prosecutor points out that the impugned Decision does not definitively state that the evidence with regard to the killing of John Vuningoma will be considered in respect of al1 other Counts, rather that it is not yet time for the Chamber to determine whether the evidence supports other allegations in the Indictment but that this will be done when the Chamber comes to assess al1 the evidence and arguments as put forward by the respective Parties.

6. In addition to the fact that the instant request does not meet the requirements of Rule 73 (B), the Prosecutor submits that the appeal being sought is also unlikely to prevail in persuading the Appeals Chamber to overturn the Trial Chamber's Decision

> "based merely on [the] bare assertion that the impugned decision is based on the erroneous application of the jurisprudence".

**Deliberations**

7. Rule 73 (B) governing the certification of interlocutory appeals provides as follows :

> (B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The Rule is clear with regard to the exceptional nature of the procedure. The Trial Chamber in the *Nyiramasuhuko* case stated[2]

> As a general observation, it must be noted that the general rule in Rule 73 (B) remains this : 'Decisions rendered on such motions are without interlocutory appeal'. This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases[3], or allowed only in very limited circumstances[4]. Rule 73 (B) of the Rules provides, however that in exceptional circumstances, the Trial Chamber may – not must – allow interlocutory appeals of such decisions.

9. The Chamber will consider the submissions relating to the first condition for certification and decide if the

> "decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".

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[2] *Prosecutor* v. *Nyiramasuhuko.* ICTR-97-21-T Decision on Ntahobali's and Nyiramasuhuko Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at para. 14.

[3] See *R. v. Mills* 1986 Carswell Ont 11652 CR (3d) 1, [1986] 1 SCR 983, 26 CCC (3d) 481 [Supreme Court of Canada]; *Cobbledick v. US*, 60 S Ct 540 (1940) [US Supreme Court] ; *Firestone Tire & Rubber Co v. Risjord* 101 S Ct 669 (1981) [US Supreme Court].

[4] See, in England and Wales, ss 9(11), 9(3) and 7 of the Criminal Justice Act 1987 ; ss 35, 31 and 29 of the Criminal Procedure and Investigations Act 1996. See also *R. v. Gunawardena*, [1990] 91 Cr App R 55 [Court of Appeal of England and Wales].

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If this condition is met, the Chamber will then consider whether "an immediate resolution by the Appeals Chamber may materially advance the proceedings".

10. The impugned Paragraphs of the Decision of 24 November 2004 reads as follows :

> 28. Based on the jurisprudence of the Appeals Chamber quoted above, the Trial Chamber finds that the Indictment does not plead with sufficient particularity the allegations regarding the alleged killing of John Vuningoma. Consequently the Trial Chamber will disregard the testimony as evidence in support of Count Six of the Indictment. However, for the reasons stated in paragraphs 22 and 23, the evidence of both GTA and DCH is admissible and may be relevant to other charges in the Indictment.
>
> 29. However, it is not yet the time for the Trial Chamber to determine whether the evidence in relation to the killing of John Vuningoma supports other allegations in the Indictment. This will be done after al1 the evidence has been received, after the Trial Chamber has had the opportunity to consider the arguments of the Parties, and after it has reviewed the evidence as a whole, with a view to making its findings thereon.

11. As to the first limb of the test, the Chamber further recalls the Appeals Chamber Decision in *Nyiramasuhuko* v. *The Prosecutor* on the issue of admissibility of evidence where it stated :

> It is first and foremost the responsibility of the Trial Chambers as triers of fact to determine which evidence to admit during the course of trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence[5].

12. Even assuming that the Defence has met the first limb of the test and demonstrated that the

> "decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial",

it would still have to satisfy the second limb, namely that an immediate resolution by the Appeals Chamber may materially advance the proceedings. This, the Defence has failed to show.

13. With regard to the second limb of the test stipulated in Rule 73 (B), the Chamber wishes to reiterate that the present Motion relates to witnesses who have already been heard by the Chamber. The consideration of their testimony as a whole and in relation to the murder of John Vuningoma in particular will be determined when the Chamber comes to deliberate on the totality of the evidence presented to it by the Parties. In doing so, the Chamber is bound to apply the relevant legal principles on the admissibility of evidence *vis-à-vis* factors such as specificity of the Indictment and notice an prejudice the Accused. The Chamber will also be guided by the jurisprudence of the Appeals Chamber in this regard. The Chamber therefore does not find that "an immediate resolution by the Appeals Chamber may materially advance the proceedings".

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[5] *Nyiramasuhuko v. The Prosecutor*, Case n° ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence [AC], 4 October 2004, para. 5. footnote omitted.

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14. Having considered the submissions of the Parties, the Chamber does not find that the conditions for certification under Rule 73 (B) have been met in the instant case.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 25 February 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Decision on Casimir Bizimungu Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September 2004 concerning rule 73* bis *of the Rules and for other Appropriate Relief 9 March 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Certification of appeal, Conditions for certification of appeal, Advance of the proceedings, Working languages of the Tribunal – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 73 (A), 73 (B), 73* bis*, 73* bis *(E) and 98 (C); Statute, art. 31*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004 (ICTR-98-42)*

*Canada : Supreme Court of Canada,* R. v. Mills, *26 June 1986, [1986] 1 S.C.R. 863*

*United Stated of America : Supreme Court,* Cobbledick v. US, *26 February 1940, 309 U.S. 323 (1940); Supreme Court,* Firestone Tire & Rubber Co v. Risjord, *13 January 1981, 101 S Ct 669 (1981)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of "Casimir Bizimungu Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules of Procedure and Evidence and for Other Appropriate Relief" filed on 25 October 2004 (the "Motion");

CONSIDERING

(i) The "Prosecutor's Response to Casimir Bizimungu Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules of Procedure and Evidence and for Other Appropriate Relief," filed on 1 November 2004 (the "Response"); And

(ii) "Casimir Bizimungu's Reply to the Prosecutor's Response to the Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September 2004 Concerning Rule 73 *bis* of the Rules of Procedure and Evidence and for Other Appropriate Relief," filed on 8 November 2004 (the "Reply");

NOTING the "Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73 *bis* (E) to Vary the Prosecutor's List of Witnesses filed on 25 May 2004" dated 3 September 2004 (the "Impugned Decision");

NOTING further the official translations from the Language Section filed on 28 February 2005 : "Casimir Bizimungu's Response to the Prosecutor's Motion for Leave to Add Witness GTC to the final list of witnesses"(originally filed in French on 16 August 2004), "Casimit Bizimungu's amended and confidential response to the Prosecutor's Motion for Leave to Add Witness GTC to the final list of witnesses" (originally filed in French on 21 Aughust 2004), "Additional information regarding Casimir Bizimungu's 'Amended and confidential response to the Prosecutor's Motion for Leave to Add Witness GTC'" (originally filed in French on 24 August 2004);

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

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

## Submissions of the Parties

*The Defence*

1. The Defence recalls that on 3 September 2004, the Chamber granted the Prosecutor's Motion to vary his list of witnesses pursuant to Rule 73 *bis.* The Defence is seeking certification for an interlocutory appeal against the Impugned Decision pursuant to Rule 73. The Defence submits that the Impugned Decision raises issues affecting the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution will advance the proceedings.

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2. The Defence presents a summary of the procedural history and background leading up to the Impugned Decision[1].

3. The Defence submits that, as stated in the Chamber's Decision of 23 June 2004 on factors to be considered to allow a list of witnesses to be reinstated pursuant to Rule 73 *bis* (E), it has presented the Chamber with a "close analysis of these factors" with regard to the Prosecutor's Motion[2]. The Defence further submits that the errors in the Impugned Decision result from the fact that its submissions in response to the Prosecutor's Motion were not translated from French to English. It is thus argued that the Chamber did not understand fully the Defence submissions. This caused "judicial errors and raises questions of fairness" requiring an immediate resolution.

4. The Defence submits that a mere reading of the Impugned Decision shows the resultant errors : In respect of Witness GTC for example, Paragraph 9 of the Impugned Decision presents an incorrect summary of the Defence submissions as stated in Paragraphs 38-45 of its Amended Response. The Defence points out that at Page 2 of the Impugned Decision, the Chamber took into account the final list of witnesses as filed on 9 June 2004, and not the consolidated and final list dated 25 May 2004 which withdrew Witness GTC. The Defence alleges that this has an impact on the evaluation of the lateness of the filing of the Prosecution Motion.

5. Paragraph 10 of the Impugned Decision is likewise incorrect in its summary of the Defence submissions. The Defence alleges that the Prosecution's justification to add Witness GTC on the list was acknowledged by the Defence but was found to be unsatisfactory in light of the fact that the Prosecution Motion was filed on 12 August 2004 that is 48 hours after the Appeal's Chamber Decision regarding Casimir Bizimungu.

6. The Defence further submits that Paragraphs 13 and 22 of the Impugned Decision also reflect a misunderstanding of the Defence submissions in that the Defence never used the word *crédibilité* (credibility) in its submissions but used "probative value" which may be appreciated in the light of credibility and relevance.

7. Notwithstanding the wide discretion afforded to the Chamber by Rule 98 (C), regard must be given to the Defence submission in the spirit of Rule 73 *bis* (E). Where the Chamber decides to allow the Prosecutor to vary his witness list "one full year after the commencement of the trial", the Defence argues that factors such as the probative value of the testimony sought to be included as well any prejudice which may be caused to the Accused person should be considered.

8. The Defence submits that Paragraph 19 of the Impugned Decision erred in holding that the disclosures as of 8 October 2003 provided by the Prosecutor gave the Accused sufficient notice such that he would not be prejudiced as a result of the varied list of witnesses. In fact, further disclosure in respect of Witness GTC was made on 17 August 2004. The Defence contends that its submissions in this regard were "apparently not understood or ignored in the impugned Decision".

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[1] See the Motion, at pp. 2-5.

[2] See *Bizimungu et al.,* ICTR-99-50-T, "Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73 *bis* (E) for Leave to Vary the Prosecutor's List of Witnesses – Confidential", 23 June 2004 at para. 17.

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9. The Defence also states that it made extensive arguments in French challenging the Prosecution's late submission, the lack of justification for the addition of Witness GTC, the late disclosures with regard to the latter. Submissions were also made as to how the addition of Witness GTC would cause "irreparable prejudice to the Accused" given the lack of relevance and probative value of the witness' testimony.

10. Referring to Article 31 of the Statute on the working languages of the Tribunal, the Defence states that it has repeatedly complained of the language difficulties faced by it. The Defence points out that to date, none of its submissions has ever been formally translated into English before a Decision is rendered by the Chamber, thus placing it in a "complex dilemma" with regard to the working languages of the Tribunal and providing the Accused with an adequate Defence. In the final analysis, the Defence states that its submissions in English are a pale reflection of the arguments had they been made in French. It is submitted that, in effect, this leads to a situation in which the legal principle of *audi alteram partem* has been violated in that a party's submissions are not being fully and accurately translated and therefore not fully and accurately understood; thus bringing into question the very fairness of the proceedings.

11. Finally, the Defence argues that the Impugned Decision raises an issue affecting the fair an expeditious conduct of the proceedings or the outcome of the trial as the addition of Witness GTC would cause an irreparable prejudice to the Accused.

*The Prosecution's Response*

12. The Prosecution opposes the Motion and prays that it be denied as it does not meet the criteria of Rule 73 (B). The Prosecution particularly emphasises the exceptional nature of interlocutory appeals and cites the *Nyiramasuhuko* Decision, which this Trial Chamber concurred with, in support of its position[3].

13. The Prosecution submits that in deciding whether or not to certify an appeal, the Chamber must consider factors such as the importance of the issue, whether the Appeals Chamber has previously provided guidance on the matter and whether there are conflicting approaches amongst the Trial Chambers in dealing with the issue[4]. It is argued that "only if factors are truly significant will an appeal be appropriate".

14. It is also submitted that the instant application "has no prospects of success on Appeal". The Prosecution contends that the Defence

> "is unlikely to prevail in persuading the Appeals Chamber to overturn the Trial Chamber's decision based merely on [the] assumption that the Trial Chamber misunderstood [its] submissions".

[3] *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at paras. 14-15. *Bizimungu et al.,* ICTR-99-50-T, Decision On Prosper Mugiraneza's Motion Pursuant To Rule 73 (B) For Certification To Appeal The Trial Chamber's Oral Decision Of 20 February 2004, 12 May 2004, at paras. 6-7.

[4] *Prosecutor v. Milosevic,* IT-02-54-T, Decision On Prosecution's Application For Certification Under Rule 73 (B) Concerning Rule 70, 29 August 2002.

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15. As regards the issue of the working languages of the Tribunal and the difficulties faced by the Defence thereon, the Prosecutor contends that "this is a matter of a general nature". The Prosecutor points out that this Chamber has previously ruled on the exceptional nature of Rule 73 (B) and that the Rule cannot

> "be used for purposes of gaining access to the Appeals Chamber to resolve issues of a general nature"[5].

*The Defence Reply*

16. The Defence challenges the Prosecution's assertion that it has no prospects of success on appeal, and also disagrees with the criteria for certification submitted by the Prosecution. In support, the Defence cites the Appeals Chamber's statement in the instant case :

> The party challenging the exercise of discretion must show "that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion[6].

17. The Defence also disagrees with the Prosecution's contention that the language issues raised by the Defence are of a "general nature". The Defence submits that notwithstanding the general nature of the problem, in the instant situation, the language difficulties and lack of translation have prevented the Chamber from giving weight, or

> "sufficient weight, to a number of considerations that are crucial and relevant under Rule 73 *bis* (E) […]"

The Defence reiterates that the Chamber's exercise of discretion was based on specific errors as to the facts, as identified in the instant Motion.

18. Finally, the Defence also reiterates its submission with regard to the *audi alteram partem* principle as summarised in Paragraph 8 above.

19. In light of its submissions, the Defence prays for the Motion for certification to be granted. The Defence also prays for the Chamber to order the Registry to ensure *timely* translations of all submissions filed by it in French and for the accuracy of these translations to be verified by the Defence. Finally, the Defence moves for the Chamber to grant it "any other appropriate relief".

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[5] *Bizimungu et al.,* ICTR-99-50-T, Decision On Prosper Mugiraneza's Motion Pursuant To Rule 73 (B) For Certification To Appeal The Trial Chamber's Oral Decision of 20 February 2004, 12 May 2004, at para. 7.

[6] *Bizimungu et al.*, ICTR-99-50-T, Decision On Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave To File Amended Indictment, 12 February 2004, at para. 11, citing *Prosecutor v. Karemera et al.*, N° ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 ("Karemera"), para. 9; *Prosecutor v. Milosević,* Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5 (footnotes omitted).

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**Deliberations**

20. The Chamber notes that Rule 73 (B) which governs the certification of appeal of Motions brought under Rule 73 (A) provides as follows :

> Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. First, the Chamber recalls with approval the reasoning of the Trial Chamber in the *Nyiramasuhuko* case[7] :

> As a general observation, it must be noted that the general rule in Rule 73 (B) remains this : 'Decisions rendered on such motions are without interlocutory appeal.' This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases[8], or allowed only in very limited circumstances[9]. Rule 73 (B) of the Rules provides, however, that in exceptional circumstances, the Trial Chamber may – not must – allow interlocutory appeals of such decisions.

22. Second, the Chamber will consider the submissions relating to the first condition for certification and decide if the

> "decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial."

If this condition is met, the Chamber will then consider whether "an immediate resolution by the Appeals Chamber may materially advance the proceedings".

23. The Chamber notes that the Motion alleges that the Chamber did not fully understand the Defence submissions when rendering the Impugned Decision, in which judicial errors were committed, raising questions of fairness and requiring an immediate resolution by the Appeals Chamber.

24. The Chamber does not consider that the Defence's general submissions with respect to the working languages of the Tribunal and the difficulties in obtaining translation for the Registry affect in any way the fair and expeditious conduct of the proceedings or the outcome of the trial. The Parties are entitled to file their submissions in either French or English and the Chamber disposes of motions on the basis of submissions filed in both languages.

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[7] *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at para. 14.

[8] See *R. v. Mills* 1986 Carswell Ont 11652 CR (3d) 1, [1986] 1 SCR 863, 26 CCC (3d) 481 [Supreme Court of Canada]; *Cobbledick v. US*, 60 S Ct 540 (1940) [US Supreme Court]; *Firestone Tire & Rubber Co v. Risjord* 101 S Ct 669(1981) [US Supreme Court].

[9] See, in England and Wales, ss 9 (11), 9 (3) and 7 of the Criminal Justice Act 1987; ss 35, 31 and 29 of the Criminal Procedure and Investigations Act 1996. See also *R. v. Gunawardena*, [1990] 91 Cr App R 55 [Court of Appeal of England and Wales].

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25. With respect to the Defence' specific submissions, the Chamber does not find any support in the contention that the Chamber erred in its consideration of the Defence submissions before allowing the Prosecution to reinstate its witness list on the alleged basis of a lack of understanding. The Chamber notes that all relevant factors were duly considered and analysed before rendering the Impugned Decision.

26. Moreover, upon receipt of the translation from the Language Section, the Chamber has reviewed the submissions and arguments put forward by the Defence and do not find any change of its understanding or perception of these submissions and arguments. Its understanding and perception remain the same and its Decision would also not change. The Chamber is satisfied that its understanding of the arguments was correct and that no question of fairness of the proceedings or outcome of the trial can therefore be raised on the basis of the Impugned Decision.

27. Since the Defence failed to demonstrate the first criterion for certification, there is no need to consider whether the second criterion has been met. Consequently, the Chamber considers that the Motion fails to meet the certification criteria and is denied.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 9 March 2005.

[Signed] : Khalida Rachid Khan, Lee Gacuiga Muthoga, Emile Francis Short

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## *Order for the Transfer of Detained Witness GKJ from Rwanda (Rule 90* **bis***)*
## *6 May 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Detained witness, Transfer of the detained witness to the United Nations Detention Facility, Advance notice to the Registry*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 90* bis*, 90* bis *(A) and 90* bis *(B).*

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

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SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of the "Prosecutor's Extremely Urgent *Ex Parte* Motion for an Order for the Transfer of Detained Witness GKJ Pursuant to rules 90 *bis* and 73 (A) of the Rules of Procedure and Evidence", filed on 12 April 2005 (the "Motion"),

**Submissions**

1. The Prosecution requests the Trial Chamber, pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence (the "Rules"), to order the temporary transfer of Witness GJQ from the Republic of Rwanda, where he is currently detained.

2. The Prosecution provides the following assurances to the Chamber :

(i) The presence of the witness is not required for any criminal proceedings in the Republic of Rwanda during the period he is required to be present at the Tribunal as a Prosecution Witness;

(ii) The transfer of the witness will not extend beyond the period of his detention as foreseen by the Republic of Rwanda.

3. The Prosecution has transmitted to the Chamber as a confidential Annex a letter frm the Ministry of Justice in Rwanda addressed to the Deputy Prosecutor of the Tribunal confirming that Witness GKJ is available to give testimony before the Tribunal, pursuant to the requirements of Rule 90 *bis* of the Rules of Procedure and Evidence[1].

**Deliberations**

4. The Trial Chamber notes that pursuant to the provisions of Rule 90 *bis* (A) of the Rules :

i) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.

5. Pursuant to Rule 90 *bis* (B) of the Rules, a Trial Chamber shall issue a transfer order only after prier verification that the following conditions are met :

ii) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

iii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State;

6. On the basis of representations made by the Prosecution and the confidential Annex provided, the Chamber finds that the requirements set out in Rule 90 *bis* of the Rules for the temporary transfer of detained witnesses have been satisfied. The Chamber is aware that the Registry requires significant advance notice in order to properly facilitate the transfer of detained witnesses from Rwanda to Arusha, and also

[1] Confidential letter dated 25 April 2005.

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some flexibility in the timing, which must be worked out in consultation with the Governments of Rwanda and Tanzania. The Chamber thus considers it appropriate that such flexibility be incorporated into the order for transfer, whilst remaining strictly within the maximum limits allowed. From the date of transfer, the Chamber decides that the detained witness to be transferred should remain at the United Nations Detention Facility in Arusha (the "UNDF") for the shortest period practically possible to ensure that his testimony is taken, and in any event for a period not exceeding one month without further prior approval.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

ORDERS the Registry, pursuant to Rule 90 *bis* of the Rules, to transmit the Chamber's Order to the Rwandan authorities and to ensure the proper conduct of the transfer of Detained Witness GKJ to the UNDF, at an appropriate time prior to his anticipated testimony during the current trial session. His return travel should be facilitated as soon as practically possible after the end of his testimony. In any event, without prior approval from the Chamber, his return into Rwandan custody should be facilitated at a time not later than one month from the date of transfer to the UNDF;

REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registry in the implementation of this Order.

Arusha, 6 May 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Decision on Prosper Mugiraneza's Motion to Order a Witness to be returned for further Cross-Examination or in the Alternative to Strike his Testimony Based Upon Late Disclosure of Rule 68 Material 6 May 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Prosper Mugiraneza – Cross-examination of a witness, Interests of justice – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 66 and 68*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion to Order Witness GKJ Returned for Further Cross-Examination or, to Strike Out His Testimony in Whole Based on the Failure of the Prosecutor to Timely Disclose Rule 68 Material" filed on 7 April 2005 (the "Motion");

CONSIDERING (i) the "Confidential Annex to Prosper Mugiraneza's Motion to Order Witness GKJ Returned for Further Cross-Examination or, to Strike Out His Testimony in Whole Based on the Failure of the Prosecutor to Timely Disclose Rule 68 Material" filed together with the Motion on 7 April 2005; (ii) the "Brief from Casimir Bizimungu in Support of Prosper Mugiraneza's Motion to Order Witness GKJ Retumed for Further Cross-Examination or, to Strike Out His Testimony in Whole Based on the Failure of the Prosecutor to Timely Disclose Rule 68 Material" filed on 12 April 2005 (the "Bizimungu Response"); (5) the "Prosecutor's Response to Prosper Mugiraneza's Motion for the Recall of Witness GKJ or to Strike Out GKJ's Testimony Because of the Untimely Disclosure of Rule 68 Material, and Casimir Bizimugu's Brief in Support Thereof" filed on 12 April 2005 (the "Response"); (iv) "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion to Order Witness GKJ Returned for Further Cross-Examination or, to Strike Out His Testimony in Whole Based on the Failure of the Prosecutor to Timely Disclose Rule 68 Material" filed on 13 April 2005 (the "Reply");

CONSIDERING the Rules of Procedure and Evidence (the "Rules"), particularly Rules 66 and 68 of the Rules;

**Submissions**

1. The Defence wants the Chamber to make an order for the recall of Witness GKJ for further cross-examination. This request arises out of the late disclosure of a statement of the Witness, being the recording and transcript of a radio interview in which he took part[1]. According to the Defence, the Prosecution disclosed this statement seven months after he testified, and even then, only in Kinyarwanda. Alternatively, the Defence seeks that the testimony of the witness be stricken from the record. The Defence for Casimir Bizimungu joins the Defence for Prosper Mugiraneza in its request.

2. The Prosecution agrees that Witness GKJ should be returned to the stand, with two conditions. First, that he be returned for cross-examination strictly on the point of the newly disclosed material. Second, that he is given the newly disclosed material prior to his cross-examination, so that he is aware of the reason for his recall prior to his cross-examination

3. In reply, the Defence submits that if Witness GKJ is returned to the stand, his testimony should properly be treated as a continuation of his earlier testimony, and thus he should not be forewarned of the reason for his return to Arusha. Had the

[1] KT-00-1 169 (audio CD) and KT-0 14-2003-K0 14-2025 (transcript).

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Prosecution been diligent in its work and disclosed the statement on time, the Witness would not have been warned of the broadcast prior to his testimony. Therefore, a proper remedy of the situation requires that he should not be forewarned.

**Deliberations**

4. The Chamber is persuaded by the submissions of the Parties, who are in agreement on the matter, that the interests of justice require that the Chamber grant the request to return Witness GKJ to the stand for cross-examination on the statement, which was disclosed late by the Prosecution.

5. However, this witness has already given his evidence, and this will not be an opportunity to introduce new matters. This witness is being returned to the stand solely to deal with the issue of the prior statement identified by the Parties.

6. This witness need not be forewarned of the reason for his return. The reason will be disclosed in court.

7. In the event that Witness GKJ is not brought back for further cross-examination, the Chamber does not see any justification for striking out from the record his entire testimony because of the Prosecution's late disclosure under Rule 68. However, in assessing his entire testimony, the Chamber would take into account the late disclosure of the Witness's prior statement and the fact the Defence did not have an opportunity to cross-examine the Witness on this statement.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following terms :

ORDERS that Prosecution Witness GKJ be returned to Arusha for cross-examination on his prior statement, identified above.

Arusha, 6 May 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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***Decision on the Prosecutor's Request pursuant to Rule 73 for Certification to Appeal the oral decision of 24 March 2005 refusing to Qualify and admit Jean Rudabuka as an expert witness***
***Rule 73 of the Rules of Procedure and Evidence***
***13 June 2005 (ICTR-99-50-T)***

(Original : English)

Trial Chamber II

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Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Admissibility of evidence, Expert witness, Qualification as Expert, Voir dire proceedings, Discretionary power of the Chamber to admit evidence – Exceptional nature of certification for appeal of interlocutory decisions, Conditions for a Certification to Appeal – Rights of the Accused to a fair trial – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73, 73 (A), 73 (B), 89 (C) and 94* bis

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

SITTING as Trial Chamber II, composed of Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (The "Chamber");

BEING SEIZED of the "Prosecutor's Request Pursuant to Rule 73 For Certification to appeal the Oral Decision of 24 March 2005 Refusing to Qualify and Admit Jean Rudabuka as an expert witness" filed on 30 March 2005 (the "Motion");

HAVING CONSIDERED

(i) "Justin Mugenzi's Reply to the Prosecutor's Request for Rule 73 Certification in Respect of the Decision Concerning Jean Rudabuka", filed on 2 April 2005;

(ii) "Casimir Bizimungu's Response to the Prosecutor's Request for Certification to Appeal from the Ruling of 24 March 2005", filed on 5 April 2005;

(iii) "Prosper Mugiraneza's Response to the Prosecutor's Request Pursuant to Rule 73 for Certification to Appeal the Oral Decision of 24 March 2005 Refusing to Qualify and Admit Jean Rudabuka as an Expert Witness", filed on 5 April 2005

(iv) "Bicamumpaka's Response to the 'Prosecutor's Request Pursuant to Rule 73 for Certification to Appeal the Oral Decision of 24 March 2005 Refusing to Qualify and Admit Jean Rudabuka as an Expert Witness", filed on 6 April 2005.

RECALLING the Chamber's Oral Ruling of 24 March 2005 (the "Impugned Ruling");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter solely on the basis of the Briefs of the parties pursuant to Rule 73 (A) of the Rules.

## Sumissions of the Parties

*The Prosecutor's Motion*

1. The Prosecutor, pursuant to Rule 73 (B), moves the Chamber to grant him certification to appeal the Chamber's Oral Ruling of 24 March 2005, in which the Chamber declined to admit Prosecution Witness Jean Rudabuka as an Expert Witness.

2. The Prosecutor contends that the present Motion meets the requirement of Rule 73 (B). The Prosecutor submits that the Impugned Decision denies the Prosecutor

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the opportunity to lead expert opinion evidence on matters that are paramount and crucial to this case. The Impugned ruling therefore significantly affects the fair and expeditious conduct of the proceeding or the outcome of the trial, and is one that merits the exercise of the Trial Chamber's discretion for an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

3. The Prosecutor submits that the Chamber erred in law, and in fact, in its reasoning and misdirected itself as to the law relevant to the exercise of its discretion, thereby giving weight to extraneous considerations. The Chamber further erred as to the facts upon which it exercised its discretion.

*The Defence Submissions*

The Defence for Justin Mugenzi

4. The Defence for Justin Mugenzi submits that the Chamber has no jurisdiction. Under Rule 73 (B) or any other Rule, to grant certification at the Prosecutor's request. The rule states without ambiguity that the decision to which it relates are those which are rendered on motions brought before the Chamber. In the instant case, the Chamber was exercising its jurisdiction under Rule 89 (C) on the admissibility of evidence in deciding whether or not Mr. Jean Rubaduka's qualifications and experience were such as to qualify him to give expert opinion evidence, which is both relevant and of probative value, on matters pertaining to the Rwandan Constitution. The Impugned Decision, therefore, is one from which there is no interlocutory appeal.

5. Should the Chamber reject the Defence argument on the point of jurisdiction. The Defence further submits that the Prosecutor has not demonstrated that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Defence contends that the Prosecutor also has not shown that an immediate resolution by the Appeals Chamber would not materially advance the proceedings. The Defence submits that indeed an Appeal of the matter would set the proceedings back, rather than advance it.

6. Finally, the Defence for Justin Mugenzi submits that the Impugned Decision is one which was well within the discretion of the Chamber was based on sound and careful reasoning and cannot be said to have taken into account matters which are irrelevant or extraneous. The likelihood of an Appeal on the same being successful is negligible.

The Defence for Casimir Bizimungu

7. The Defence for Casimir Bizimungu submits that the lmpugned Decision \vas rendered within the broad discretion afforded to the Chamber by Rule 89 (C). A certification for appeal is an exception to that Rule. Accordingly, it is argued that the Prosecutor has not met the criteria stipulated in Rule 73 (B) in that the Impugned Decision is "discretionary, correct, reasonable and unlikely to be overturned". The Chamber rendered a discretionary ruling based on a reasonable appreciation of the facts put into evidence during the course of the *voir dire* on the qualifications of Mr. Rubaduka to testify as an expert witness.

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8. The Defence argues that the Prosecutor has failed to show how the Impugned Decision is unfair so that it could be said to significantly affect the "fairness" of the proceedings as stipulated in Rule 73 (B).

9. The Defence contends that there would be little to be gained from an Appeal of the Impugned Decision because matters on which the Prosecutor sought to lead Mr. Rubaduka may not even be useful and relevant. It is submitted that most of the matters submitted by the Prosecutor as being "paramount and crucial" to his case are either outside the scope of constitutional law, irrelevant or inadmissible. Further, the Defence submits, granting the Prosecutor leave to appeal at this stage of the proceedings would significantly affect the expeditious conduct of the same. The Defence for Prosper Mugiraneza

10. The Defence for Prosper Mugiraneza adopts the arguments submitted by the Defence for Justin Mugenzi. The Defence contends that granting certification would cause undue delay. It is further submitted that the Chamber's ruling on the merits was correct.

11. It is argued that the Prosecutor's Motion should be dismissed because not only has the latter failed to argue that certification of appeal would lead to a more expeditious trial, he has also failed to demonstrate how the Chamber has abused its discretion in ruling as it did in the Impugned Decision.

Defence for Jerome Bicamumpaka

12. The Defence for Jerome Bicamumpaka submits that the Chamber lacks jurisdiction pursuant to Rule 73 (B) to certify the appeal of the Impugned Decision because it is nota Decision on a motion.

13. The Defence further submits that the Prosecutor has failed to meet the burden of qualifying his Motion in respect of the requirements of Rule 73 (B) for the certification of an appeal. The Defence contends that the Prosecutor's Motion concerns a matter that does not significantly affect the conduct of the proceedings and the outcome of the trial, and the resolution of the question will not materially advance the proceedings.

14. The Defence also makes the point that any argument on the merits of the appeal, as set out in paragraphs 11 to 18 of the instant Motion, is untimely.

## Deliberations

15. Rule 73, in relevant part, provides :

(A) Subject to Rule 72 either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.

(B) Decisions rendered on such motions are without interlocutory appeal saw with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and for which, in the

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opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. In the instant case, the question before the Chamber was whether or not it should allow the opinion testimony of Mr. Rubaduka as an expert on matters pertaining to the Rwandan Constitution.

17. All Defence teams filed their respective notices of challenge indicating that they did not accept Mr. Rubaduka to be an expert in the stated area in compliance with Rule 94 *bis*. The Chamber elected to enter into *voir dire* proceedings to determine the preliminary question as to whether or Mr. Rubaduka is an expert in the stated area. Having heard the Parties on the matter, the Chamber ruled that it was not satisfied that

> "Mr. Jean Rubaduka possesses sufficient knowledge and expertise on the Rwandan constitutional law to enable him to testify as an expert witness in that area" and accordingly, found that he was not "qualified to testify as an expert witness"[1]. The transcript of 8 March 2005 makes it very clear that the Chamber was not treating the Defence's notices of challenge, pursuant to Rule 94 *bis,* as motions[2].

18. At the outset, the exceptional nature of certification for appeal of interlocutory decisions is worthy of emphasis. In this regard, the Chamber recalls, with approval the reasoning of the Trial Chamber in the *Nyiramasuhuko* case :

> As a general observation, it must be noted that the general rule in Rule 73 (B) remains this : 'Decisions rendered on such motions are without interlocutory appeal'. This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases or allowed only in very limited circumstances. Rule 73 (B) of the Rules provides however that in exceptional circumstances, the Trial Chamber may – not must – allow interlocutory appeals of such decisions[3].

19. Furthermore, it is settled law that the determination of what evidence it should or should not admit rests primarily with the trier of fact, and that is the Trial Chamber. The Chamber makes this determination pursuant to the broad discretionary power, afforded to it by Rule 89 (C) to "admit any relevant evidence which it deems to have probative value".

20. A case in point is the Appeals Chamber's Decision in *Nyiramasuhuko v. The Prosecutor* which restated the conditions of Rule 73 (B) :

> It is first and foremost the responsibility of the Trial Chambers, as triers of fact. To determine which evidence to admit during the course of trial; it is not for the Appeals Chamber to assume this responsibility. As the Appeals Chamber previously underscored, certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence[4].

21. For the Chamber to exercise its discretion in favour of certification the applicant must show that

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[1] T. 24 March 2005, pp. 15-16.

[2] T. 8 March 2005, pp. 42-43.

[3] *Prosecutor v. Nyiramasuhuko,* ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ inadmissible', 18 March 2004, at para. 14.

[4] *Nyiramasuhuko v. The Prosecutor,* Case n° ICTR-98-42-AR72.2, Decision on Pauline Nyiramsuhuko's Appeal on Admissibility of Evidence [AC], 4 October 2004, par. 5, footnote omitted.

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"the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".

The Chamber considers that the use of the word "significantly" implies that the drafters of the Rule intend to exclude minor or trivial issues that may arise in the course of a trial from certification to appeal. Examples of "significant" issues within the meaning of Rule 73 (B) include those that affect the rights of the Accused to a fair trial or, upon which a decision whether or not to certify an appeal may lead to a different result at the end of the trial.

22. The Chamber has considered the Prosecutor's submissions on this the limb of the test and is not persuaded that the subject matter of this application is one which will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Chamber has already taken judicial notice of the Rwandan Constitution, and in the opinion of the Chamber, is not a matter on which expert testimony is required. Indeed, the Chamber was not satisfied that Prosecutor's chosen witness possessed the expertise to provide the Chamber with opinion testimony on matters pertaining to the Rwandan Constitution. The "fair" conduct of the proceedings therefore cannot be said to have been "significantly" affected. The Chamber is therefore not persuaded that the Impugned Ruling involves an issue "that would significantly affect the fair and expeditious conduct of the proceedings".

23. Second, the Trial Chamber must be satisfied that immediate resolution by the Appeals Chamber o f the issue involved in the decision "may materially advance the proceedings". The Chamber considers that the use of the word "and" in Rule 73 (B) implies that the two conditions set out above are cumulative and an applicant needs to satisfy both of them in order for the Chamber to exercise its discretion in favour of certification.

24. Under the circumstances o f the present case the Chamber finds that appellate resolution of the matter will not materially advance the proceedings but rather serve to cause further delays in the process.

25. These are the only two conditions it must consider in deciding whether or not to certify an appeal. All other considerations such as whether there was an error o f law or abuse o f discretion in the Impugned Decision are for the consideration of the Appeals Chamber after certification to appeal has been granted by the Trial Chamber. The Prosecutor's submissions on the merits of his appeal are therefore untimely and irrelevant to the decision for certification and will not be considered by the Chamber.

26. Having found that the Prosecution has failed to meet the conditions set out in Rule 73 (B) for certification to appeal the Impugned Ruling of 24 March 2005 the Chamber does not find it necessary to consider whether the Impugned Ruling relates to a Motion brought before the Chamber.

FOR THE FOREGOING REASONS, THE CHAMBER

DISMISSES the Motion in its entirety.

Arusha, 13 June 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Decision on the Defence Motion for the Chamber to Visit Sites in Rwanda 24 June 2005 (ICTR-99-50-T)*

Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Seat of the Tribunal, Visits of Sites, Appreciation of the evidence, Lack of information – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 4 and 73 (A)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005 (ICTR-2001-76)*

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

SITTING as Judge Khalida Rachid Khan, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence ("the Chamber");

BEING SEIZED OF "Justin Mugenzi's Motion for the Chamber to Visit and View Sites in Rwanda of Particular Relevance to the Trial", filed on 7 March 2005;

CONSIDERING :

(a) The "Prosecutor's Response to Justin Mugenzi's Motion for the Chamber to Visit and View Sites in Rwanda of Particular Relevance to the Trial", filed on 21 March 2005 ("the Response");

(b) "Justin Mugenzi's Rejoinder to the Prosecutor's Response to a Motion for the Chamber to Visit Sites in Rwanda", filed on 29 March 2005 (the "Rejoinder");

(c) The "Brief from Casimir Bizimungu in Support of Justin Mugenzi's Motion for the Chamber to Visit and View Sites in Rwanda of Particular Relevance to the Trial", filed 30 March 2005 ("the Bizimungu Brief");

(d) The "Prosecutor's Response to Casimir Bizimungu's Brief in Support of Justin Mugenzi's Motion for the Chamber to Visit and View Sites in Rwanda of Particular Relevance to the Trial", filed on 5 April 2005 ("the Response");

CONSIDERING the Statute of the Tribunal ("the Statute") and the Rules of Procedure and Evidence ("the Rules");

HEREBY CONSIDERS the Motion

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## Submissions

*Mugenzi Defence Motion*

1. Counsel for Justin Mugenzi requests that the Chamber conduct site visits to three locations in Rwanda : Murambi (Gitarama); Muramba (Gisenyi *Préfecture*); and Gisenyi town. The Defence asserts that a visit to these locations will provide a greater understanding of the charges, as well as reveal the implausibility of many of the allegations relevant to the Prosecution case. The Defence contends that the visit should be conducted prior to the conclusion of evidence in the case and prior to the presentation of closing arguments.

*Bizimungu Brief in Support of Mugenzi's Motion*

2. Counsel for Casimir Bizimungu endorses the Mugenzi Defence Motion and proposes three additional sites to be visited : the French Embassy in Kigali; the Meridien Hotel in Gisenyi; and the Conference Room in Rambura, Gisenyi. The Defence submits that a visit to these additional sites will enable the Chamber

> "to appreciate the powers of the accused and relationships with subordinates, decisions, capacity to act and omissions, as well as state of mind",

as well as to properly evaluate and understand the testimonies of Witnesses "D", "GKI", "GTC", and Joseph Ngarambe.

*Prosecutor's Response to Mugenzi Defence Motion*

3. The Prosecution raises no objection in principle to the Chamber's inspection of sites in Rwanda, but argues that the Motion fails to comply with Rule 73 *ter* of the Rules and is, therefore, premature.

## Deliberations

4. The Chamber, pursuant to Rule 4 of the Rules, may exercise its functions away from the Seat of the Tribunal, if so authorized by the President, in the interests of justice. Accordingly, Trial Chamber 1 of the Tribunal, in *Prosecutor v. Bagilishema,* visited sites in Kibuye *Préfecture* in Rwanda, which were deemed relevant to the allegations in the case, in order "to better appreciate the evidence to be adduced during the trial"[1].

5. The Chamber notes, however, that the need for a site visit must be assessed in view of the particular circumstances of each trial[2]. Further, in view of the logistics and the costs involved, a decision to carry out a site visit should be made preferably when the visit will be instrumental in the discovery of the truth and the determination of the matters before the Chamber[3].

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[1] *Bagilishema*, Judgement (TC), 7 June 2001, para. 10.

[2] *Bagasora et al*, Decision on the Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004, para. 4. See also *Simba*, Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005, para. 2.

[3] *Simba*, Decision on the Defence Request for Site Visits in Rwanda, 31 January 2005, para. 3.

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6. At this stage of the proceedings, the Chamber lacks sufficient information regarding the Defence case to make an appropriate determination about the proposed site visits. The Chamber is of the view that, as the trial proceeds, evidence may be adduced and exhibits, such as photographs, sketches, and maps, produced to shed light on the relevant locations. Therefore, the Chamber will consider the merits of the Defence request for site visits in Rwanda following commencement of the Defence case.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DIRECTS the Defence for Mugenzi and Bizimungu to renew their applications for site visits, after the commencement of the Defence case, precisely setting forth justifications for the proposed visits by the Chamber, in light of the allegations against the Accused, as well as a proposed itinerary for the visits.

Arusha, 24 June 2005.

[Signed] : Khalida Rachid Khan

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## *Decision on Jerôme Bicamumpaka's Motion for Protection of Defence Witnesses 27 June 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

*Jérôme Bicamumpaka – Measures of protection for witnesses,* In camera *proceedings, Identity of victim, General duty to investigate crimes, Professional collegiality – Fair trial – Late submission of a* Corrigendum*, Interests of Justice – Motion granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 67 (A) (ii) (a), 69 (A) and 75; Statute, art. 19, 20 and 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses, 3 April 2001 (ICTR-98-44A); Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Order for Non-Disclosure, 3 October 2001 (ICTR-2001-71); Trial Chamber,* The Prosecutor v. Athanase Seromba, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003 (ICTR-2001-66); Trial Chamber,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Defence Motion for Reconsideration of the*

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*Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Sylvestre Gacumbitsi, *Decision on Defence Motion for Protection of Witnesses, 25 August 2003 (ICTR-2001-64); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision on Defence Request for Protection of Witnesses, 25 August 2004 (ICTR-2001-76); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses 5 February 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005 (ICTR-98-41)*

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

SITTING as Judge Khalida Rachid Khan, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence ("the Chamber");

SEISED of the "*Requête de la Défense de Jérôme Bicamumpaka en Émission de Mesures de Protection de Témoins*", filed on 18 May 2005 (the "Motion");

CONSIDERING

(1) The "Prosecutor's Response to Jerome Bicamumpaka's Motion for Protection of Defence Witnesses", filed on 24 May 2005 (the "Response");

(2) The "*Réplique de J. Bicamumpaka à la Réponse du Procureur à Sa Requête pour Mesures de Protection des Témoins – 21 du Statut, 75 du Règlement*", filed on 30 May 2005 (the "Defence Reply");

(3) The "Prosecutor's Consolidated *Corrigendum* To Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 15 June 2005 ("the *Corrigendum*");

HEREBY DECIDES the Motion, pursuant to Articles 19, 20, and 21 of the ICTR Statute (the "Statute") and Rule 75 of the Rules of Procedure and Evidence (the "Rules").

## Submissions

*Defence Motion*

1. The Defence for Jérôme Bicamumpaka seeks an order for the protection of its witnesses on the ground that they have expressed real fears for their safety and for the safety of their families within Rwanda and in neighbouring countries, as well as outside of Africa.

2. The Defence requests protective measures, primarily non-disclosure to the public and the Prosecution of the names and the identifying information of all potential Defence witnesses. According to the Defence, the identifying data shall be disclosed to the Prosecution no sooner than twenty-one days before the testimony of each witness. The Defence asserts that the granting of these measures is consistent with the

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Accused's rights and the interests of a fair trial, pursuant to Article 21 of the Statute and Rule 75 of the Rules.

3. The Defence submits, in Paragraph 31 (i) of its Motion, that Rule 67 (A) (ii) (a) of the Rules (notification of the Defence of alibi and information pertaining to alibi witnesses) should be subject to the requested protective measure to regulate disclosure of witness identities to the Prosecution, under Rule 75 of the Rules.

*Prosecution's Response*

4. The Prosecution submits that protective measures are to be granted generally on a case-by-case basis[1]. According to the Prosecution, the Defence has not provided current information to demonstrate the objective basis, upon which the witnesses' real fear of danger exists and to which the requested protective measures respond. Therefore, the Prosecution requests that the Chamber require the Defence to provide factual evidence to show that, in view of the current security situation, its witnesses warrant the requested protection.

5. In addition to the submission in Paragraph 4 above, the Prosecution contests one of the proposed measures in the Defence Motion : Paragraph 31 (i), concerning alibi witnesses. The Prosecution submits that provisions relating to witness protection measures, under Rule 75 of the Rules, stand independent of alibi disclosure obligations, under Rule 67 (A) (ii) (a) of the Rules. The Prosecution asserts that protective measures should not prevent the Accused from discharging his obligations, under Rule 67 (A) (ii) (a) of the Rules, to provide notification of the identity of alibi witnesses and any evidence in support of his alibi.

Corrigendum *to the Response of the Prosecution to Jérôme Bicamumpaka's Motion*

6. In its *Corrigendum*, the Prosecution seeks to revise its earlier submission, in which it affirmed the Defence request to restrict confidential witness information to members of the immediate Prosecution team.

7. Characterizing the Office of the Prosecutor as a single and indivisible unit, "within which information may flow without restriction", the Prosecution requests the Chamber to deny two protective measures, set forth in Paragraph 31 (f, g), in the Motion. The first of the two measures prohibits the Prosecution from sharing, directly or indirectly, any information which could lead to the identification of a potential Defence witness with any person other than the members of the immediate Prosecution team. The second measure requires the Prosecution to designate all members of the immediate Prosecution team, to provide notification of any change in the composition of that team, and to ensure remission of all relevant information from any member departing from the team.

[1] *Prosecutor v. Aloys Simba,* ICTR-01-76-I, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2004, para. 5.

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**Deliberations**

(i) *Protection Measures*

8. By virtue of Article 21 of the Statute, the Tribunal provides in its Rules for the protection of victims and witnesses. Under Rule 75 of the Rules, such protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of victims. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records, assigning a pseudonym to a witness, and permitting witness testimony in closed session.

9. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for their safety or for the safety of families and that there must be an objective justification for this fear. In granting protective measures, the Chamber, on a case-by-case basis, must also take into consideration the fairness of the trial and the equality of the Parties[2].

10. The Chamber is of the view that the Defence has not provided independent justifying elements to clearly demonstrate that the fears of its potential witnesses are well-founded. However, the Chamber is mindful of its previous decisions regarding protection for Defence witnesses and considers that the evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the Tribunal's proceedings would threaten their safety and security[3].

(ii) *Disclosure Obligations of Alibi Witnesses*

11. The Chamber will consider the Defence request on this issue in its Decision on the "Notice of Alibi From the Defence of Jérôme Biamumpaka".

12. With respect to the other protective measures sought by the Defence, the Chamber observes that such measures have normally been granted in previous cases and that they are substantially identical to those ordered in respect of Prosecution witnesses in the present case[4]. In the Chamber's view, the interests of trial fairness favour the adoption of identical measures, applicable to all protected witnesses, absent

[2] *Gacumbitsi*, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8. *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras. 2, 4.

[3] *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 3.

[4] *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 5 February 2005; *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 2; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7.

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exceptional circumstances. These measures are enumerated below in language customarily adopted in witness protection order[5].

(iii) Corrigendum *to the Response of the Prosecution to Jérôme Bicamumpaka's Motion*

13. The Chamber expresses its concern regarding the late submission of a *Corrigendum*, filed by the Prosecution on 15 June 2005, several weeks after the Motion and the corresponding Response. However, in the interests of justice, the Chamber considers the Prosecution's submissions in the *Corrigendum*.

14. The Chamber does not agree with the Prosecution's assertion that its duty to investigate and prosecute, its statutory disclosure obligations, and the practicalities of organization require dissemination of confidential witness information to any staff member within the Office of the Prosecutor. As the Tribunal has observed in a decision on a similar motion in *Bagosora et al.*,

> "Neither the general duty to investigate crimes nor professional collegiality can supersede the specific obligations of a witness protection order, which is itself authorized under Article 21 of the Statute"[6].

The Chamber adopts this reasoning, and considers that the two measures in question, in conjunction with others, are designed to offer substantial protection to potential witnesses who may, in the absence of such measures, be subject to great danger or intimidation and, consequently, may be unwilling to testify before the Tribunal.

15. The Chamber is satisfied that the two measures in question, which limit disclosure of protected witness information to the immediate Prosecution team, strike an appropriate balance between affording security to witnesses and enabling the exercise of the Prosecution's duties.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the Motion for Protection Measures in the following terms :

(a) The names, addresses, whereabouts of, or/and other identifying information concerning potential Defence witnesses should be sealed by the Registry and are not to be included in any records of the Tribunal;

(b) The names, addresses, whereabouts of, and other identifying information concerning all potential Defence witnesses should be communicated only to the Victims and Witness Support Unit by the Registry in accordance with the established procedure and only to implement protective measures for these individuals;

(c) To the extent that any names, addresses, whereabouts of, and other identifying information conceming such potential Defence witnesses currently exist in records of the Tribunal, such information should be expunged from those documents;

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[5] *Bizimungu et al.,* Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 5 February 2005; *Kajelijeli,* Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Ndindabahizi,* Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al.,* Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

[6] *Bagosora et al.,* Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. 6.

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(d) The names, addresses, whereabouts of, and other identifying data of potential Defence witnesses found in the supporting material or in any other information on file with the Registry, or any other information that may reveal the identity of such potential Defence witnesses shall not be disclosed to the public or to the media during or after the Trial until the Chamber decides to further revise this prohibition;

(e) The Prosecution shall not share, discuss, or reveal, 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 Defence witnesses to any person or entity other than persons working on the immediate Prosecution team;

(f) The Prosecution shall designate to the Chamber and the Defence all persons working on the immediate Prosecution team who will have access to any information which may reveal or lead to the identification of Defence witnesses. The Prosecution shall also inform the Chamber in writing of any changes in the team composition and shall ensure that all members departing from this team remit all materials that reveal or could lead to the identification of Defence witness;

(g) No photographing, audio or visual recording, or sketching of any Defence witnesses shall be allowed without leave of the Chamber and the Parties;

(h) The disclosure to the Prosecution of the names, addresses, whereabouts of, and other identifying data which reveal or may identify Defence witnesses, and any other information in the supporting material on file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the Prosecution in a redacted form until such a mechanism is in place, and, in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69 (A) of the Rules;

(i) The Defence is required to submit the following identifying data pursuant to Paragraph (h), if such information is contained in the original witness information sheets :

  (i) Full names (including family, first, nicknames, and pseudonym);

  (ii) Date and place of birth;

  (iii) Names of parents;

  (iv) Ethnic group;

  (v) Religion;

  (vi) Address in April 1994;

  (vii) Occupation in April 1994.

(j) The Prosecutor shall make a written request, on reasonable notice to the Defence, to the Trial Charnber, or Judge thereof, to contact any protected potential Defence witness or any relative of such person. The Defence shall undertake all necessary arrangements to facilitate the interview with such a person at the direction of the Trial Chamber, or a Judge thereof, with the consent of such a protected person or the parents or guardians of that person, if that person is under the age of 18;

(k) The Defence shall designate a pseudonym for each Defence witness, which will be used to refer to each such witness in Tribunal proceedings, communications,

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and discussions between the Parties to the Trial, and the public, until such time as the Chamber decides otherwise.

Arusha, 27 June 2005.

[Signed] : Khalida Rachid Khan

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## *Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses 27 June 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

*Justin Mugenzi – Protection of Defence Witnesses,* In camera *proceedings, Protection of the identity of victims, Assignment a pseudonym to a witness, testimony in Closed sessions, Real fear for their personal safety or the safety of their families, Objective justification for the fear, Disclosure of Confidential Witness Information by the Victims and Witness Support Unit, Absolute necessity to communicate with governmental and official authorities to ensure the protection of witnesses, Obligation to protect the identity of the witness or victim, General duty to investigate crimes of the Office of the Prosecutor, Professional collegiality of the Office of the Prosecutor, Interest of justice – Motion granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 69, 73 (A) and 75; Statute, art. 19, 20 and 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses, 3 April 2001 (ICTR-98-44A); Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Order for Non-Disclosure, 3 October 2001 (ICTR-2001-71); Trial Chamber,* The Prosecutor v. Athanase Seromba, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003 (ICTR-2001-66); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Sylvestre Gacumbitsi, *Decision on Defence Motion for Protective Measures for Defence Witnesses, 25 August 2003 (ICTR-2001-64); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Deci-*

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*sion on Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 5 February 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005 (ICTR-98-41)*

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

SITTING as Judge Khalida Rachid Khan, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence ("the Chamber");

SEISED of "Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses", filed on 5 April 2005 (the "Motion");

CONSIDERING

(1) The "Prosecutor's Response to Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses", filed on 9 June 2005 ("the Response");

(2) The "Prosecutor's Consolidated *Corrigendum* To Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 15 June 2005 (the "*Corrigendum* to the Prosecution's Response");

(3) "Justin Mugenzi's Response to Prosecutor's *Corrigendum*", filed on 20 June 2005 (the "Response to the *Corrigendum*";

HEREBY DECIDES the Motion, pursuant to Articles 19, 20, and 21 of the ICTR Statute (the "Statute") and Rules 69 and 75 of the Rules of Procedure and Evidence (the "Rules").

## Submissions

*Defence Motion*

1. The Defence for Justin Mugenzi seeks an order for the protection of its witnesses on the ground that they have expressed real fears for their safety and for the safety of their families within Rwanda and in neighbouring countries, as well as outside of Africa.

2. The Defence requests protective measures, primarily non-disclosure to the public and the Prosecution of the names and the identifying information of all potential Defence witnesses. According to the Defence, the identifying data shall be disclosed to the Prosecution no sooner than twenty-one days before the testimony of each witness. The Defence asserts that the granting of these measures is consistent with the Accused's rights and the interests of a fair trial, pursuant to Articles 19, 20, and 21 of the Statute and Rules 69 and 75 of the Rules.

3. The Defence draws attention to the common practice that information given to the Victims and Witness Protection and Support Unit is communicated to the Rwandan authorities. In this regard, the Defence submits that the present arrangements do not afford adequate protection to Defence witnesses. Accordingly, Counsel for Mugenzi, in Paragraph 15 (g) and (h) of the present Motion, seeks protective measures designed to protect information about witnesses within the Victims and Witness Protection and Support Unit.

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*Prosecution's Response*

4. The Prosecution objects only to the Defence submissions contained in Paragraph 15 (g) and (h) of its Motion. The Prosecution submits that the cooperation of the Rwandan authorities is necessary to the operation of the Tribunal. Furthermore, the Prosecution notes that that the Victims and Witness Protection and Support Unit discloses information only to the extent that it is absolutely necessary to ensure the presence and protection of witnesses.

Corrigendum *to the Prosecution's Response*

5. In its *Corrigendum*, the Prosecution seeks to revise its earlier submission, in which it affirmed the Defence request to restrict confidential witness information to members of the immediate Prosecution team.

6. Characterizing the Office of the Prosecutor as a single and indivisible unit, "within which information may flow without restriction", the Prosecution requests the Chamber to deny two protective measures, set forth in Paragraph 15 (g) and (h) in the Motion. The first of the two measures prohibits the Prosecution from sharing, directly or indirectly, any information which could lead to the identification of a potential Defence witness with any person other than the members of the immediate Prosecution team. The second measure requires the Prosecution to designate all members of the immediate Prosecution team, to provide notification of any change in the composition of that team, and to ensure remission of all relevant information from any member departing from the team.

**Deliberations**

7. The Chamber recognizes the substantial delay in the filing of the Prosecution's Response. However, in the interest of justice, the Chamber will consider the Prosecution's submissions.

(i) *Protection Measures*

8. By virtue of Article 21 of the Statute, the Tribunal provides in its Rules for protection of victims and witnesses. Under Rules 69 and 75 of the Rules, such protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of victims. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records, assigning a pseudonym to a witness, and permitting witness testimony in closed session. Pursuant to Rule 69 of the Rules :

> (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the defence.

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9. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for their personal safety or the safety of their families, and that there must be an objective justification for this fear. In granting protective measures, the Chamber, on a case-by-case basis, must also take into consideration the fairness of the trial and the equality of the parties[1].

10. The Chamber considers that the Defence has not provided independent justifying elements that clearly demonstrate that the fears of its potential witnesses are well-founded. However, the Chamber is mindful of its previous decisions regarding protection for Defence witnesses and considers that the evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the Tribunal's proceedings would threaten their safety and security[2].

(ii) *Disclosure of Confidential Witness Information by the Victims and Witness Support Unit*

11. In Paragraph 15 (g) and (h) of its Motion, the Defence seeks orders designed to protect sensitive information relating to witnesses' identities from being disseminated outside the Victims and Witness Protection and Support Unit. Specifically, in Paragraph 15 (g), the Defence seeks an order prohibiting the Victims and Witness Protection and Support Unit from communicating any information with anyone outside its immediate team that could lead to the identification of a potential Defence witness. In Paragraph 15 (h), the Defence seeks an order requiring the Unit to specify all persons within its immediate team and any change to the composition of the team.

12. In the view of the Chamber, the requests of the Defence in Paragraphs 15 (g) and (h) of its Motion are unworkable and unnecessary, and, therefore, denied. Disclosure of confidential information by the Victims and Witness Protection and Support Unit occurs only insofar as it is absolutely necessary to communicate with governmental and official authorities to ensure the protection of witnesses and their presence in Arusha. Confidential information is handled by the Victims and Witness Protection and Support Unit in a manner that restricts its dissemination to those who require such access for the proper exercise of their duties. In such circumstances, the party receiving the information is bound by the same obligation to protect the identity of the witness or victim as are the representatives of the Victims and Witness Protection and Support Unit.

13. With respect to the other protective measures sought by the Defence, the Chamber observes that such measures have normally been granted in previous cases and that they are substantially identical to those ordered in respect of Prosecution witnesses in the present case[3]. In the Chamber's view, the interests of trial fairness favour the adoption of identical measures, applicable to all protected witnesses, absent

[1] *Gacumbitsi,* Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8. *Bagosora et al.,* Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras. 2,4.

[2] *Bagosora et al.,* Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 3.

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exceptional circumstances. These measures are enumerated below in language customarily adopted in witness protection order[4].

(iii) Corrigendum *to the Prosecution's Response*

14. The Chamber expresses its concern regarding the late submission of a *Corrigendum*, filed by the Prosecution on 15 June 2005, several weeks after the Motion and the corresponding Response. However, in the interests of justice, the Chamber considers the Prosecution's submissions in the *Corrigendum.*

15. The Chamber does not agree with the Prosecution's assertion that its duty to investigate and prosecute, its statutory disclosure obligations, and the practicalities of organization require dissemination of confidential witness information to any staff member within the Office of the Prosecutor. As the Tribunal has observed in a decision on a similar motion in *Bagosora et al.*,

> "Neither the general duty to investigate crimes nor professional collegiality can supersede the specific obligations of a witness protection order, which is itself authorized under Article 21 of the Statute"[5].

The Chamber adopts this reasoning, and considers that the two measures in question, in conjunction with others, are designed to offer substantial protection to potential witnesses who may, in the absence of such measures, be subject to great danger or intimidation and, consequently, may be unwilling to testify before the Tribunal.

16. The Chamber is satisfied that the two measures in question, which limit disclosure of protected witness information to the immediate Prosecution team, strike an appropriate balance between affording security to witnesses and enabling the exercise of the Prosecution's duties.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the Motion for Protection Measures in the following terms :

The names, addresses, whereabouts of, or/and other identifying information concerning potential Defence witnesses should be sealed by the Registry and are not to be included in any records of the Tribunal;

The names, addresses, whereabouts of, and other identifying information concerning all potential Defence witnesses should be communicated only to the Victims and Witness Support Unit by the Registry in accordance with the established procedure and only to implement protective measures for these individuals;

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[3] *Bizimungu et al.,* Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 5 February 2005; *Bagosora et al.,* Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 2; *Seromba,* Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7.

[4] *Bizimungu et al.,* Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses (TC), 5 February 2005; *Kajelijeli,* Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Ndindabahizi,* Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al.,* Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

[5] *Bagosora et al.,* Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. 6.

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To the extent that any names, addresses, whereabouts of, and other identifying information concerning such potential Defence witnesses currently exist in records of the Tribunal, such information should be expunged from those documents;

The names, addresses, whereabouts of, and other identifying data of potential Defence witnesses found in the supporting material or in any other information on file with the Registry, or any other information that may reveal the identity of such potential Defence witnesses shall not be disclosed to the public or to the media during or after the Trial until the Chamber decides to further revise this prohibition;

The Prosecution shall not share, discuss, or reveal, 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 Defence witnesses to any person or entity other than persons working on the immediate Prosecution team;

The Prosecution shall designate to the Chamber and the Defence all persons working on the immediate Prosecution team who will have access to any information which may reveal or lead to the identification of Defence witnesses. The Prosecution shall also inform the Chamber in writing of any changes in the team composition and shall ensure that all members departing from this team remit all materials that reveal or could lead to the identification of Defence witness;

No photographing, audio or visual recording, or sketching of any Defence witnesses shall be allowed without leave of the Chamber and the Parties;

The disclosure to the Prosecution of the names, addresses, whereabouts of, and other identifying data which reveal or may identify Defence witnesses, and any other information in the supporting material on file with the Registry is prohibited until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection. The Defence is authorised to disclose any material to the Prosecution in a redacted form until such a mechanism is in place, and, in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor sooner than twenty-one (21) days before the witness is due to testify at trial, unless the Chamber decides otherwise pursuant to Rule 69 (A) of the Rules;

The Defence is required to submit the following identifying data pursuant to Paragraph (h), if such information is contained in the original witness information sheets :

(i) Full names (including family, first, nicknames, and pseudonym);

(ii) Date and place of birth;

(iii) Names of parents;

(iv) Ethnic group;

(v) Religion;

(vi) Address in April 1994;

(vii) Occupation in April 1994.

The Prosecutor shall make a written request, on reasonable notice to the Defence, to the Trial Chamber, or Judge thereof, to contact any protected potential Defence witness or any relative of such person. The Defence shall undertake all necessary arrangements to facilitate the interview with such a person at the direction of the Trial Chamber, or a Judge thereof, with the consent of such a protected person or the parents or guardians of that person, if that person is under the age of 18; (k) The Defence shall designate a pseu-

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donym for each Defence witness, which will be used to refer to each such witness in Tribunal proceedings, communications, and discussions between the Parties to the Trial, and the public, until such time as the Chamber decides otherwise.

Arusha, 27 June 2005.

[Signed] : Khalida Rachid Khan

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## *Decision on Prosecutor's Consolidated* Corrigendum *to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses 7 July 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judge : Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Filing delay, Interests of Justice, Discretionary power to review a decision – Protection of witnesses – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 73 (A); Statute, art. 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Jerome Bicamumpaka's Motion for Protection of Defence Witnesses, 27 June 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005 ICTR-99-50)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Zdravko Mucić et al., *Judgement and Sentence Appeal, 8 April 2003 (IT-96-21)*

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

SITTING as Judge Emile Francis Short, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

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SEISED of the "Prosecutor's Consolidated *Corrigendum* To Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses", filed on 15 June 2005 (the "Request for Reconsideration of Decision");

CONSIDERING "Prosper Mugiraneza's Reply to the Prosecutor's Consolidated *Corrigendum* To Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, Dated 2 February 2005", filed on 20 June 2005 (the "Reply");

HEREBY DECIDES the Request.

## Introduction

1. On 15 June 2005, the Prosecution filed a document entitled "Prosecutor's consolidated *Corrigendum* to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, Dated 2 February 2005". This document consists of two separate submissions : first, a *corrigendum* relating to the Prosecution's Response to witness protective measures requested by the Defence for Casimir Bizimungu, Justin Mugenzi, and Jérôme Bicamumpaka; second, a submission for the Chamber to reconsider its Decision of 2 February 2005, in which it granted the protective measures in question to the Accused Prosper Mugiraneza.

(i) *The Prosecution's* Corrigendum *to Its Response to Three Defence Motions*

2. In three Decisions issued on 27 June 2005[1], the Chamber addressed the Prosecution's revised arguments submitted in its *corrigendum*. In each Decision, the Chamber held that protective measures designed to restrict confidential witness information to designated members of the Prosecution team were appropriate. The Chamber also confirmed the same witness protection measures for the Accused Bizimungu, Mugenzi, and Bicamumpaka as it had granted to the Accused Mugiraneza in its Decision of 2 February 2005.

(ii) *The Prosecution's Request for Reconsideration of Protective Measures Ordered by the Chamber in Its Decision of 2 February 2005*

3. The Prosecution requests that the Charnber reconsider Provisions (e) and (f) of Paragraph 15, in its Decision of 2 February 2005, which restrict information about witnesses' identities to designated members of a particular Prosecution team.

4. Characterizing the Office of the Prosecutor (the "OTP") as a single and indivisible unit, "within which information may flow without restriction", the Prosecution

[1] *Bizimungu et al.,* Decision on Jerome Bicamumpaka's Motion for Protection of Defence Witnesses, 27 June 2005; Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005; Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses, 27 June 2005.

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submits that the measures in question are contrary to the nature of the OTP. The Prosecution further submits that these measures impede the discharge of the OTP's duties to investigate, to prosecute, and to ensure its disclosure obligations, pursuant to Rule 68 of the Rules.

*The Defence Reply*

5. The Mugiraneza Defence submits that the restriction of confidential information to the immediate Prosecution team is necessary to ensure the protection of Defence witnesses. The Defence also asserts that witnesses testifying on behalf of the Accused should be afforded the same level of protection as Prosecution witnesses, for whom the Chamber has ordered measures to restrict information to an individual Defence team.

**Deliberations**

6. While the Chamber expresses serious concern about the substantial filing delay, it will consider the Prosecution's submissions, in the interests of justice.

(iii) *Standard of Review of the 2 February 2005 Decision*

7. A Chamber has inherent jurisdiction, to be exercised at its discretion, to reverse or to revise a previous decision (a) where new material circumstances have arisen since the decision was issued, or (b) where the decision was erroneous and has caused prejudice or injustice to a Party[2]. Given that the Prosecution has not demonstrated any new material circumstances in the present case, the single issue before the Chamber is whether its Decision of 2 February 2005 was erroneous and, if so, whether it has caused prejudice or injustice to the Prosecution.

(iv) *Substance of the Motion*

8. The Prosecution challenges the witness protection measures set out in Paragraph 15 (e) and (f) of the Chamber's Decision of 2 February 2005. The first of the two measures prohibits the Prosecution from sharing, directly or indirectly, any information which could lead to the identification of a potential Defence witness with any person other than the members of the immediate Prosecution team. The second measure requires the Prosecution to designate all such members of the immediate Prosecution team, to inform the Chamber in writing of any change in the composition of that team, and to ensure remission of al1 relevant information from any member departing from that team.

9. The Prosecution provides no adequate explanation to support its argument that the measures in issue are "untenable, impracticable, unnecessary, and incapable of being implemented". Nor does the Prosecution show how it has suffered any prejudice

[2] *Mucic et al.,* Judgement and Sentence on Appeal (AC), 8 April 2003, para. 49; *Bagosora et al.,* Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. 3.

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or injustice as a consequence of these measures, which have commonly been ordered by the Tribunal for both Prosecution and Defence witnesses.

10. The Prosecution also asserts that the protection measures in question interfere with the discharge of its functions of disclosure, investigation, and prosecution. The Chamber is not persuaded by these arguments and recalls the recent Decision in *Bagasora et al.*, in which Trial Chamber 1 held that

> "[n]either the general duty to investigate crimes nor professional collegiality can supersede the specific obligations of a witness protection order, which is itself authorized under Article 21 of the Statute"[3].

The Chamber adopts this reasoning and considers that the measures in issue are designed to afford the highest level of protection to prospective witnesses who might otherwise be subject to intimidation or justifiable fear of intimidation.

11. The protection of witnesses amounts to a fundamental duty of the Tribunal, given expression by Article 21 of the Statute. The two disputed measures are designed, in conjunction with others, to restrict the dissemination of witness' identities. The purpose for so doing is to diminish the risk of intentional or inadvertent disclosure of sensitive and confidential information. The essential consideration is whether the measures in question strike an appropriate balance between affording security to witnesses and enabling the exercise of the Prosecution's functions. The Chamber considers that these measures are necessary and proportionate to the objectives that they serve.

12. The Chamber considers that its Decision of 2 February 2005 was not erroneous. Accordingly, the protection measures restricting confidential witness information to designated members of a particular Prosecution team stand.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Prosecution Request for Reconsideration of the Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses.

Arusha, 7 July 2005.

[Signed] : Emile Francis Short

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## *Decision on Jérôme Bicamumpaka's Notice of Alibi 7 July 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

[3] *Bagosora et al.,* Decision on Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005, para. *6.*

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Judge : Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Alibi, Timely disclosure, Reciprocal Disclosure, Fair trial*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 67 (A) (ii) (a), 69, 73 (A) and 75*

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Judgement (Reasons), 1 June 2001 (ICTR-95-1); Appeals Chamber,* The Prosecutor v. Georges Rutaganda, *Judgement, 26 May 2003 (ICTR-96-3)*

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

SITTING as Judge Emile Francis Short, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence (the "Chamber");

SEISED of the "Notice of Alibi from the Defence of Jérôme Bicamumpaka", filed on 18 May 2005 (the "Notice of Alibi");

CONSIDERING the "Prosecutor's Response to Notice of Alibi from the Defence of Jérôme Bicamumpaka", filed on 24 May 2005 (the "Response");

HEREBY DECIDES as follows :

## Introduction

1. On 18 May 2005, the Bicamumpaka Defence filed a Notice of Alibi, setting forth times and locations where the Accused claims to have been present between 6 April 1994 and 19 July 1994. In its Response, the Prosecution asserts that the Notice of Alibi fails to comply with Rule 67 (A) (ii) (a) of the Rules because it does not provide the names and addresses of most of the witnesses or other particulars, on which the Accused intends to rely to establish his alibi. The Prosecution also submits that, without this information, it is unable to investigate the evidence upon which the alibi relies, which is the purpose of this notice.

## Deliberations

*Specificity of the Notice of Alibi*

2. Pursuant to Rule 67 (A) (ii) (a) of the Rules, the Defence shall notify the Prosecutor of its intent to enter the defence of alibi as early as reasonably practicable and in any event prior to the commencement of the trial. The Rule also provides that :

> the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.

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3. The purpose of Rule 67 (A) (ii) (a) is to enable the Prosecution to test the evidence upon which the Accused relies in support of the defence of alibi. Indeed, as the Appeals Chamber held, the Rule

> "allows the Prosecution to organize its evidence and to prepare its case prior to the commencement of trial on the merits"[1].

4. The purpose of Rule 67 (A) (ii) (a) also was considered by the Appeals Chamber in *Kayishema and Ruzindana*, which held that :

> the purpose of entering a defence of alibi or establishing it at the stage of reciprocal disclosure of evidence is only to enable the Prosecutor to consolidate evidence of the accused's criminal responsibility with respect to the crimes charged[2].

5. In light of this established jurisprudence, the Chamber considers that the Notice of Alibi provided by the Bicamumpaka Defence does not provide all of the information called for by Rule 67 (A) (ii) (a). This Rule is to be considered in conjunction with the provisions of Rules 69 and 75. Accordingly, the Chamber urges the Defence to provide the names and addresses of all witnesses, and any other material information, upon which the Accused intends to rely to establish his alibi, as early as reasonably practicable. Failure to provide timely disclosure may impair the interests of fair trial proceedings and undermine the Prosecution's ability to prepare its case and investigate the evidence on which the alibi defence rests. The Chamber emphasizes that failure to provide timely disclosure may affect the Chamber's evaluation of the reliability of the alibi defence.

*Relationship between the Notice of Alibi and Witness Protection Measures*

6. In its Decision of 27 June 2005, the Chamber issued protection orders, in respect of Defence witnesses, that :

> The disclosure to the Prosecution of the names, addresses, whereabouts of, and other identifying data which reveal or may identify Defence witnesses, and any other information in the supporting material on file with the Registry is prohibited *until such time as the Chamber is assured that the witnesses have been afforded an adequate mechanism for protection*. The Defence is authorised to disclose any material to the Prosecution in a redacted form *until such a mechanism is in place*, and, in any event, the Defence is under no obligation to reveal the identifying data to the Prosecutor *sooner than twenty-one (21) days* before the witness is due to testify at trial, *unless the Chamber decides otherwise pursuant to Rule 69 (A) of the Rules*. [emphasis added]

7. The Chamber considers that the above protection orders extend to all of the Accused's witnesses. The Chamber is mindful of both necessary protections for witnesses and the obligation to notify the Prosecution, as early as reasonably practicable, of information relevant to the defence of alibi, in the interests of fair proceedings. Once the Chamber receives confirming information from the Registry's Witnesses and

[1] *Rutaganda*, Appeal Judgement, 26 May 2003, para. 241.
[2] *Kayishema and Ruzindana* Appeal Judgement, 1 June 2001, para. 111.

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Victims Support Section, that protective measures are in place, then the information required pursuant to Rule 67 (A) (iii) (a) should be disclosed.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

URGES the Defence to disclose to the Prosecution as soon as reasonably practicable the names of addresses of witnesses and any other evidence upon which the Accused intends to rely to establish the defence of alibi, in accordance with Rule 67 (A) (ii) (a) of the Rules.

Arusha, 7 July 2005.

[Signed] : Emile Francis Short

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## *Decision on Prosper Mugiraneza's Motion for Certification 7 July 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judge : Emile Francis Short

*Prosper Mugiraneza – Certification of appeal, Exceptional circumstances, Discretionary power of the Chamber to grant certification to appeal, Non-compliance with the Rules, Material Prejudice to the defence, Sanctions of the Defence counsel for disclosure violations – Abuse of process, Frivolous motion – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 5, 5 (A), 5 (B), 66 (A) (ii), 73 (A), 73 (B) and 73 (F)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *"Decision on Propose Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66", 4 February 2005 (ICTR-99-50)*

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

SITTING as Judge Emile Francis Short, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

SEISED of "Prosper Mugiraneza's Motion for Certification for Interlocutory Appeal of the Trial Chamber's Decision of 4 February 2005 on Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66", filed on 10 February 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to Prosper Mugiraneza's Motion for Certification for Interlocutory Appeal of the Trial Chamber's Decision of 4 February 2005 on Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66", filed on 17 February 2005 (the "Response");

NOTING the Chamber's "Decision on Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66", filed on 4 February 2005 (the "Impugned Decision");

HEREBY DECIDES the Motion.

## Submissions

*Defence Motion*

1. The Mugiraneza Defence seeks certification to appeal the Impugned Decision of 4 February 2005, in which the Chamber denied relief for future violations of the Prosecution's disclosure obligations, and found the underlying Defence Motion to be frivolous. The Defence submits that timely disclosure is necessary for a fair trial and that the Prosecution's repeated failures to meet its disclosure obligations interfere with the expeditious conduct of proceedings. The Defence further submits that its Motion for relief was not frivolous insofar as its purpose was to call the Chamber's attention to the Prosecution's repeated breaches of disclosure obligations and to request the Chamber to take equitable measures to prevent further violations.

*Prosecution's Response*

2. According to the Prosecution, the Defence has failed to demonstrate any material prejudice that it has suffered, and the issue is now moot, in light of the delayed filing of the Defence Motion. The Prosecution further asserts that, pursuant to Rule 73 (B) of the Rules, certification to appeal is to be granted only in exceptional circumstances, which do not exist in the present case.

## Deliberations

(i) *Whether Certification to Appeal Should be Granted*

3. Rule 73 (B) of the Rules, which governs certification of appeal of Motions brought under Rule 73 (A) of the Rules, provides as follows :

> Decisions rendered on such motions are without interlocutory appeal Save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious

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conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

4. The Chamber notes that, pursuant to Rule 73 (B) of the Rules, Decisions on Motions are without interlocutory appeal except at the Chamber's discretion for the limited circumstances stipulated in this Rule.

5. The Chamber recalls with approval the reasoning of Trial Chamber II in *Nyiramasuhuko et al.* :

> As a general observation, it must be noted that the general rule in Rule 73 (B) remains this : 'Decisions rendered on such motions are without interlocutory appeal'. This general rule is consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases, or allowed only in very limited circumstances. Rule 73 (B) of the Rules provides, however, that in exceptional circumstances, the Trial Chamber may-not must-allow interlocutory appeals of such decisions[1].

6. The Chamber has the discretion to grant certification to appeal if both conditions of Rule 73 (B) are satisfied. Under the first condition of Rule 73 (B), the applicant must show that

> "the decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial".

This condition is not determined on the merits of the appeal. Under the second condition, the applicant has the burden of convincing the Chamber that "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered[2].

7. In this respect, the Chamber observes that the Defence, in its present Motion, has revisited the thrust of its previous arguments which led to the Impugned Decision, and has again failed to demonstrate the two conditions required for the Chamber to grant certification to appeal, pursuant to Rule 73 (B) of the Rules.

8. With respect to the Defence submissions that the Prosecution has repeatedly failed to comply with its disclosure obligations, under Rule 66 (A) (ii) of the Rules, the Chamber refers to Rule 5 of the Rules, which stipulates the conditions on which relief may be granted to a Party for non-compliance with the Rules :

*Rule 5 : Non-Compliance with Rules*

> (A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber

[1] *Nyiramasuhuko et al.,* "Decision on Ntahobali's and Nyirarnasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible'", 18 March 2004, para. 14.

[2] *Nyiramasuhuko et al.,* "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process'", 19 March 2004, paras. 12-16; *Nyiramasuhuko et al.,* Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14-17.

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shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that Party.

(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.

(C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.

9. The Chamber observes that, pursuant to Rule 5 (A) of the Rules, a showing of "material prejudice" is a precondition to the grant of relief to an objecting Party. In the instant case, the Defence has not satisfied this precondition. In its Decision of 4 February 2005, the Chamber specifically held that "the Defence in its Motion has not demonstrated any prejudice it has suffered"[3]. Similarly, the Defence, in the present Motion, provides no indication of prejudice suffered as a consequence of the Prosecution's alleged violation of disclosure violations.

10. The Chamber notes the substantial delay by the Defence in filing its Motion. According to Rule 5 (B) of the Rules, relief is to be granted at the Chamber's discretion, where an objection on the ground of non-compliance with the Rules "is raised otherwise than at the earliest convenience". On the basis of the late submission by the Defence of its Motion and its failure to show any material prejudice suffered as a result of the Prosecution's alleged non-compliance with its disclosure obligations, as required under Rule 5 of the Rules, the Chamber was entitled to exercise its discretion to deny the request for certification for interlocutory appeal in its 4 February 2005 Decision.

11. The Chamber also notes that the Mugiraneza Defence seeks prospective relief. Pursuant to Rule 5 of the Rules, relief is to be granted in response to prejudice that has occurred or would occur but for the Chamber's intervention. It is not the role of the Chamber to stipulate in advance the sanctions for a breach of the Rules that may or may not occur. Nor would it be possible to so stipulate, since the appropriate relief is to be proportionate to the breach and can be assessed only on a case-by-case basis.

12. The Chamber may grant such certification (1) if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, (2) and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. In the Chamber's view, neither of these conditions has been satisfied. Chamber does not consider that there is serious doubt, raised by the Defence Motion, about any question of law, resolution of which by the Appeals Chamber would materially advance the proceedings, as required by Rule 73 (B). In the Chamber's view, the impugned Decision involves an exercise of discretion based on an assessment of the factual significance of the evidence, within the framework of clear legal guidelines.

[3] *Bizimungu et al.*, "Decision on Propose Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66", 4 February 2005, para. 10.

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Resolution of the issue of sanctions for disclosure violations, under Rule 66 (A) (ii), by the Appeals Chamber would not materially advance the present stage of the proceedings.

(ii) *Whether the Underlying Motion Constituted an Abuse of Process*

13. The Chamber next addresses the Defence request for certification to appeal the finding, in the 4 February 2005 Decision, that its underlying Motion was frivolous and amounted to an abuse of process. In this respect, the Chamber refers to Rule 73 (F) of the Rules, which reads as follows :

> In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.

14. Rule 73 (F) of the Rules affords wide discretion to a Chamber in assessing whether conduct amounts to an abuse of process. This Chamber was and remains of the view that the Defence Motion was so unmeritorious as to be frivolous and amount to an abuse of process. Indeed the underlying Motion failed to show any material prejudice suffered by the Defence as a consequence of the Prosecution's alleged disclosure violations, as required under Rule 5 of the Rules. Nor did the Motion satisfy the requisite conditions for certification to appeal, under Rule 73 (B) of the Rules. Moreover, certification is not to be granted merely for the purpose of an appellate determination of what constitutes a frivolous motion.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Arusha, 7 July 2005.

[Signed] : Emile Francis Short

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## *Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee 8 July 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judge : Lee Gacuiga Muthoga

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Expert Testimony, Qualification as an expert witness, Scope of the expertise, Dis-*

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*cretionary power to admit evidence, Distinction between the admissibility of evidence and the probative value – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A) and 89 (C)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Decision on Defence Motion for the Transfer, Appearance, and Protection of Thirteen Detained Witnesses, 9 March 1998 (ICTR-96-4); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004 (ICTR-98-41); Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42); Appeals Chamber,* The Prosecutor v. Laurent Semanza, *Judgement, 20 May 2005 (ICTR-97-20)*

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

SITTING in the person of Judge Lee Gacuiga Muthoga, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence (the "Chamber");

SEISED of "Justin Mugenzi's Motion for the Exclusion of Portions of Prosecution Exhibits P97 and P98", filed on 20 May 2005; "*Requête de Casimir Bizimungu en Exclusion Partielle du Rapport, du Livre et de la Déposition du Témoin Binaifer Nowrojee*", filed on 23 May 2005; "Bicamumpaka's Submissions for Limiting the Admittance of Binaifer Nowrojee's Testimony, her Expert Report (Prosecution Exhibit 98), and her Book (Prosecution Exhibit 97)", filed on 26 May 2005; and "Prosper Mugiraneza's Motion on the Admissibility of Expert Testimony of Binaifer Nawrojee", filed on 3 June 2005 (the "Motions");

CONSIDERING "*Arguments Additionnels à la Requête de Casimir Bizimungu en Exclusion Partielle du Rapport, du Livre et de la Déposition du Témoin Binaifer Nowrojee*", filed on 2 June 2005 ("Additional Arguments"); and the "Prosecutor's Response to Defence Objections to the Qualifications and Testimony of Expert Binaifer Nowrojee", filed on 8 June 2005 (the "Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

HEREBY DECIDES the Motions, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

## Introduction

1. Each of the four Accused has submitted a separate motion regarding the admissibility of Dr. Binaifer Nowrojee's expert testimony. Since the four motions are similar in substance, it is expedient to address them as one.

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2. Before the commencement of Dr. Nowrojee's testimony, on 16 May 2005, the Chamber determined that Dr. Nowrojee's evidence would be accepted, but expressly reserved the right of the Defence to make submissions, after the completion of her testimony, as to whether Dr. Nowrojee qualified as an expert and whether any parts of her book, *Shattered Lives,* (Exhibit P 97) or report (Exhibit P 98) should be excluded. The issues now before the Chamber are : (i) whether Dr. Nowrojee qualifies as an expert; (ii) whether her evidence comes within the scope of her expertise; (iii) whether she expresses opinions on ultimate issues in the case; and (iv) whether her evidence has probative value.

3. It should be noted that in an oral ruling of 16 May 2005, the Chamber held that the material contained in Paragraphs 33-44 of Dr. Nowrojee's report was inadmissible, on the ground that the opinions expressed therein were formed on the basis of statements obtained by the Office of the Prosecutor, which were not entered into evidence.

## THE DEFENCE SUBMISSIONS

4. The Defence for Justin Mugenzi accepts that Dr. Nowrojee is an expert in the investigation of human rights abuses. It is submitted that Dr. Nowrojee expressed opinions on certain matters in her book and report that lie outside her field of expertise and in respect of which she lacks first-hand knowledge. It is further submitted that evidence pertaining to the culpability of the authorities is a matter upon which the Chamber, as the fact-finder, is alone competent to make a determination. The Defence requests that specified portions of Dr. Nowrojee's report and the whole of her book, save for the accounts of rape victims, be excluded.

5. The Defence for Casimir Bizimungu has put in issue Dr. Nowrojee's qualification as an expert. Characterizing Dr. Nowrojee as a human rights investigator, the Defence relies on a decision to the effect that a particular investigator was not an expert since his expertise did not extend to the subject matter to which he would testify[1]. It has further been submitted that Dr. Nowrojee testified on matters that extend beyond her area of expertise, and that parts of the report which do not relate to the charges in the case and which were not prepared by Dr. Nowrojee should be excluded.

6. The Defence for Jérôme Bicamumpaka accepts Dr. Nowrojee's expertise as a reporter of human rights violations. The Defence argues, however, that certain parts of Dr. Nowrojee's testimony extend beyond her expertise or provide opinions on ultimate issues in the case. The Defence also asserts that the evidence presented by Dr. Nowrojee is irrelevant since the Indictment contains no allegations of sexual crimes.

7. The Defence for Prosper Mugiraneza submits that Dr. Nowrojee's evidence should be excluded in its entirety since the Prosecution has failed to meet its burden in showing the evidence to be relevant and reliable.

[1] *Nyiramasuhuko et al.,* Oral Decision, 13 April 2005.

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THE PROSECUTION SUBMISSIONS

8. The Prosecution submits that Dr. Nowrojee's qualifications and experience are clearly demonstrative of her expertise, upon which her conclusions are based. The Prosecution submits that her expert testimony is of probative value and is, accordingly, admissible. Furthermore, the Prosecution emphasizes the "liberal approach" that the Tribunal has adopted to the admission of expert testimony which "may assist the Chamber in understanding the evidence"[2]. The Prosecution challenges the Defence Motions to render inadmissible certain portions of Dr. Nowrojee's evidence, and requests that the Chamber consider the totality of Dr. Nowrojee's evidence and attach varying weight to the evidence, as the Chamber deems appropriate.

## Deliberations

(i) *Qualification as an Expert*

9. The first issue, raised by the Bizimungu Defence, concerns Dr. Nowrojee's qualifications as an expert. On the basis of her experience as an investigator of human rights violations and her publications on issues of sexual violence, the Chamber considers that Dr. Nowrojee is an expert in the field of sexual violence in Rwanda and that her testimony will assist the Chamber in better understanding and evaluating the evidence presented by factual witnesses.

(ii) *Scope of Dr. Nowrojee's Expertise*

10. The second, but related, issue is whether the evidence presented by Dr. Nowrojee's comes within the scope of her expertise. In this respect, the Chamber recalls its determination that Dr. Nowrojee possesses expertise in the investigation of sexual violence in Rwanda. Dr. Nowrojee does not purport to be an expert in Rwandan culture, language, history, or political affairs. Accordingly, the Chamber considers that the scope of Dr. Nowrojee's expertise is limited to matters that relate to her investigations of sexual crimes in Rwanda, based on her interviews and investigations in the field.

11. The Chamber considers that the testimony of an expert witness is admissible only to the extent that the testimony comes within the scope of the witness' expertise. The Chamber delimits the scope of Dr. Nowrojee's expertise to the investigation of sexual violence in Rwanda. The Chamber considers that such parts of Dr. Nowrojee's testimony relating to genocide propaganda, the political goals of perpetrators of the crimes, the culpability of authorities, and the knowledge that officials are alleged to have possessed are matters that lie beyond the scope of her expertise and are, accordingly, inadmissible.

[2] *Bagosora et al.*, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8.

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(iii) *Evidence on Ultimate Issues*

12. The third issue arises from the Defence submission that Dr. Nowrojee's evidence is determinative of the culpability of the Interim Government. The Chamber observes that Dr. Nowrojee's opinions which relate to the activities of Rwandan political authorities fall outside the scope of matters on which she can properly provide an expert opinion. To the extent that Dr. Nowrojee expresses opinions on ultimate issues of fact, the Chamber considers such opinions to be inadmissible. Dr. Nowrojee's expert evidence serves the limited purpose of illuminating the broader context of the events alleged in the Indictment. Only the Chamber, as the finder of fact, is competent to make a judicial determination on the ultimate issues in the case.

(iv) *Probative Value of the Testimony*

13. The fourth issue raised by the Defence concerns the general probative value of Dr. Nowrojee's testimony. Rule 89 (C) of the Rules and Procedure and Evidence, which governs the admissibility of evidence, provides that : "A Chamber may admit any relevant evidence which it deems to have probative value". In ascertaining whether Dr. Nowrojee's evidence is of probative value, the Tribunal has distinguished between the evidence of experts and non-experts :

> The Tribunal is of the view that that there is a fundamental difference between, on the one hand, a witness called to testify about the crimes with which the accused is directly charged and, on the other hand, an expert witness, whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field[3].

14. The Appeals Chamber has held that the :

> purpose of expert testimony is to supply specialized knowledge that might assist the trier of fact in understanding the evidence before it[4].

15. The Tribunal held in *Bagosora et al.* that :

> In light of the complexity and scale of events in Rwanda in 1994, it is unsurprising that Chambers of this Tribunal have adopted a liberal approach to the admission of expert testimony. … The standard for admission of expert testimony is whether the specialized knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion, may assist the Chamber in understanding the evidence[5].

16. The evolving standard of admissibility that these authorities disclose is whether the expert testimony assists the Chamber in evaluating the factual evidence presented during the proceedings. Indeed the Chamber considers Dr. Nowrojee's testimony to have probative value in assisting the court by illuminating the general context of events with which the present case is concerned.

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[3] *Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998. para. 2.

[4] *Semanza*, Judgement (AC), 20 May 2005, para. 303.

[5] *Bagosora et al.*, Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004, para. 8.

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(v) *Distinction between Admissibility and Weight*

17. The Chamber has determined that certain parts of Dr. Nowrojee's evidence are to be excluded. When considering evidentiary matters, the Chamber wishes to emphasize the distinction between questions of admissibility and weight. The Appeals Chamber has held that

> "a distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative weight to be attached to it"[6].

The Chamber considers that Dr. Nowrojee's testimonial evidence and her book, *Shattered Lives*, when appraised in their totality, and to the extent that such evidence comes within the scope of her expertise and expresses no opinion on ultimate issues, are admissible. It is for the Chamber to evaluate such evidence and to determine the weight to be attached to it.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS IN PART the Defence Motions, thereby ruling inadmissible those portions of Dr. Nowrojee's evidence that fall outside the scope of her expertise or express opinions on ultimate issues before the Chamber, and

DENIES THE REMAINDER of the Defence Motions.

Arusha, 8 July 2005.

[Signed] : Lee Gacuiga Muthoga

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## *Decision on Prosper Mugiraneza's Motion for an Extension of Time to File a Reply to the Prosecution's Response to his Motion for Judgement of Acquittal Pursuant to Rule 98* **Bis** *19 August 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judge : Emile Francis Short

*Prosper Mugiraneza – Extension of time, Size of the Prosecutor's submission – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A) and 98* bis

[6] *Nyiramasuhuko et al.*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 6.

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

SITTING as Judge Emile Francis Short, designated by Trial Chamber II, in accordance with Rule 73 (A) of the Rules of Procedure and Evidence (the "Chamber");

SEISED of "Prosper Mugiraneza's Motion for Extension of Time to file Reply to Prosecutor's Response to His Motion for Judgement of Acquitta1 Pursuant to Rule 98 bis", filed on 16 August 2005 (the "Motion");

CONSIDERING the "Prosecutor's Consolidated Response to Dr. Bizimungu's, Mr. Bicamumpaka's and Mr. Mugiraneza's Motions for Extension of Time Within Which to File Their Replies and Request for Urgent Translation of the Prosecutor's Response Pursuant to Rule 98 *Bis*", filed on 17 August (the "Response");

HEREBY DECIDES as follows :

**Introduction**

1. On 16 August 2005, the Mugirananeza Defence filed a Motion requesting an extension of time until 31 August 2005 in which to file a Reply to the Prosecution's Response to the Accused's Motion for acquittal pursuant to Rule 98 *bis* of the Rules. The Defence has requested this extension of time, in light of the significant length of the Prosecutor's Response, which consists of a 97-page text and an annex of 202 pages, and the voluminous evidentiary references cited in the Response. The Prosecution does not object to the Defence Motion's for an extension of time to file its Reply.

**Deliberations**

2. On the basis of the Defence submissions, and considering that the Prosecution does not object to the Defence Motion, the Trial Chamber

GRANTS the Defence Motion for an extension of time until 31 August 2005 to file its Reply to the Prosecution's Reponse.

Arusha, 19 August 2005.

[Signed] : Emile Francis Short

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***Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89 (C)) 2 September 2005 (ICTR-99-50-T)***

(Original : English)

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Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Expert witness,* Voir dire *Hearing, Admissibility of evidence, Discretionary power of the Chamber to admit evidence, Relevant Expert testimony, Probative Value, Defects of the Testimony, Distinction between the admissibility of evidence and the probative value – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A) and 89 (C)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Decision on Defence Motion for the Transfer, Appearance, and Protection of Thirteen Detained Witnesses, 9 March 1998 (ICTR-96-4); Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

BEING SEISED of "Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe", filed on 9 April 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to Casimir Bizimungu's Urgent Motion Seeking Exclusion of the Report and the Testimony of Mr. Déo Mbonyinkebe", filed on 18 April 2005 (the "Response");

CONSIDERING "Casimir Bizimungu's Reply to the Prosecutor's Response to Urgent Motion Seeking Exclusion of Déo Sebahire Mbonyinkebe", filed on 21 April 2005 (the "Reply");

CONSIDERING the Statute of the Tribunal ("the Statute") and the Rules of Procedure and Evidence ("the Rules"), in particular Rule 89 (C) of the Rules;

HEREBY DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, upon the basis of the oral and written submissions of the Parties.

## Introduction

1. In an oral ruling delivered by the Chamber on 2 May 2005, following a *voir dire* hearing in relation to the qualification of Professor Mbonyinkebe as an expert witness, the Chamber determined that, by virtue of Professor Mbonyinkeke's education and experience, the witness was qualified as

> "an expert witness on issues of social and cultural anthropology in relation to the events of 1994 in Rwanda"[1].

[1] T. 2 May 2005, p. 54.

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Following the Chamber's Decision, Professor Mbonyinkebe then testified before the Tribunal, in his capacity as an expert witness, between 2 May 2005 and 12 May 2005.

2. During the course of Professor Mbonyinkebe's testimony, the Chamber admitted into evidence his report entitled "On the Genocide of the Rwandan Tutsi : *Essay Answers to Some Questions*", dated 7 October 2004[2].

3. After hearing oral submissions by the Parties in relation to that part of the Defence Motion which challenges the admissibility of the evidence on the basis that they are irrelevant to the Prosecution's case, the Chamber dismissed the Defence Motion[3], indicating that written reasons would follow. The Chamber now sets out those reasons.

## Submissions

*Defence Motion*

4. As a preliminary issue, the Chamber notes that, since it has already ruled on the expertise of Professor Mbonyinkebe as stated in paragraph 1, this issue is settled, and any submissions in this regard are moot.

5. The Defence for Casimir Bizimungu moves the Chamber to exclude the expert report and testimony of Prosecution Witness Professor Déo Sebahire Mbonyinkebe on the ground that the witness' evidence is inadmissible pursuant to Rule 89 (C) of the Rules. The Defence submits that the witness' evidence is "irrelevant, unreliable and lacks probative value"[4] and furthermore is entirely lacking in scientific value.

6. In relation to the "relevancy" requirement of Rule 89 (C), the Defence submits that : (i) the evidence does not relate to the charges against the Accused, specifically, the charges in Part 7 of the Indictment; and (ii) the evidence, including the witness' methodology in compiling his report, contains words or statements of legal characterization (such as "genocide"), which an anthropologist is not qualified to give, rendering his opinion irrelevant. Furthermore, such statements relating to the role or *mens rea* of Ministers are inadmissible, as determinative of ultimate issues, and cause prejudice to the Accused, which outweighs any probative value the evidence may have.

7. In relation to the "probative value" requirement of Rule 89 (C), the Defence submits that the Prosecution has failed to show that the witness' report meets the requisite standard. Furthermore, the Defence submits that the report is based upon scientifically unreliable methodology and an inadequate pool of data.

[2] Exhibit number P. 95 (F); T. 2 May 2005, p. 66.

[3] Transcript, 2 May 2005, p. 16.

[4] Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe, filed on 9 April 2005, paragraph 4.

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*Prosecution Response*

8. The Prosecution submits that the report is both relevant and probative, in accordance with the standards articulated in Rule 89 (C). It submits that the report is relevant because it covers issues such as genocide, the multiparty system, the use of youths by the political parties[5], the power struggle in the multiparty system, the Arusha Peace Accords and the general Rwandan culture as a factor influencing the events of 1994. The Prosecution further submits that the report is probative, pointing to the methods outlined by the author in the written report itself, in which he also recognizes the limitations and constraints on his methodology.

*Defence Reply*

9. In its reply, the Defence reiterates its submission that Professor Mbonyinkebe's evidence be excluded on the ground that it is not admissible under Rule 89 (C).

## Deliberations

*The Standard of Admissibility*

10. Rule 89 (C) of the Rules gives the Chamber broad discretion to admit evidence which it deems to be both relevant and probative. The Chamber now considers each of these thresholds.

*Relevancy*

11. Whether expert witness testimony is relevant may be determined by considering whether the testimony enlightens the Chamber on "specific issues of a technical nature, requiring specialised knowledge in a special field"[6] and whether

> "the specialised knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion, may assist the Chamber in understanding the evidence"[7].

12. The Chamber finds that the report and the testimony of Professor Mbonyinkebe are relevant, since his evidence relates to material issues in this case and may assist the Chamber in understanding the evidence. The Chamber is satisfied that there is a nexus between parts of Professor Mbonyinkebe's report and certain paragraphs in the Indictment, notably the links drawn between Part 5 of the Indictment and the Professor's report. Specifically, the report and the testimony bear upon issues such as anti-Tutsi sentiment in Rwanda, the power struggle within the Rwandan multiparty system,

[5] Exhibit P. 95 (E), Report of Professor Mbonyinkebe entitled "On the Genocide of the Rwandan Tutsi: Essay Answers to Some Questions", dated 7 October 2004, pp. 15, 28 and 29.

[6] *Prosecutor v. Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (TC), 9 March 1998, para. 2.

[7] *Prosecutor v. Bagosora et al.*, Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens (TC), 28 September 2004, para. 8.

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the effect of the Arusha Peace Accords on the "social atmosphere in Rwanda", and various other matters of Rwandan cultural significance. All of these matters are relevant to the Prosecution case. This testimony may be of assistance to the Chamber in better understanding the factual evidence of the case.

13. The Defence expresses concern that Professor Mbonyinkebe's evidence includes legal characterisation and expressions of opinion on ultimate issues of fact[8]. In this respect, the Chamber recalls its previous ruling made in relation to the testimony of Expert Witness Dr. Binaifer Nowrojee[9]. Thus, the Chamber deems inadmissible the opinions of Professor Mbonyinkebe on ultimate issues of fact. Only the Chamber is competent to make such determinations.

*Probative Value*

14. The issue is whether the alleged scientific defects in Professor Mbonyinkebe's report render it "so lacking in terms of the indicia of reliability, such that it is not probative"[10] and therefore inadmissible. This is a low threshold to satisfy, and the Appeals Chamber has determined that "only the beginning of proof that evidence is reliable" is required[11].

15. The Chamber finds that the Prosecution has met this preliminary threshold, demonstrating that Professor Mbonyinkebe's report and testimony do possess "sufficient indicia of reliability" to be admissible. By virtue of his expertise in social and cultural anthropology concerning the events in Rwanda in 1994, Professor Mbonyinkebe is qualified to comment on the matters raised in his report. The report's limitations, some of which are acknowledged by the witness in both his testimony and his report[12], will be factored into the Chamber's consideration and weighing of the Professor's evidence.

16. Subject to the Chamber's finding in paragraph 13 above, the Chamber overrules the Defence objections on admissibility. The Chamber reminds the Parties of the holding of the Appeals Chamber in *Nyiramasuhuko*, where it stated that :

> [A] distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative weight to be attached to it. The former requires some relevance and probative value, whereas the latter is an assessment to be made by the Trial Chamber at the end of the case[13].

17. Consequently, although the Chamber has admitted the report, it is yet to determine what weight to attach to it.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following Terms :

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[8] Motion, paras. 80-82.

[9] *Prosecutor v. Bizimungu et al.,* Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee (TC), 8 July 2005, para. 12.

[10] *Nyiramasuhuko v. The Prosecutor,* Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.

[11] *Ibid.*

[12] Exhibit P. 95, Report of Professor Mbonyinkebe entitled "On the Genocide of the Rwandan Tutsi: *Essay Answers to Some Questions",* dated 7 October 2004, pp. 2-3.

[13] *Nyiramasuhuko et al.,* para. 6.

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The Chamber rules inadmissible those portions of Professor Mbonyinkebe's evidence which express opinions on ultimate issues of fact in this trial.

DENIES the Motion in all other respects.

Arusha, 2 September 2005.

[Signed] : Khalida Rachid Khan, Lee Gacuiga Muthoga, Emile Francis Short

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## *Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges 2 September 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Expert witness testimony, Impartiality and independence of the expert witnessRole of an expert witness, Hearsay Evidence, Admissibility of Evidence, Discretionary power of the Chamber to admit evidence, Non disclosure of Expert testimony sources, Distinction between the admissibility of evidence and the probative value, Distinction between the testimony of an expert witness and a factual witness – Privilege of the Expert witness, Lawyer-client Privilege, War correspondents Privilege – Right to a fair trial, Right of the Parties to be equal before the Tribunal, Right of an accused to examine or have examined witnesses against him or her, Limitation of the right to cross-examination by the non-disclosure of sources – Interpretation of jurisprudence, Distinguishable case – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 89 (C); Statute, art. 20, 20 (1), 20 (4) and 20 (4) (e)*

*International and National Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean-Paul Akayesu*, Decision on Defence Motion for the Transfer, Appearance, and Protection of Thirteen Detained Witnesses, 9 March 1998 (ICTR-96-4); Trial Chamber,* The Prosecutor v. Georges Anderson Rutaganda, *Judgement and Sentence, 6 December 1999 (ICTR-96-3); Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4); Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on*

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*Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Blagoje Simić, *Decision of the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 (IT-95-9); Appeals Chamber,* The Prosecutor v. Radoslav Brđanin, *Decision on Interlocutory Appeal, 11 December 2002 (IT-99-36); Trial Chamber,* The Prosecutor v. Radoslav Brđanin, *Decision on Prosecutions Submission on Statement of Expert Witness Ewan Brown, 3 June 2003 (IT-99-36)*

*E.C.H.R. :* Kostovski v. Netherlands*, 20 November 1989, n° 11454/85*

*United States : Supreme Court,* New York Times v. Sullivan*, 9 March 1964, 376 US 254 (1964); Supreme Court,* Branzburg v. Haynes, *29 June 1972, 408 US 665 (1972); Supreme Court,* Trammel v. United States, *27 February 1980, 445 40, 50 (1980); Supreme Court,* University of Pennsylania v. EEOC, *9 January 1990, 493 US 182 (1990)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

BEING SEISED of Justin Mugenzi's Oral Motion for the Exclusion of Parts of Dr. Des Forges' Testimony, submitted on 31 May 2005 ("Mugenzi's Oral Motion");

BEING SEISED ALSO of Prosper Mugiraneza's Oral Motion to Compel an Expert Witness to Divulge Her Sources, submitted on 31 May 2005 ("Mugiraneza's Oral Motion");

CONSIDERING the Prosecutor's Oral Response to both the above Motions, and the Defence Replies to the same, as orally submitted on 1 June 2005 ("Prosecutor's Oral Response");

CONSIDERING FURTHER the

(i) "Prosecutor's Written Submissions in Response to Mugiraneza's Motion to Exclude Certain Portions of Dr. Des Forges' Testimony Arising from Prosecutor's Exhibit P (106) E and F", filed on 1 June 2005;

(ii) "Justin Mugenzi's Response to the Prosecutor's Written Submissions in Response to Mugiraneza's Motion to Exclude Certain Portions of Dr. Des Forges' Testimony Arising from Prosecutor's Exhibit P (106) E and F", filed on 1 June 2005;

(iii) "Prosper Mugiraneza's Memorandum of Law on an Expert Witness' Right to Refuse to Disclose Sources", filed on 2 June 2005;

(iv) "*Arguments de la défense de Casimir Bizimungu en appui à la requête de Justin Mugenzi sur les sources anonymes de Alison Des Forges*", filed on 2 June 2005;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter based on the oral and written submissions of the Parties.

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## INTRODUCTION

1. In an oral ruling given on 14 June 2005, the Chamber denied the Defence motions for the exclusion of portions of Dr. Des Forges' evidence in relation to which sources were not disclosed[1]. The Chamber expressed its view that non-disclosure of sources was a matter that went to the weight, rather than to the admissibility, of Dr. Des Forges' evidence. The Chamber stated that written reasons were to follow. This decision sets out those reasons.

## SUBMISSIONS OF THE PARTIES

### Background and Oral Submissions

2. On 31 May 2005, expert witness Dr. Alison Des Forges testified before the Chamber about information contained in a document entitled "Organization of the Civilian Self-Defence", submitted into evidence by the Prosecution as Exhibit P 106. During cross-examination, Dr. Des Forges referred to two independent and unidentified sources, who on separate occasions, had provided similar accounts of a meeting with President Habyarimana, an event which was corroborated by information in this document. She declined to divulge the names of these two confidential informants without their consent. Further, the issue of opinion evidence based, whether in part or entirely, on factual assertions of unidentified sources, arose on a number of occasions in the course of the cross-examination of Dr. Des Forges by Mr. Gumpert for the Defence.

3. In an oral motion on 31 May 2005, the Defence for Justin Mugenzi submits that the Chamber should not accept evidence in relation to which the witness was not prepared to divulge her source. Relying on the Accused's right to a fair trial under Article 20 of the Statute, the Defence submits that the Chamber should disregard assertions of fact which were incapable of being investigated for its *bona fides* and accuracy.

4. The Defence for Prosper Mugiraneza submits that the Rules recognize only the attorney-client privilege. The Defence submits that the Chamber is able to obtain classified information from states, and that to recognize a privilege of the nature it submits is claimed by Dr. Des Forges would be unwise for policy reasons.

5. Responding on 1 June 2005, the Prosecution submits that the issue does not engage the right to a fair trial. The question relates not to admissibility, but rather the weight to be attached to the evidence. The Prosecution argues that qualified privilege is available to war correspondents, and that Dr. Des Forges may be compared to an investigative journalist.

6. The Defence for Prosper Mugiraneza submits that the Chamber is entitled to all of a witness' evidence in the absence of a recognized privilege, and reiterates its submission that the Chamber should not recognize a new privilege.

[1] T. 31 May 2005, p. 58.

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7. Emphasizing that privilege forms no part of its submissions, the Defence for Justin Mugenzi argues that the relevant issue concerns the Defence's right to cross-examine witnesses, which is an essential component of the right to a fair trial under Article 20. The Defence argues that where Dr. Des Forges chooses to withhold the identity of a source, the Defence is deprived of the right to address the credibility of the evidence during cross-examination. The Defence submits that such evidence should be inadmissible, since no weight could legitimately attach to it.

8. On 1 June 2005, following oral arguments, the Prosecutor sought, and was granted, leave to provide the Chamber with written submissions on the issues raised.

## Written Submissions

### *The Prosecution*

9. In support of its argument that expert witness Dr. Alison Des Forges is not bound to disclose further particulars of her confidential sources, upon which she has based her expert opinion, the Prosecution submits that :

a) The testimony of an independent expert witness, governed by Rule 94 *bis* of the Rules, is fundamentally different from the testimony of a factual witness. Unlike factual witnesses, who are called upon to testify about specific events which they have witnessed or heard about, expert witnesses apply specialized knowledge to the totality of information in their possession, and base their opinions upon a multitude of sources. It is the Trial Chamber's role to determine the weight afforded to expert opinion, in consideration of the methodology and the nature of the sources provided by the expert witness.

b) Pursuant to Rule 89 (C) of the Rules, the Trial Chamber may assess all relevant evidence which it deems to have probative value. Citing jurisprudence from the *ad hoc* Tribunals, the Prosecution argues that Dr. Des Forges' testimony is analogous to a form of hearsay evidence and that the Chamber has the discretion to admit such evidence, subject to the right to cross-examine the witness on the hearsay evidence[2]. Firsthand testimony is clearly superior to hearsay information and may be granted greater weight by the Chamber in its assessment of the evidence.

c) Should the names of persons who spoke in confidence to Dr. Des Forges, a human rights activist, be divulged, future participants in or witnesses to genocide may be deterred from communicating information to human rights investigators who represent nongovernmental organizations. Citing ICTY jurisprudence as authority, the Prosecution argues that Dr. Des Forges, in her capacity as a human rights advocate, gathers information in a similar manner to a conflict journalist or a representative of the International Committee of the Red Cross ("ICRC"), who has a qualified privilege not to reveal confidential sources or materials[3].

[2] *Akayesu,* Judgement (AC), para. 287, citing *Kordic,* Decision (ICTY), para. 22; *Rutaganda*, Judgement and Sentence (TC).

[3] *Brdjanin*, Decision on Interlocutory Appeal (AC), para. 38; *Simic*, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness.

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d) To reveal the name of a confidential source may expose both the individual involved and Dr. Des Forges to significant personal danger.

*The Defence for Justin Mugenzi*

10. In support of its motion that the Chamber rule inadmissible assertions of fact made by Dr. Des Forges, for which the information has been provided by sources whose identities she knows but refuses to name, the Defence for Justin Mugenzi submits :

a) The relevant issue is not the question of privilege, but the right to a fair trial under Article 20, and specifically Article 20 (4) (e), of the Statute.

b) The Prosecution has erred in its implicit assertion that Dr. Des Forges is an independent witness. According to the Chamber's oral ruling of 23 March 2005, an expert witness' impartiality or independence is not a matter to be determined at this stage of the proceedings. The Defence for Justin Mugenzi does not seek to exclude all of Dr. Des Forges' evidence or to compel her to divulge her sources. While it is accepted that the evidence of expert witnesses differs from that of factual witnesses, this does not remove the Chamber's discretion to exclude such parts of Dr. Des Forges' testimony as to protect the right of the accused to a fair trial.

c) Where the witness Dr. Des Forges presents a hearsay account but will not provide the identities of her sources, cross-examination is an insufficient safeguard to ensure the accuracy, veracity, or reliability of the information. The ICTY *Kordic* Decision, cited by the Prosecution, interprets Rule 89 (C) of the Rules to preserve the right of cross-examination to ensure that the Chamber is satisfied that the evidence is reliable. Contrary to the Prosecution's submission, however, the right of the Defence to cross-examine Dr. Des Forges on the factual assertions in respect of which she deliberately withholds her sources amounts to an empty, rather than effective, right. The Chamber cannot, therefore, be satisfied that the evidence is reliable.

d) Contrary to the Prosecution's submission, the same reasons for compliance with Article 20 of the Statute are not applicable to both hearsay evidence and evidence from anonymous sources. Relying on a ruling issued by the European Court of Human rights, in the case of *Kostovski v. Netherlands*, the Defence asserts that, unlike hearsay evidence, the admission of evidence from anonymous sources is a breach of an accused's right to a fair trial[4]. The *Kostovski* Court acknowledged that failure to provide an accused with the name of an anonymous source – thus impairing the accused's ability to test the reliability and credibility of evidence – could be counterbalanced by judicial procedures, such as making the Court aware of the identity of the informants. Similarly, in the case at bar, no such counterbalance is present.

e) No evidence has been submitted that Dr. Des Forges may be in danger if she reveals the identity of her informants. In this respect, however, the Defence does not submit that the Chamber order Dr. Des Forges to reveal the names of her

[4] *Kostovski v. Netherlands*, European Court of Human Rights, 20 November 1989, paras. 28-30, 38, 41-42.

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informants. The remedy requested is that the Chamber exclude any evidence given by Dr. Des Forges emanating from undisclosed sources.

*The Defence for Prosper Mugiraneza*

11. The Defence for Prosper Mugiraneza requests the Chamber to reject expert witness Dr. Alison Des Forges' claim of privilege, as a human rights investigator, or reject that part of her testimony which is based on confidential sources. In support of its submissions, the Defence asserts :

a) The law strictly construes evidentiary privileges, which contravene the truth-seeking role of the courts and the public's right to "everyman's evidence"[5]; accordingly, the Chamber should not recognize the "human rights investigator" privilege. The Chamber is not faced with the question of whether a human rights investigator may refuse to testify. In that situation, the issues and balance of equities would be different. In the instant case, a witness who has volunteered to testify is providing the Tribunal and the litigants only with information that she deems to be appropriate. Dr. Des Forges' position differs from that of the ICRC which, for the public good, will not allow any member of the organization to provide evidence or produce documents for use in trials.

b) The witness' refusal to identify her sources prevents the Defence from evaluating the credibility of the evidence or testing its accuracy. The Chamber would be able to afford appropriate protective measures to meet any security concerns arising from revealing the sources.

c) Dr. Des Forges should be ordered to reveal her sources or suffer adverse consequences – such as, contempt of the Trial Chamber or having her testimony struck from the record. However, the Defence also suggests a middle ground : the presumption that she has no source for her information[6]. Relying on *Prosecutor v. Brdjanin*, an ICTY Decision on Interlocutory Appeal[7], the Defence argues that "the decision on whether a *potential* witness can totally avoid providing information lies with Judges not the potential witness"[8].

*The Defence for Casimir Bizimungu*

12. The Defence for Casimir Bizimungu submits that expert witness Dr. Alison Des Forges' refusal to divulge her anonymous sources deprives the Accused of their right to real and concrete cross-examination, guaranteed by Article 20 of the Statute. The

[5] *Branzburg v. Haynes*, 408 US 665 (1972); *University of Pennsylania v. EEOC*, 493 US 182 (1990), citing *United States v. Bryan*, 339 US 323, 331 (1950); *Trammel v. United States,* 445 40, 50 (1980).

[6] *DeRoburt v. Gannett Co.*, 507F. Supp. 880 (DDC 1981); *New York Times v. Sullivan*, 376 US 254 (1964).

[7] *Brdjanin*, Decision on Interlocutory Appeal, 11 December 2002, paras. 48-49. The Defence argues that the Brdjanin Decision is consistent with another ICTY Appeals Chamber Decision, *Prosecutor v. Blaskic*, 29 October 1997, where, to preserve secrecy, a State was requested to submit classified and confidential documents to the Chamber for in camera review.

[8] Prosper Mugiraneza's *Memorandum* of Law on an Expert Witness' Right to Refuse to Disclose Sources, para. 20.

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sources of information on which an expert witness bases her information are the principal issues for cross-examination, in regard to the credibility of the witness as well as the opinions and conclusions of the witness. The Defence suffers irremediable prejudice where it has no real possibility of defending itself against factual statements based on anonymous sources. In light of Dr. Des Forges' refusal to reveal the identities of her sources, the only possible remedy is for the Chamber to exclude from evidence the witness' opinions and conclusions which are based on information provided by anonymous sources.

## DELIBERATIONS

### *General Principles with Respect to Admissibility of Evidence*

13. Rule 89 (C) of the Rules affords the Chamber a broad discretion to admit any evidence which the Chamber deems to be relevant and of probative value. The critical issue before the Chamber is whether evidence in respect of which Dr. Des Forges has declined to disclose her source has probative value, and if so, whether the admission of such evidence is consistent with the right to a fair trial. If the evidence in respect of which Dr. Des Forges has declined to disclose her source has no probative value, it must be excluded. If the evidence has probative value, the Chamber has discretion to admit the evidence. At that point, once the evidence passes through the gateway of admissibility, the matter becomes one of weight.

14. As the Appeals Chamber has stated in the case of *Nyiramasuhuko* :

> [A] distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative weight to be attached to it. The former requires some relevance and probative value, whereas the latter is an assessment to be made by the Trial Chamber at the end of the case. The Trial Chamber did not abuse its discretion at this stage of the proceedings, and there is thus no need for appellate intervention.
>
> As the Appeals Chamber has previously indicated, Rule 89 (C) of the Rules grants a Trial Chamber a broad discretion in assessing admissibility of evidence. Evidence may be deemed inadmissible where it is found to be so lacking in terms of the indicia of reliability, such that it is not probative. Thus, at the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible. Finally, the admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are to be assessed by the Trial Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence[9].

15. It should be emphasized that the answer to the question outlined above - namely, whether the evidence in respect of which Dr. Des Forges has declined to disclose her source has probative value – is not capable of general application. The question

[9] *Pauline Nyiramasuhuko v. The Prosecutor,* Appeals Chamber Decision on Pauline Nyirimashuko's Appeal on the Admissibility of Evidence, 4 October 2004, paras. 6-7.

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of admissibility of evidence for which a source is not disclosed is to be ascertained on a case-by-case basis and by reference to the specific circumstances of a particular situation. This will be discussed further below under the title "Right to a Fair Trial Including the Right to Cross-Examination".

*Testimony of an Expert Witness*
*is different from that of a factual Witness*

16. The Chamber notes that the Mugenzi Defence does not deny the Prosecutor's assertion that the testimony of an expert witness is different from that of a factual witness, a proposition which is supported in law. The Chamber further notes, however, that whilst certain issues in relation to the status of the witness Dr. Alison Des Forges, as well as issues concerning her impartiality and independence are yet to be determined by the Chamber, this does not preclude the Chamber from making determinations in relation to the admissibility of the evidence she has given thus far.

17. Under the broad ambit of the powers afforded to it by Rule 89 (C), the Chamber is of the view that when an expert witness provides factual testimony, the sources of which she refuses to divulge or disclose to the Chamber and the Parties, the veracity and reliability of that information will be factors the Chamber must consider in determining the weight it affords such information and opinions derived from it. The issue, therefore, is one of weight and not admissibility of evidence.

18. The Tribunal has distinguished between the evidence of experts and non-experts :

> The Tribunal is of the view that that there is a fundamental difference between, on the one hand, a witness called to testify about the crimes with which the accused is directly charged and, on the other hand, an expert witness, whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field[10].

19. The role of an expert witness is therefore to assist the Chamber in better understanding the evidence presented during the proceedings. The admission of the evidence of an expert witness does not necessarily mean that the Trial Chamber accepts the evidence and the opinion based on that evidence[11]. In this regard, the Trial Chamber's reasoning in the case of *Nahimana* is instructive. The *Nahimana* Chamber held that :

> [A]t the stage of evaluation of the evidence, if opinions turn out to be of a general nature, or are unsubstantiated or tend to be based on evidence that we ourselves have heard in this courtroom, then the Chamber has a discretion and will exercise a discretion to intervene in the course of the testimony to limit such evidence. The Chamber is definitely not interested in any opinion that is not based on sound research and expertise or facts[12].

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[10] *Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, para. 2.

[11] *The Prosecutor v. Radoslav Brdjanin*, Decision on Prosecutions Submission on Statement of Expert Witness Ewan Brown, 3 June 2003, p. 5.

[12] *Prosecutor v. Nahimana et al.* Case N° 99-52-T, Transcripts of 20 May 2002, pp. 124-125 (TC I); *Prosecutor v. Bagosora et al.* ICTR-98-41-T,Transcripts of 4 September 2002, p. 8 (TC III).

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*Right to a fair Trial*
*including the Right to Cross-Examination*

20. The Chamber notes that procedural fairness is a paramount consideration in international criminal trials, encompassing such fundamental guarantees as the right of the Parties to be equal before the Tribunal[13] and the right of an accused to examine or have examined witnesses against him or her[14]. It is submitted by the Mugenzi Defence that, as a result of the Chamber admitting into evidence hearsay testimony in relation to which the witness has refused to reveal her sources,

> "the defendants are denied that crucial element of a fair trial procedure which enables the Defence to investigate the *bona fides* of and likely accuracy of the ultimate providers of pieces of information"[15].

Whilst the Chamber notes the fundamental nature of the bundle of rights encompassed by the notion of the right to fair trial, the Chamber does not share the viewpoint of the Mugenzi Defence that the admission of hearsay testimony, in relation to which the witness has declined to reveal her sources, infringes the right of the Accused to a fair trial.

21. It is firstly necessary to recognise the distinction between factual evidence and opinion evidence, between statements of fact and the ultimate opinion formed on the basis of such facts. In the case of an expert witness, such as Dr. Des Forges, whilst the evidence is sought to be admitted for the truth of its contents, it is offered to the Chamber as a basis, whether a sole basis or one basis amongst others, for the witness' opinion about a particular issue. Ultimately, the matter which will fall for determination by the Chamber is what weight, if any, it will afford to the witness' opinion about a particular matter. In so doing, it will take into account a number of matters including, but not limited to, the bases upon which the expert witness formed that opinion as well as the extent to which the expert has been able to provide details about those bases of his or her opinion. Other relevant matters to be taken into account will include corroboration, whether by testimony of the witness, or by the testimony of other witnesses during the course of the trial, as well as the extent to which the accused persons have had the opportunity to test the veracity of the assertions made. Therefore, whilst the decisions referred to by the Parties, notably, *Akayesu*[16], *Kordic*[17] and *Rutaganda*[18] are of assistance in terms of their enunciation of

[13] Article 20 (1) of the ICTR Statute provides that "[a]ll persons shall be equal before the International Tribunal for Rwanda".

[14] Article 20 (4) provides that "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; …"

[15] T. 31 May 2005, p. 94.

[16] "The main safeguard applicable in this case is the preservation of the right to cross-examine the witness on the hearsay evidence which has been called into question", *Akayesu* Judgement (AC), para. 287.

[17] "Rule 89 (C) must be interpreted so that safeguards are provided to ensure that the Trial Chamber can be sure that the evidence is reliable", *Kordic* Decision, para. 22, cited in *Akayesu* Judgement (AC), para. 287.

[18] "The Rules do not exclude hearsay evidence, and the Chamber has the discretion to consider such evidence", *Rutaganda*, Judgement and Sentence, 6 December 1999, para. 18.

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general statements of principle about the treatment of hearsay evidence, they are not instructive in terms of the particular question which the Chamber is asked to answer.

22. The Chamber is of the view that the context in which Dr. Des Forges has referred to the information provided to her by undisclosed sources is instrumental to the determination of the issues before the Chamber. The Chamber notes that, on several occasions during the course of her cross-examination by Mr Gumpert, Dr. Des Forges declined to identify sources used in forming the opinions enunciated in her book, *Leave None to Tell the Story,* as well as in her report and during her testimony. The issue arose in the course of the cross-examination of Dr. Des Forges' on a number of her opinions on topics including : the "Civilian Self-Defence"; the relationship between the Liberal Party (PL) and the movement known as "Hutu Power"; the use of double meanings in language at the relevant time; the circumstances under which *Préfet* Habyarimana was removed from office; and the circumstances under which the President gave his speech in Butare *Préfecture*. Each topic in relation to which Dr. Des Forges offered her opinion was distinct, and the evidence in relation to each should be treated as such.

23. The issue arose, for example, on 31 May 2005, during discussions pertaining to a document which was entered as Exhibit P. 106 and the topic of the "Civilian Self-Defence"[19]. In this instance, Dr. Des Forges referred to information provided to her by two unidentified sources as corroboration of assertions made during the course of her testimony about the interpretation of documentary exhibit P. 106[20]. The document had been in the possession of Jean Kambanda, upon whose arrest the document was obtained by the Office of the Prosecutor. Dr. Des Forges expressed her opinion that the organization of civilian self-defence was eventually turned to the purpose of genocidal killings[21]. She testified that the document "reinforced" information which she had received from two separate sources[22]. Dr. Des Forges testified that

> "because [the document] came from a source of great importance, and because it confirmed information I had from other sources, I have used it in the preparation of my report"[23].

The two sources were both military officers, but when asked to name them, Dr. Des Forges responded, "I cannot without asking their permission because that information was given to me in confidence…"[24].

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[19] T. 31 May 2005, pp. 77-86.

[20] See T. 31 May 2005, page 86, lines 3-13, THE WITNESS: … As I recall the conversation at the time the document was seized and presented to Mr. Kambanda for comments. He remarked that he himself had not seen the document until after the events of 1994. This does not surprise me because I think Mr. Kambanda was not part of the original group of readers at that time, but that would indicate to me that it was indeed a closely held document. In addition the testimony from two military officers interviewed completely independently, and who barely know each other, about the meeting with President Habyarimana at about this time, involved their asking for details of this plan. And according to both officers, Habyarimana then turned to the Minister of the Defence and said 'Shall we tell them?' And the answer was, 'N°' These were members of the *gendarmerie* who [*sic*] were felt not to be sufficiently committed to 'Defending the republic'".

[21] T. 31 May 2005, p. 82.

[22] T. 31 May 2005, p. 77.

[23] T. 31 May 2005, p. 78.

[24] T. 31 May 2005, p. 86.

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24. According to Dr. Des Forges, the unnamed sources support her interpretation of the civilian self-defence programme. It is clear, however, that the unnamed sources comprise one basis among others upon which Dr. Des Forges' expert opinion is founded. During her testimony, Dr. Des Forges said that this opinion was supported by other documents[25], one example of which was P. 106 itself. While Dr. Des Forges drew support from the two unnamed sources, her opinion on this matter is not based solely on the unnamed sources.

25. Giving due consideration to the multitude of sources on which the opinion of Dr. Des Forges is based, the Chamber considers that the limited testimony in relation to which Dr. Des Forges declined to disclose confidential sources has probative value. Accordingly, the Chamber considers such evidence to be admissible and is of the view that, in assessing the weight, if any, to be attached to the evidence and opinion based on unidentified sources, it will consider each context in which the issue arises, taking into account those matters outlined at paragraph 21, above. The Chamber will also take into account, where applicable, situations where the opportunity to cross-examine the witness has been limited by the non-disclosure of her sources.

26. The case of *Kostovski v. Netherlands*, which the Mugenzi Defence cites in support of its arguments, is distinguishable from the present set of circumstances. In that case, the applicant was convicted on the strength of the testimony of two anonymous factual witnesses, which testimony was given in the absence of the applicant and his counsel. In the instant case, the Defence is well aware of the factual assertions made by the unnamed sources upon which Dr. Des Forges has based her opinions and can investigate and seek to refute the same. Whilst the Chamber recognises the difficulties associated in locating unidentified sources, the Defence is certainly not precluded from identifying the information alleged to have been provided by those sources and calling evidence to challenge those opinions expressed by Dr. Des Forges. Additionally, the Chamber, for its part, is equally alert to the fact that the witness' testimony contains statements of fact which have not been verified before it and must be treated with caution. The Chamber is therefore not persuaded that the right to a fair trial has been compromised. It is up to the Defence to challenge pieces of information which it contends are unreliable using investigative sources of its own.

27. Further, the Chamber is not convinced that, admitting into evidence the testimony of Dr. Des Forges, including those parts of her testimony in relation to which she has declined to name the source, violates the right of any of the Accused to examine, or have examined, the witnesses against him, pursuant to Article 20 (4) (e) of the Statute.

28. Dr. Des Forges has been presented to the Chamber as an expert witness to assist the Chamber in understanding the totality of the evidence before it. In forming her opinion about the events that transpired in Rwanda in 1994, she has relied, in part, upon information provided to her by sources, some of whom she does not wish to

[25] T. 31 May 2005, p. 78. "The document is a plan for the organization of civilian defence, and it carries forward the kind of planning which had been initiated by a military commission, according to the documents of the Rwandan army, at the end of October. If you examine it, you will see that in many ways it coincides with the document discussed earlier today, that is the document about the existence of arms in Gisenyi *Préfecture.* It also picks up many of the things of civilian self-defence that we have already discussed today".

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name without their consent. The Chamber will weigh the testimony of Dr. Des Forges in light of her role as an expert witness and in accordance with the right of the accused to cross-examination.

29. Further, the Chamber remains unconvinced that the right to cross-examine Dr. Des Forges, whilst it has been limited in certain respects, has been an empty one, as evidenced by the cross-examination of the witness by Mr. Gumpert[26]. Whilst a limitation has certainly been placed on Counsel's ability to investigate and challenge the unnamed sources, Counsel has not been limited in challenging the opinions offered by the witness in other regards. As previously outlined, however, in circumstances where one of the sources upon which Dr. Des Forges has formed her opinion is unnamed and, as such, Counsel has not been able to test the integrity of that source, the Chamber will take into account this fact in determining what weight, if any, should be attached to the relevant parts of the witness' opinion testimony.

*Privilege*

30. The Chamber notes the arguments with regard to privilege as submitted by the Defence for Prosper Mugiraneza. While Counsel is right in pointing out that the only privilege explicitly provided for by the Rules is the lawyer-client privilege, others, such as a privilege pertaining to war correspondents, have emerged in practice[27].

31. In the instant case, it must also be pointed out that Dr. Des Forges is not seeking privilege. She is merely declining to breach confidences that she has given without first obtaining the concurrence of those who confided in her and whom she assured would not have their names divulged in public. In other words, she is seeking to be excused from having to breach those confidences and to be given an opportunity to seek the permission of the concerned persons before divulging their names. This position is different from the occasion when a witness declines to disclose his or her source of testimony on grounds of privilege or other grounds. The Chamber notes that

[26] For example, during the cross-examination of Dr. Des Forges by Mr. Gumpert on 1 June 2005, undisclosed sources arose in the context of Dr. Des Forges asserting that there were Liberal Party (PL) supporters present at a meeting (referred to in Dr. Des Forges' report as a Hutu Power rally in October 1993) during which Mr. Karemera made a certain speech [page 60, lines 15-23]. When she was asked for the basis of this assertion, she said that it was the testimony of several people who were present at the meeting and who said they recognised people who were PL supporters present at that meeting. Mr. Gumpert then cross-examined Dr. Des Forges on this point when he asked her whether or not she had ever read Mr. Karemera's speech. He then took her to the transcript and he said (quoting a passage of the transcript):

"'Umuhutu Power' and the response was, 'power, power, power'; 'MRND power' and the response was, 'power, power, power'; 'CDR power' and the response was, 'power, power, power'; 'MDR power' and the response was, 'power, power, power'; '*Interahamwe* power' and the response was, 'power, power, power'; '*Les Hutus unis*' and the response was, 'power, power, power'".

Mr. Gumpert then used the speech to challenge the assertion made by Dr. Des Forges, based on unnamed sources, that members of the PL were present at the meeting, since no mention of the party was made during the course of the speech.

[27] See *Simic,* "Decision of the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness", 27 July 1999; *Brdjanin*, Decision on Interlocutory Appeal (AC), 11 December 2002.

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none of the Parties took any steps to ensure that such permission is sought. It is for the Chamber to decide how to treat evidence based on undisclosed sources.

32. In light of Rule 89 (C), the evidence is clearly admissible and the question as to its use is one of weight not admissibility.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Motions in their entirety.

Arusha, 2 September 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Decision on Prosper Mugiraneza's Motion for Extension of Time to File Pre Defence Brief 13 September 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Prosper Mugiraneza – Extension of time, Adequate time to the Defence to prepare its case – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A), 73* ter *and 98* bis

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion for Extension of Time to File Pre Defence Brief Pursuant to Rule 73 *ter* (B)", filed on 9 September 2005 (the "Motion");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 73 *ter* of the Rules;

HEREBY decides the Motion, pursuant to Rule 73 (A) of the Rules, upon the basis of the written submissions of the Parties;

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*Defence Submissions*

1. The Defence requests an extension of time, until 20 October 2005, within which to file its Pre-Defence Brief. Alternatively it requests leave to amend its witness and exhibit list.

2. The Defence states that it is still in the process of finalizing its witness list, and informs the Chamber that there have been "possible misunderstandings between Mugiraneza's counsel and the Defence Counsel and Detention Management Section" concerning requests for travel. Furthermore, a mission scheduled for July and August was aborted because the Defence interviewer became ill with malaria.

3. The Defence states that until such time as the Chamber rules on its Rule 98 *bis* Motion the Accused will not know what charges, if any, he faces.

4. Finally, the Defence states that since Mugiraneza will present his evidence last, his case will remain a work in progress, until his Co-Accused have presented their cases.

**Deliberations**

5. The Defence has failed to convince the Chamber that an extension of time in which to file its Pre-Defence brief is justified. The Defence has had adequate time to prepare its case, and time is still running.

6. The Chamber emphasises that it is not necessary to wait for the adjudication of the pending Rule 98 *bis* Motion before the Defence files its Pre-Defence Brief. Should it be necessary for the Chamber to order acquittal or partial acquittal of the Accused on the basis of the Rule 98 *bis* Motion, the Defence witness list, exhibit list and brief can be amended at that time, if necessary.

7. The alternative Defence request for leave to amend its witness and exhibit list is premature.

FOR THE ABOVE REASONS THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 13 September 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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# *Decision on Casimir Bizimungu and Jérôme Bicamumpaka's Extremely Urgent Motion Requesting the Chamber to Order Urgent Translation of the Prosecutor's Response Pursuant to Rule 98* Bis *of the Rules as well as Time to File a Reply 26 September 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Translation, Length of the Brief, Language Services Section – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A), 73* ter *and 98* bis

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of "Casimir Bizimungu and Jérôme Bicamumpaka's Extremely Urgent Motion Requesting the Chamber to Order Urgent Translation of the Prosecutor's Response Pursuant to Rule 98 *bis* of the Rules as Well as Time to File a Reply", filed on 11 August 2005 (the "Motion");

CONSIDERING the "Prosecutor's Consolidated Response to Dr. Bizimungu Mr. Bicamumpaka and Mr. Mugiraneza's Motion for Extension of Time Within Which to File their Replies and Request for Urgent Translation of the Prosecutor's Response Pursuant to Rule 98 *bis*", filed on 17 August 2005 (the "Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 73 *ter* of the Rules;

HEREBY decides the Motion, pursuant to Rule 73 (A) of the Rules, upon the basis of the written submissions of the Parties;

## SUBMISSIONS

1. The Defence of Casimir Bizimungu and Jérôme Bicamumpaka request that the Chamber order urgent translation of the "Prosecutor's Response to Defence Motions for Acquittal pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 4 August 2005 (the "Prosecutor's Response to Defence Motions for Acquittal"). This document was filed in English only, and the Defence claim that given its volume and complexity, they will require a French translation. They further request that the

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Chamber grant sufficient time following the translation of the document to enable them to prepare and file a Reply.

2. The Prosecution does not object to the Motion.

## DISCUSSION

3. The Prosecutor's Response to Defence Motions for Acquittal comprises a legal brief (the "Brief") and an annex (the "Annex"). The Brief extends to approximately 100 pages of legal argument. The Annex comprises approximately 200 pages of summaries and references. Both were filed in English only.

4. Following the filing of the present Motion, a meeting was arranged between representatives of the Language Services Section, Chambers Support Section, and Court Management Section, to discuss translation priorities. The Parties were subsequently informed as to the possible timeline for translation of the Annex and the Brief.

5. Lead Counsel for Casimir Bizimungu and Jérôme Bicamumpaka informed the Chamber by letter that they would be agreeable to receiving a French translation of the Brief only, and would not require the Annex to be translated into French[1]. Counsel for Bizimungu further requested that an additional ten days be allowed following receipt of the translated Brief within which to file a Reply[2].

6. The Chamber notes that the Brief is a lengthy and complex document, and once the French translation is received, it will require close analysis. Under the circumstances, it is reasonable that the Defence for Casimir Bizimungu should be given additional time within which to file its Reply.

7. On 18 September 2005, the Defence for Jérôme Bicamumpaka filed its Reply to the Prosecutor's Response to Defence Motions for Acquittal. As regards the Defence for Jérôme Bicamumpaka, the Chamber declares the Motion to be moot.

FOR THE ABOVE REASONS THE CHAMBER

GRANTS the Defence Motion in the FOLLOWING TERMS ONLY :

ALLOWS the Defence for Casimir Bizimungu ten days within which to file a Reply to the Prosecutor's Response to Defence Motions for Acquittal. This time will begin to run upon transmission to the Parties of the French translation of the Brief.

Arusha, 26 September 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

***

[1] Letter from Ms. St. Laurent, Lead Counsel for Casimir Bizimungu, to Mr. William Romans, Associate Legal Officer, dated 05/09/2005; Letter from Mr. Pierre Gaudreau, Lead Counsel for Jérôme Bicamumpaka, to Mr. William Romans, Associate Legal Officer, dated 15/09/2005.

[2] *Ibid.*

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# *Decision on Prosper Mugiraneza's Extremely Urgent Motion for Voice Exemplars by Witness Fidèle Uwizeye 27 September 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Identification of the witness, Voiceprint identification, Discretionary authority of the power to make general orders, Condition of necessity – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 54*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

SEISED of Prosper Mugiraneza's "Extremely Urgent Motion for Voice Exemplars by Witness Fidele Uwizeye", filed on 18 April 2005 (the "Motion");

CONSIDERING "Prosecutor's Response to Prosper Mugiraneza's Extremely Urgent Motion for Voice Exemplars by Witness Fidele Uwizeye", filed on 21 April 2005; and "Prosper Mugiraneza's Reply to the Prosecutor's Response to Extremely Urgent Motion for Voice Exemplars by Witness Fidele Uwizeye", filed on 22 April 2005;

HEREBY DECIDES the Motion, based solely on the written submissions of the parties pursuant to Rule 73 (A) of the Rules.

## Introduction

*Defence Submissions*

1. The Defence for Prosper Mugiraneza seeks an order to require Witness Fidèle Uwizeye to provide voice exemplars so that an expert witness may determine whether it is his voice on a tape recorded broadcast. The broadcast identifies Mr. Uwizeye as the speaker, but Mr. Uwizeye denies this. The Defence submits that this raises an important issue of credibility as to Mr. Uwizeye's testimony.

2. The Defence submits that the voice may be identified by means of voiceprint identification undertaken by an expert witness. While it would be possible to use tapes of Mr. Uwizeye's testimony to the Tribunal, the more reliable method would be to obtain a clear exemplar from Mr. Uwizeye, using the method prescribed by Mr. David

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Cain, the Defence's proposed expert. The Defence requests that an exemplar be obtained by the Tribunal's audio-video department.

*Prosecution Submissions*

3. While the Prosecution does not in principle oppose the motion, it advances several objections as to the reliability of the method. Firstly, relying on authorities from the United States, the Prosecution submits that voiceprint identification is not established as an accepted scientific technique. Secondly, the Prosecution argues that while the method may be appropriate in the case of an accused, the status of a witness differs. Thirdly, the Prosecution submits that the reliability of the proposed test may be reduced since the broadcast in question is in Kinyarwanda. Fourthly, it is submitted that it would not be possible to replicate the conditions in which the broadcast was made since the method of the original recording is unknown. Finally, the reliability of any test would be compromised given the lapse in time since the original recording was made on 7 June 1994. For these reasons, the Prosecution requests that the Chamber dismiss the Motion.

*Defence Reply*

4. In response to the Prosecution suggestion that the method is unreliable, the Defence submits that the cases on which the Prosecution rely are no longer relevant. It points out that scientific advances in voice recognition techniques have been made since the most recent case cited by the Prosecution (1978), implying that the analysis adopted in those cases was based upon outmoded techniques which have since been improved. According to more recent case law cited by the Defence, the applicable standard in the United States is now whether the expert evidence is based on reliable scientific principles, properly applied[1]. The Defence submits that, in any event, it is premature to consider whether to admit the evidence of the prospective expert witness, that being a question for a *voir dire*.

## Deliberations

5. Regarding the Defence request for the Chamber to order Witness Mr. Fidèle Uwizeye to provide voice exemplars so that an expert witness may determine whether it is his voice on the tape recorded broadcast, the Chamber recalls Rule 54 of the Rules of Procedure and Evidence, which reads :

> Rule 54 : General Provisions
>
> At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, *subpoenas*, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

6. Rule 54 grants the Chamber discretionary authority to make general orders, under circumstances which are *necessary* for the investigation, preparation or conduct of the

[1] *Daubert v Merrill Dow Pharmaceuticals,* 509 U.S. 579 (1993).

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trial. Implicit in the Rule is the condition of *necessity*, and this must be demonstrated by the requesting party. In the Chambers view, a showing of necessity must also include a demonstration that there is no other way to obtain the evidence sought[2].

7. Witness Fidèle Uwizeye is not a protected witness, and the Defence is not prevented from obtaining his voluntary cooperation. The Defence has not demonstrated to the Chamber that it has taken all necessary steps to obtain this witness' cooperation voluntarily. Since it has not satisfied this preliminary burden, the application fails.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion.

Arusha, 27 September 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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## *Decision on the Prosecutor's Motion for Certification to appeal the Trial Chamber's Decisions on Protection of Defence Witnesses Rule 73 (B) of the Rules of Procedure and Evidence 28 September 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Standard to meet for a certification of an interlocutory appeal, Fairness of the proceedings, Impact of the decision on other trials, Immediate resolution by the Appeals Chamber, Advance of the proceedings – Identity of Protected Witness, Disclosure to "the Prosecution team in this case" – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 68, 73 (A), 73 (B) and 75 (F)*

*International Cases cited :*

[2] *Prosecutor v. Zejnil Delalic et al.*, Case N° IT-96-21, Decision on Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of *Subpoena* to an Interpreter, 8 July 1997, para. 13.

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*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Nyiramasuhuko's Motion for Certification to Appeal" etc., 20 May 2004 (ICTR-98-42); Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision On Casimir Bizimungu Motion For Certification To Appeal From The Trial Chamber's Decision Of 3 September 2004 Concerning Rule 73* Bis *Of The Rules And For Other Appropriate Relief, 9 March 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 July 2005 (ICTR-98-41)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of the (the "Motion" "Prosecutor's Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decisions on Motions for Protection of Defence Witnesses Dates 27 June 2005", filed on 4 July 2005);

CONSIDERING "Casimir Bizimungu's Confidential Response to [the] Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions for Protection of Defence Witnesses," filed on 11 July 2005 (the "Response");

RECALLING the

i) "Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses;"

ii) "Decision on Jerome Bicamumpaka's Motion for Protection of Defence Witnesses;"

iii) "Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses,"

iv) as filed on 27 June 2005 (the "Impugned Decisions")

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 73 (B);

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

## Submissions of the Parties

*The Motion*

1. The Prosecutor seeks leave to appeal the Chamber's ruling that disclosure of information pertaining to the identity of a protected witness must be restricted to members of the "immediate Prosecution team", and cannot extend to anyone else within the Office of the Prosecutor. The Prosecution had applied for the Chamber to replace the words "Prosecution team" with "the Prosecution", thus permitting dissemination of the identity, or information disclosing the identity, of protected Defence witnesses to any person working for the Office of the Prosecutor. The Prosecution sub-

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mits that the issues raised by the present certification request are of such importance as to require immediate appellate resolution.

*Casimir Bizimungu's Response*

2. The Defence for Casimir Bizimungu moves for the Prosecutor's Motion to be dismissed. The Defence contends that the Prosecutor's arguments of the merits of his appeal are premature. At this stage, the Defence submits, the Chamber need only be concerned with whether or not the conditions for the certification of an appeal, as stipulated in Rule 73 (B) have been met. The Defence submits that Prosecutor has failed to meet both of these conditions.

**Deliberations**

3. The Chamber recalls its previous statements on the standard which must be met before certification of an interlocutory appeal is granted pursuant to Rule 73 (B)[1]. The Rule provides that leave may be granted only where it

> "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".
>
> Albeit exceptionally, certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence[2].

4. Rule 73 (B) requires the Chamber to assess the significance of the decision in relation to "the proceedings" and "the trial". The Chamber notes that the Prosecutor's arguments concern the impact of the present decision on other trials and other accused persons – in particular, the Prosecution's ability to disclose exculpatory information to other accused, in accordance with its obligations under Rule 68 of the Rules.

5. The Chamber takes the view that the effect of its decisions on other trials is relevant in determining whether the criteria in Rule 73 (B) are met. As stated by the Trial Chamber in *Bagosora*[3] :

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[1] See *inter alia*, *Bizimungu et al.,* Decision On Casimir Bizimungu Motion For Certification To Appeal From The Trial Chamber's Decision Of 3 September 2004 Concerning Rule 73 *Bis* Of The Rules And For Other Appropriate Relief, 9 March 2005.

[2] *Nyiramasuhuko et al*., Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004; *Nyiramasuhuko et al.,* Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible' (TC), 18 March 2004, para. 15 ("It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73 (B) must be exceptional indeed"); *Nyiramasuhuko et al*., Decision on Nyiramasuhuko's Motion for Certification to Appeal", etc., (TC), 20 May 2004, para. 16 ("The Chamber recalls the jurisprudence that decisions rendered on Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B)")

[3] *Bagosora et al.,* Certification Of Appeal Concerning Access To Protected Defence Witness Information, 29 July 2005.

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> […] If such reciprocal effects were ignored, then this would lead to the unreasonable conclusion that important decisions would be immunized from interlocutory appeal as long as their immediate effect was felt only on other trials, even if all Trial Chambers had adopted precisely the same approach and were, therefore, mutually affected by the same approach.

6. The Chamber will consider the submissions relating to the first condition for certification and decide if the

> "decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".

If this condition is met, the Chamber will then consider whether "an immediate resolution by the Appeals Chamber may materially advance the proceedings".

7. With regard to the first limb of the test, the Prosecutor argues that restricting access to witness identities to "the Prosecution team in this case" would prevent the trial team in this case from sharing information with other teams. This, the Prosecutor submits, is contrary to his disclosure obligations under Rule 68. The Impugned Decisions are further incompatible with Rule 75 (F), which, the Prosecutor contends, is designed precisely to permit the Prosecution to comply with its disclosure obligations to Defence teams in other trials.

8. The Chamber notes that the greater portion of a protected witness' testimony is given in open session and is, therefore, accessible to anyone in the Office of the Prosecutor. Testimony which is received in closed session does not, by virtue of its sealed nature alone, prevent Counsel in other cases from being informed of material that may be exculpatory, provided that the identity of the witness is not revealed. The Chamber agrees with the Trial Chamber in *Bagosora* that

> […] denying automatic access to protected information by all employees of the Office of the Prosecutor may make compliance with Rule 68, and sharing of evidence relevant to other trials, somewhat more burdensome. Extra effort will be required by trial teams who wish to exchange salient information without disclosing protected witness identities. Though the Chamber does not believe that this burden conflicts with Rule 68 or the mandate of the Prosecutor, important interests are affected. The Appeals Chamber has stated that "[t]he disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal", and has described the obligation as equal in significance to the Prosecution's obligation to prosecute. [Footnote omitted]

The Chamber accordingly finds that the first limb of the test in Rule 73 (B) has been satisfied.

9. The Chamber now moves to consider the second limb of the test as to whether "immediate resolution by the Appeals Chamber may materially advance the proceedings".

10. The Chamber is concerned about the questions of principle and policy raised by the Prosecutor's Motion, particularly that pertaining to the need for effective and meaningful witness protection measures. The Chamber accepts that appellate resolution of these questions will affect the conduct of all proceedings before the Tribunal, and the relationship of proceedings to one another. In light of the view expressed in paragraph 5 above on reciprocal effect of one Chamber's decision on another, the

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Chamber accepts that an interlocutory resolution of this question "may materially advance the proceedings".

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS certification of the interlocutory appeal under Rule 73 (B)

Arusha, 28 September 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

***

## *Order Assigning Judges to an Interlocutory Appeal before the Appeals Chamber 18 October 2005 (ICTR-99-50-A)*

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Assignment of a judge before the Appeals Chamber*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 73 (C); Statute, art. 13 (4)*

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Prosecutor's Interlocutory Appeal, pursuant to Rule 73 (C), Respecting the Decision of Trial Chamber II on the Protection of Defence Witnesses", filed on 4 October 2005;

CONSIDERING Article 13 (4) of the Statute of the Tribunal and Rule 73 (C) of the Rules of Procedure and Evidence;

CONSIDERING the composition of the Appeals Chamber of the Tribunal as set out in Document IT/237, issued on 21 July 2005;

HEREBY ORDER that, in *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73, the Appeals Chamber shall be composed as follows.

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Judge Theodor Meron
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Fausto Pocar
Judge Andrésia Vaz

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

Done this 18th day of October 2005,

At The Hague, The Netherlands.

[Signed] : Theodor Meron

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## *Decision on Defence Motion Pursuant to Rule 98* bis *31 October 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Sufficient evidences, Evidence regarding the charges, Partial acquittal – Motion partially granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rule 98* bis*; Statute, art. 6 (1) and 6 (3)*

The Prosecution closed its case on 23rd June 2005, after calling 57 witnesses during 177 trial days and entering 113 exhibits. All four Defence teams subsequently filed motions for acquittal, pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence. The Prosecution responded to each motion in a combined brief following which further replies were filed by three accused persons, namely, Casimir Bizimungu, Jerôme Bicamumpaka and Prosper Mugiraneza.

The Chamber has read and considered all of the submissions and has conducted a preliminary analysis of the trial record. In brief, the enquiry, pursuant to Rule 98 *bis*, is simply whether the Prosecution has established sufficient evidence so that a reasonable trial of fact could find the count proved beyond a reasonable doubt if the evidence were to be believed. Where a count is sustained, it does not mean that a conviction will follow.

The Chamber has not examined the evidence in relation to individual paragraphs of the indictment, but, rather, the counts in the indictment. Rule 98 *bis* requires the Chamber to determine only whether the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, and to order a judgment of acquittal in respect of those counts. The Chamber will now read out those counts on which either a partial or a full acquittal has been entered for one or more of Accused :

COUNT 1 : Conspiracy to commit genocide; the Chamber acquits all four Accused in respect of Article 6 (3), responsibility only.

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## *Décision orale relative aux requêtes de la défense aux fins de l'article 98 31 octobre 2005 (ICTR-99-50-T)*

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Présidente de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi et Prosper Mugiraneza – Preuves suffisantes, Preuves au regard des chefs d'accusation, Acquittement partiel – Requête partiellement acceptée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 98* bis*; Statut, art. 6 (1) et 6 (3)*

Le Procureur a fini la présentation de ses moyens à charge le 23 juin 2005, après avoir cité 57 témoins à charge au cours de 177 jours de procès, et après avoir proposé et présenté 113 pièces à conviction. Toutes les quatre équipes de la défense ont ensuite présenté des requêtes aux fins d'acquittement, en se fondant sur l'article 98 *bis* du Règlement de procédure et de preuve.

Le Procureur a répondu à chacune des motions dans un mémoire joint, à la suite desquelles des d'autres réponses ont été déposées par trois accusés, notamment Casimir Bizimungu, Jérôme Bicamumpaka et Prosper Mugiraneza. La Chambre a pris connaissance de tous les arguments présentés et les a examinés et a procédé à une analyse préliminaire du dossier du procès.

En résumé, l'analyse, conformément à l'article 98 *bis*, vise simplement à s'assurer que le Procureur a établi ou a présenté des preuves suffisantes pour qu'un juge de faits raisonnable, puisse conclure que chaque chef d'accusation a été prouvé au-delà de tout doute raisonnable, et si la preuve devait être prise pour fondée. Lorsque la preuve est retenue, cela ne signifie pas nécessairement qu'il s'ensuit une condamnation. La Chambre n'a pas examiné la preuve relativement aux paragraphes individuels de l'acte d'accusation, mais plutôt a tenu compte des chefs d'accusation contenus dans l'acte d'accusation. L'article 98 *bis* exige de la Chambre de première instance qu'elle conclut que ceci ou que les preuves ne suffisent pas à justifier une condamnation pour un ou pour plusieurs des chefs visés dans l'acte d'accusation et de prononcer l'acquittement en ce qui concerne lesdits chefs. La Chambre va, à présent, donner lecture de ces chefs pour lesquels soit un acquittement «partial» ou complet a été prononcé, relativement à un ou plusieurs accusés :

CHEF 1. Entente en vue de commettre le génocide. La Chambre prononce l'acquittement pour tous les quatre accusés en se fondant sur l'article 6 (3) qui vise la responsabilité individuelle uniquement.

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COUNT 6 : Murder, as a crime against humanity; the Chamber acquits justice – Justin Mugenzi in respect of Article 6 (1) of the Statute, responsibility only. The Chamber acquits Jerôme Bicamumpaka and Prosper Mugiraneza in respect of both Articles 6 (1) and 6 (3) responsibility.

COUNT 8, rape as a crime against humanity; the Chamber acquits all four Accused in respect of both Articles 6 (1) and 6 (3), responsibility.

COUNT 10 : War crimes outrages upon personal dignity; the Chamber acquits all four Accused in respect of both Articles 6 (1) and 6 (3), responsibility.

The Defence motions on Rule 98 *bis* are denied in all other respects.

[Signed] : Unspecified

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CHEF 6. Meurtre; crime contre l'humanité. La Chambre prononce l'acquittement pour Justin Mugenzi en se fondant sur l'article 6 (1) du Statut, et qui vise la responsabilité individuelle uniquement. La Chambre prononce l'acquittement pour Jérôme-Clément Bicamumpaka et Prosper Mugiraneza, relativement à l'article 6 (1) et 6 (3) relative relatifs à la responsabilité individuelle.

LE CHEF 8. Viols et crime contre l'humanité. La Chambre prononce l'acquittement pour les quatre accusés, relativement à l'article 6 (1) et à l'article 6 (3); responsabilité individuelle uniquement.

CHEF 10. Crime de guerre; atteinte à la dignité personnelle. La Chambre prononce l'acquittement pour tous les quatre accusés, relativement aux articles 6 (1) et 6 (3); responsabilité individuelle.

Les requêtes de la Défense fondées sur «les» articles 98 *bis* sont rejetées sur tous ses autres aspects.

[Signé] : Non spécifié

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## *Decision on Prosecution Appeal of Witness Protection Measures 16 November 2005 (ICTR-99-50-AR73)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Andrésia Vaz

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Protection of the Witnesses, Discretionary power of the chamber to review a decision, Error of law – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 68 and 73 (B)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Jerome Bicamumpaka's Motion for Protection of Defence Witnesses, 27 June 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Prosecution's Consolidated Response and Reply to "Prosper Mugiraneza's Motion to Dismiss Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses" and "Prosper Mugiraneza's Brief in Response to Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses", 14 October 2005 (ICTR-99-50)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Slobodan Milošević, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (IT-02-54)*

### I. Procedural Background

1. On 27 June 2005, Trial Chamber II of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Trial Chamber" and "Tribunal", respectively), rendered decisions on Casimir Bizimungu's ("Bizimungu") Motion for Protection of Defence Witnesses, Justin Mugenzi's ("Mugenzi") Motion for Protection of Defence Witnesses, and Jerome-Clement Bica-

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mumpaka's ("Bicamumpaka") Motion for Protection of Defence Witnesses (collectively, the "Impugned Decisions")[1].

2. On 4 July 2005, the Prosecution filed its motion, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") for certification to appeal a holding – repeated verbatim in each of the Impugned Decisions – that restricts disclosure of information pertaining to the identity of a protected witness to members of the "immediate Prosecution team" and not to anyone else within the Office of the Prosecutor[2]. On 28 September 2005, Trial Chamber II rendered its decision on the Prosecution's motion for certification ("Decision Granting Certification"), granting certification of the interlocutory appeal pursuant to Rule 73 (B)[3]. The Prosecution filed its interlocutory appeal on 4 October 2005 ("Prosecution Appeal")[4], and Bizimungu filed his response to the Prosecution Appeal on 13 October 2005[5].

## II. Standard of Review

3. A Trial Chamber exercises its discretion in many different situations, including when deciding points of practice or procedure[6]. A Trial Chamber must exercise such discretion in deciding whether to grant protective measures for witnesses, taking into account the particular threats posed to the witness and the practical demands of the case. These fact-intensive Trial Chamber decisions require "a complex balancing of intangibles in crafting a case-specific order"[7]. Therefore, in reviewing the Trial Chamber's exercise of discretion, "the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion", but rather whether the Trial Chamber has reasonably exercised its discretion in reaching that decision[8]. To prevail in their appeal,

[1] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses, 27 June 2005; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka's Motion for Protection of Defence Witnesses, 27 June 2005.

[2] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Prosecutor's Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decisions on Motions for Protection of Defence Witnesses Dated 27 June 2005, 4 July 2005.

[3] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

[4] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, Prosecutor's Interlocutory Appeal, Pursuant to Rule 73 (C), Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses, 4 October 2005.

[5] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, *Mémoire de l'intimé Casimir Bizimungu en réponse à l'Appel du Procureur contre les trois Décisions de la Chambre de première instance datées du 27 juin 2005*, 13 October 2005.

[6] *Prosecutor v. Milošević*, Case N° IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9 ("*Milošević* Appeal Decision on Assignment of Counsel").

[7] *Cf. Milošević* Appeal Decision on Assignment of Counsel, para. 9 (discussing reasons for the Trial Chamber's discretion in cases involving assignment of counsel).

[8] *Milošević* Appeal Decision on Assignment of Counsel, para. 10 (internal citation omitted).

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the appellants must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion, or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly[9]. The Appeals Chamber has held that

> "a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[10]

## III. Discussion

4. The provisions on witness protection measures at issue in this case are similar to those that were the subject of a recent appeal in *Prosecutor v. Bagosora et al.* ("*Bagosora et al.* Decision")[11]. In that case, the Appeals Chamber held that a protective order restricting access to defence witness identities "to the Prosecution team in this case" impermissibly contravened the Prosecutor's obligation to disclose exculpatory material, pursuant to Rule 68 of the Rules, that

> "rest[s] on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations"[12].

The Appeals Chamber in the *Bagosora et al.* Decision consequently held that the Trial Chamber's construction of the witness protection orders restricting disclosure to the immediate Prosecution team was an error of law meriting reversal and remand for reconsideration[13]. The Appeals Chamber finds that, in the present case, the Trial Chamber's framing of the witness protection orders is also contrary to the requirements of the Rules. Therefore, and in light of the *Bagasora et al.* Decision, the restrictions on disclosure in the Impugned Decisions amount to an error of law meriting reversal and remand for reconsideration.

5. The Prosecution also requests a review[14] of the restrictive order in the Trial Chamber's decision granting witness protection measures to the fourth co-Accused, Prosper Mugiraneza ("Mugiraneza").[15] That decision was rendered separately on 2 February 2005 ("*Mugiraneza* Decision"), but the Prosecution raised no objection and

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[9] *Milošević* Appeal Decision on Assignment of Counsel, para. 10 (internal citation omitted).

[10] *Milošević* Appeal Decision on Assignment of Counsel, para. 10.

[11] *Prosecutor v. Bagosora et al.,* Case Nos. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005.

[12] *Id.*, para. 43.

[13] *Id.*, para. 46.

[14] Prosecution Appeal, para. 2.

[15] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005.

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the Decision was not certified for appeal at that time[16]. The Prosecution requested reconsideration of the *Mugiraneza* Decision only in conjunction with its motion for certification to appeal the Impugned Decisions in relation to Bizimungu, Mugenzi and Bicamumpaka[17]. The Trial Chamber did not rule on the Prosecution's request for reconsideration in the Impugned Decisions,[18] and makes no reference to it in the Decision Granting Certification,[19] but the Prosecution nonetheless argues that the relevant clauses of the *Mugiraneza* Decision are before the Appeals Chamber after having been "implicitly" certified by the Trial Chamber for review[20].

6. The Appeals Chamber does not consider that the Prosecution's request for reconsideration of the *Mugiraneza* Decision is properly before it, since it was not certified for appeal by the Trial Chamber. The Appeals Chamber, however, notes that the request for reconsideration was filed before the Trial Chamber, and anticipates that the Trial Chamber will dispose of the Prosecution's request for reconsideration in a manner consistent with the present decision and the *Bagosora et al.* Decision.

7. For the foregoing reasons, the Appeals Chamber GRANTS the Prosecution Appeal in part, QUASHES the holding of the Impugned Decisions that restricts disclosure of information pertaining to the identity of a protected witness to members of the immediate Prosecution team and not to anyone else within the Office of the Prosecutor, and REMITS the Impugned Decisions to the Trial Chamber for reconsideration consistent with this decision.

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

Done this 16th day of November 2005, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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[16] See *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, Prosecution's Consolidated Response and Reply to "Prosper Mugiraneza's Motion to Dismiss Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses" and "Prosper Mugiraneza's Brief in Response to Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses", 14 October 2005, p. 2 ("Prosecution Reply").

[17] See Prosecution Reply, p. 2; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, Prosper Mugiraneza's Brief in Response to Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses, 10 October 2005; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, Prosper Mugiraneza's Motion to Dismiss Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses, 10 October 2005.

[18] The Prosecution admits that the Impugned Decisions do not dispose of the request for reconsideration. Prosecution Reply, p. 3. In fact, each of the Impugned Decisions appears to only reference the request for reconsideration in its fourth preambulatory paragraph because the Prosecution consolidated it with a corrigendum to its response to the Defence motions for witness protection measures, but does not address the contents of the request for reconsideration. *Cf. Prosecutor v. Bizimungu et al.* Case N° ICTR-99-50-T, Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005, p. 2.

[19] The Trial Chamber only recalls the three Impugned Decisions and makes no reference to the *Mugiraneza* Decision. See Decision Granting Certification, p. 2 (preambulatory paragraph 5).

[20] Prosecution Reply, p. 3.

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## *Decision on Defence Motions Pursuant to Rule 98* Bis *22 November 2005 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – André Ntagerura, Pauline Nyiramasuhuko, Eliézer Niyitegeka, Théoneste Bagosora, Édouard Karemera, André Rwamakuba, Mathieu Ngirumpatse, Joseph Nzirorera, Juvénal Kajelijeli, Jean Kambanda*[1]*, Callixte Nzabonimana, Arsène Shalom Ntahobali, President Sindikubwabo, Tharcisse Renzaho*[2]*, Félicien Kabuga, Anatole Nsengiyumva – Judgment of Acquittal, Sufficient evidence, Probative value of the evidence relating to the charges, Circumstantial evidence, Uncorroborated evidence, Hearsay evidence, Contradictions between the witnesses' testimonies, Prior written statements, Expert witness testimony, Presumption of credence of the Prosecutor's evidence – Defects of the Indictment, Vagueness of the Indictment, Temporal Jurisdiction of the Tribunal – Criminal responsibility, Responsibility of the superior, Effective control over local leaders, Influence over local authorities, Interahamwe, Criteria of "knew or had reason to know of crimes of genocide", Necessary and reasonable measures to prevent crimes or to punish the perpetrators, Influence of the position of the Accused,* De jure *and* de facto *authority, Superior-subordinate relationship – Principle of* nullum crimen sine lege *– Genocide,* Mens rea *of the crime of genocide – Conspiracy of genocide, Continuing nature of the crime,* Actus Reus *of the crime of conspiracy,* Mens rea *of the crime of conspiracy, Necessary specific intent of the crime of genocide, Absence of conspiracy by omission – Complicity in genocide, Aiding and abetting – Direct and Public Incitement to Commit Genocide, Definition of the crime, Examination in the light of the cultural and linguistic context, Public element of the Crime, Factor consider the public nature of the incitement, Place of the Incitement, Selective or limited assistance – Murder as a Crime against Humanity – Extermination as a Crime against Humanity, Definition of the crime of extermination – Rape as a Crime against Humanity – Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II Violence to Life, Health and Physical or Mental Well-Being of Civilians as Part of an Internal Armed Conflict, Existence of a non-international armed conflict, Nexus between the alleged violation and the armed conflict, Status of the victims – Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II : Outrages Upon Personal Dignity, in particular Humiliating and Degrading Treatment, Rape and Indecent Assault, as Part of an Internal Armed Conflict – Partial Judgement of Acquittal*

*International Instruments cited :*

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[1] Indictment, paras. 6.9, 6.26, 6.30, 6.32, and 6.50.
[2] Indictment, para. 6.68.

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*Rules of Procedure and Evidence, rules 73 (A) and 98* bis*; Statute, art. 1, 2 (2), 2 (3) (a), 2 (3) (b), 3 (g), 4, 4 (a), 6 (1) and 6 (3); I.C.T.Y. Rules of Procedure and Evidence, rule 98* bis*; Geneva Conventions of 1949*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 2 September 1998 (ICTR-96-4); Trial Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Judgement, 21 May 1999 (ICTR-95-1); Trial Chamber,* The Prosecutor v. Georges Anderson Rutaganda, *Judgement and Sentence, 6 December 1999 (ICTR-96-3); Trial Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 27 January 2000 (ICTR-96-13); Trial Chamber,* The Prosecutor v. Ignace Baglishema, *Judgement, 7 June 2001 (ICTR-95-1A); Trial Chamber,* The Prosecutor v. Laurent Semanza, *Decision on the Defence Motion for a Judgement of Acquittal in respect of Laurent Semanza after Quashing the Counts Contained in the third Amended Indictment, 27 September 2001 (ICTR-97-20); Appeals Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 16 November 2001 (ICTR-96-13); Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98* bis *of the Rules of Procedure and Evidence, 20 August 2002 (ICTR-99-54); Trial Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, 25 September 2002 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Laurent Semanza, *Judgement and Sentence, 15 May 2003 (ICTR-97-20); Trial Chamber,* The Prosecutor v. Eliezer Nyitegeka, *Judgement, 16 May 2003 (ICTR-96-14); Appeals Chamber,* The Prosecutor v. Georges Rutaganda, *Judgement, 26 May 2003 (ICTR-96-3); Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Judgment and sentence, 1 December 2003 (ICTR-98-44A); Trial Chamber,* The Prosecutor v. Nahimana et al., *Judgement and Sentence, 3 December 2003 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Motion from Casmir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA, 23 January 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Motion from Casimir Bizimungu Opposing the Testimony of Witnesses AEI, GKE, GKF, and GKI, 3 February 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Judgement, 15 July 2004 (ICTR-2001-71); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004, 4 October 2004 (ICTR-99-50); Trial Chamber, T*he Prosecutor v. Casimir Bizimungu et al., *Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible, 24 November 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Defence Motions for Acquittal Under Rule 98* bis*, 16 December 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Mikaeli Muhimana, *Judgement and Sentence, 28 April 2005 (ICTR-95-1B); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee, 8 July 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et

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al., *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 98 (C)), 2 September 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Tharcisse Muvunyi, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98* bis*, 13 October 2005 (ICTR-2000-55)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dario Kordic and Mario Cerkez, *Decisions on Defence Motions for Judgment of Acquittal, 6 April 2000 (IT-95-14/2); Trial Chamber,* The Prosecutor v. Dragoljub Kunarac et al., *Decision on Motion for Acquittal, 3 July 2000 (IT-96-23 and 23/1); Appeals Chamber,* The Prosecutor v. Zejnil Delalić et al., *Judgment, 20 February 2001 (IT-96-21); Appeals Chamber,* The Prosecutor v. Goran Jelisic, *Judgment, 5 July 2001 (IT-95-10); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić, *Trial Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Dragoljub Kunarac, *Judgement, 12 June 2002 (IT-96-23 and 23/1); Appeals Chamber,* The Prosecutor v. Radislav Krstić, *Judgement, 19 April 2004 (IT-98-33); Trial Chamber,* The Prosecutor, v. Enver Hadžihasanović, *Decision on Motions for Acquittal Pursuant to Rule 98* bis *of the Rules of Procedure and Evidence, 27 September 2004 (IT-01-47)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

BEING SEIZED of :

"Motion by Casimir Bizimungu Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 17 July 2005 (the "Bizimungu Motion");

"Justin Mugenzi's Motion for Acquittal on Counts 1, 6, 8, 9 and 10 of the Indictment", filed on 14 July 2005 (the "Mugenzi Motion");

"Bicamumpaka's Motion for Acquittal", filed on 15 July 2005 (the "Bicamumpaka Motion");

"Prosper Mugiraneza's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*", filed on 18 July 2005 (the "Mugiraneza Motion");

CONSIDERING :

"Prosecutor's Response to Defence Motions for Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 4 August 2005 (the "Prosecution Response");

Prosper Mugiraneza's "Response to the Prosecutor's Reply to Prosper Mugiraneza's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis",* filed on 31 August 2005 (the "Mugiraneza Reply");

Jérôme-Clément Bicamumpaka's "Reply to Prosecutor's Response to Defence Motions for Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 18 September 2005 (the "Bicamumpaka Reply");

"*Réplique de Casimir Bizimungu en Vertu de l'Article 98* bis *du Réglement de Procédure et de Preuve*", filed on 5 October 2005, (the "Bizimungu Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 98 *bis* of the Rules;

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HEREBY decides the Motion, pursuant to Rule 73 (A) of the Rules, upon the basis of the written submissions of the Parties.

## Introduction

1. The Prosecution closed its case on 23 June 2005, after calling 57 witnesses during 177 trial days and entering 113 exhibits. The Chamber granted the Defence permission to file Rule 98 *bis* Motions up to ten days after the Chamber issued its Decision on the testimony of Expert Witness Binaifer Nowrojee[3]. All four Defence teams subsequently filed Motions for acquittal, pursuant to Rule 98 *bis* of the Rules (the "Defence Motions").

2. On 31 October 2005 the Chamber delivered an oral summary of the present Decision on the Motions submitted by the four Accused for a judgement of acquittal.

## Submissions of the Parties

3. The submissions of the Parties can be divided into four broad categories. The first addresses the scope of the Chamber's enquiry under Rule 98 *bis* of the Rules. The second, upon which only the Defence for Casimir Bizimungu requests acquittal, regards the sufficiency of the evidence in relation to paragraphs of the Indictment. The third category, upon which the Defence for Justin Mugenzi and Prosper Mugiraneza make substantial submissions, requests acquittal on the basis of alleged defects in the Indictment, resulting in failure to provide notice to the Accused of precise material facts, in respect of relevant counts, to support conviction of the charges. The fourth category, upon which all Accused request acquittal, is the sufficiency of the evidence in relation to the crimes alleged in the counts of the Indictment.

## Deliberations

(i) *Scope of the Chamber's Enquiry Under Rule 98* bis

4. The parties agree regarding the standard which the Prosecution must meet to withstand a motion for judgement of acquittal under Rule 98 *bis* of the Rules : there must be sufficient evidence upon which a reasonable trier of fact *could* find the accused guilty of the crime charged. As the Defence for Mugenzi has stated,

> "[T]he test to be applied is whether the evidence, assuming it is true, could not possibly sustain a finding of guilt beyond reasonable doubt. That will only be the case where there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief"[4].

[3] T. 23 June 2005, p. 70.

[4] Mugenzi Motion, para. 1, referring to *Bagosora et al.*, Decision on Defence Motions Pursuant to Rule 98 *bis*, 2 February 2005, paras. 6-8.

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5. Rule 98 *bis*, "Motion for Judgement of Acquittal" provides that :

> If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber … shall order the entry of judgement of acquittal in respect of those counts[5].

6. In its interpretation of the substantially identical provision of the ICTY Rules, the Appeals Chamber, in the case of *The Prosecutor v. Jelisic,* stated :

> The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond a reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond a reasonable doubt on the prosecution evidence (if accepted) but *whether it could.* At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt[6].

7. The Chamber observes that the enquiry under Rule 98 *bis* is not whether, on the evidence as it stands, a conviction *would* be entered but whether a conviction *could* be entered by a reasonable trier of fact, if the evidence is believed[7]. A decision by this Trial Chamber that there is sufficient evidence to sustain a conviction of the Accused on one or more of the counts in the Indictment is, in no sense, an indication of the view of the Chamber as to the guilt of the Accused on that count. That is not the issue at this point in the proceedings. Indeed, as the Trial Chamber in *Prosecutor v. Enver Hadzihasanovic Amir Kabura* has stated :

> A dismissal of a request for acquittal merely shows that the Chamber considers that there is in the case *some prosecution evidence* which, taken at its highest, could satisfy a Trial Chamber *i.e.* is capable of persuading a Trial Chamber of the guilt of the Accused of the charge being considered. If there is no evidence of an offence charged, or if, in what is likely to be a somewhat unusual case, the only relevant evidence when viewed as a whole is so incapable of belief that it could not properly support a conviction, even when taken at its highest for the Prosecution, a Rule 98 *bis* motion for an acquittal will succeed[8].

8. In evaluating the sufficiency of the evidence upon which a reasonable trier of fact could enter a conviction, at the end of the trial, the Chamber "is required to assume that the Prosecution's evidence is entitled to credence unless incapable of belief[9]". The Chamber considers that the purpose of a Rule 98 *bis* enquiry is not to make determinations of fact, having weighed the credibility and reliability of the evi-

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[5] Rule 98 *bis* of the Rules of Procedure and Evidence.

[6] *Jelisic*, Judgement (AC), 5 July 2001, para. 37.

[7] *Hadzihasanovic Amir Kabura,* Decision on Motions for Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence (TC), 27 September 2004, para. 13.

[8] *Hadzihasanovic Amir Kabura*, Decision on Motions for Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence (TC), 27 September 2004, para. 17.

[9] *Nahimana et al*., Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC), 25 September 2002, para. 18.

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dence. Rather, the Chamber's evaluation of credibility and reliability is to be made at the end of the trial, in light of all the evidence which has been presented[10].

(ii) *Sufficiency of Evidence in Relation to Particular Paragraphs of the Indictment*

9. The Defence for Bizimungu asserts that the evidence should be assessed not only in relation to entire counts of an indictment but also in relation to facts specified in individual paragraphs, which are not supported by sufficient evidence, which any reasonable trier of fact would believe[11]. While the Prosecution does not expressly agree with this argument, it has submitted a detailed annex describing the evidence in support of each paragraph of the Indictment challenged by the Defence.

10. Rule 98 *bis* requires the Chamber to determine only whether "the evidence is insufficient to sustain a conviction on one or more *counts* charged in the indictment" and to order a "judgement of acquittal in respect of those *counts*" (emphasis added)[12].

11. Furthermore, an examination of the evidence in relation to counts charged is particularly appropriate in the present case, where many of the paragraphs of the Indictment are interdependent and purport to show that one or more of the Accused committed the alleged crimes. If, at this stage of the proceedings, the Chamber were to rule on the sufficiency of the evidence in relation to each material fact in particular paragraphs of the Indictment, it would be engaging in a substantive evidentiary evaluation, which is not warranted by Rule 98 *bis*.

12. The enquiry pursuant to Rule 98 *bis* is simply whether the Prosecution has established sufficient evidence so that a reasonable trier of fact could find a count proven beyond a reasonable doubt, if the evidence were to be believed. The Chamber, therefore, considers it appropriate to examine the evidence in relation to counts, without also testing the sufficiency of the evidence in respect of particular paragraphs of the Indictment[13].

(iii) *Sufficiency of Evidence in Relation to Vague and Duplicitous Allegations or Other Defects in the Indictment*

13. The Defence for Prosper Mugiraneza argues that a judgement of acquittal should be granted where the Indictment fails to provide notice of the particular act

[10] *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 13 October 2005; *Nyiramasuhuko et al.*, Decision on Defence Motions for Acquittal Under Rule 98 *bis* (TC), 16 December 2004, para. 71; *Kamuhanda* , Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence (TC), 20 August 2002, para. 19; *Kordic and Cerkez*, Decision on Defence Motions for Judgement of Acquittal (TC), 6 April 2000, para. 28.

[11] Bizimungu Motion, paras. 63-92; Bizimungu Reply, paras. 111-125.

[12] Rule 98 *bis* of the Rules of Procedure and Evidence.

[13] The Chamber observes that most previous 98 *bis* Decisions issued by both this Tribunal and the ICTY have examined the evidence in relation to counts, without also testing the sufficiency of evidence in relation to each paragraph of an indictment. See *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 13 October 2005, para. 39; *Bagosora et al.,* Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 8.

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allegedly committed by the Accused constituting a crime, regardless of the nature of the evidence adduced[14]. Similarly, the Defence for Justin Mugenzi asserts that an indictment which fails to "delve into particulars"[15] is defective, particularly when the alleged offences are murder and rape, which are victim-specific crimes[16].

> "The consequences of such unacceptable vagueness at the stage where a submission under Rule 98 *bis* is being considered must be a finding that there is insufficient evidence, in respect of the relevant counts, to support convictions"[17].

In response to the Defence, the Prosecution submits that considerations of insufficiency of notice and other legal defects in an indictment lie outside the scope of Rule 98 *bis*[18].

14. In respect of this issue, the Chamber recalls the Decision in *Prosecutor v. Semanza*, in which the Trial Chamber stated that :

> [P]leas for quashing the indictment cannot be raised under Rule 98 *bis*. Whatever defects the Defence perceived in the form of the indictment, such as its claim that the charges in the indictment are vague or in contradiction to the indictment and the supporting materials, were to be raised under Rule 72 within the time limits prescribed therein[19].
>
> The scope of Rule 98 *bis* of the Rules does not mandate the Chamber to consider whether the Indictment contains legal defects or whether the Defence has received sufficient notice of charges, in respect of the relevant counts in the Indictment, to lead to an acquittal or to sustain a conviction of the charges[20]. These are matters for the Chamber to consider at the end of the proceedings, in light of all the evidence. The scope of the Chamber's enquiry, under Rule 98 *bis* of the Rules, is limited to a determination of whether "the evidence is insufficient to sustain a conviction"[21].

(iv) *Sufficiency of Evidence in Relation to the Counts of the Indictment*

15. In determining the sufficiency of the evidence, under Rule 98 *bis*, the Chamber must evaluate whether the evidence is "actually probative of the elements of the offence charged" in order to sustain a count based on that crime[22]. The Chamber, in assessing the sufficiency of the evidence, on Motions to acquit, may consider a

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[14] *Mugiraneza* Motion, paras. 12, 27.

[15] Mugenzi Motion, para. 76, citing *Kupreskic*, Judgement (AC), 23 October 2001, para. 88.

[16] Mugenzi Motion, para. 77.

[17] Mugenzi Motion, para. 78.

[18] Prosecution Response, para. 15.

[19] *Semanza*, Decision on the Defence Motion for a Judgement of Acquittal (TC), 27 September 2001, para. 18.

[20] *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 7; *Nyiramasuhuko et al.,* Decision on Defence Motions for Acquittal Under Rule 98 *bis* (TC), 16 December 2004, paras. 73-75; *Ntagerura et al.*, 13 March 2002, para. 6; *Semanza*, Decision on the Defence Motion for a Judgement of Acquittal (TC), 27 September 2001, para. 18; *Kunarac et al.,* Decision on Motion for Acquittal (TC), 3 July 2000, para. 27 (rejecting a request to consider cumulative charging as beyond the scope of the 98 *bis* enquiry).

[21] Rule 98 *bis* of the Rules.

[22] *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 13 October 2005, para. 39; *Bagosora et al.,* Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 10.

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number of elements, including circumstantial, uncorroborated, and hearsay evidence; contradictions between the witnesses' testimonies and any prior written statements; inconsistencies or implausibilities within the testimonies; and other features of the witnesses' testimonies[23]. The evidence of an expert witness may include both opinion evidence and factual evidence, as presented in documents[24]. In the following section, the Chamber will examine the sufficiency of the evidence in relation to each count in the Indictment, in light of the legal standard under Rule 98 *bis* of the Rules.

Article 6 (1) : Individual Criminal Responsibility and Article 6 (3) : Superior Responsibility

16. Articles 6 (1) and 6 (3) of the Statute set forth the elements of criminal responsibility, to be considered by the Chamber in its assessment of the sufficiency of the evidence in relation to the counts charged against the Accused.

17. Article 6 (1) of the Statute imposes individual criminal responsibility upon a person who

> "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute".
>
> Article 6 (3) provides that where an act was committed by a subordinate, the superior is not relieved of liability, if the superior knew or had reason to know that the subordinate was about to commit such acts, or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

*Chamber's Rulings Regarding Exclusion of Evidence*

18. Rulings issued on the admissibility of evidence during the course of the trial have had a substantial impact on the evidence which the Chamber may consider in relation to certain counts against certain of the Accused in the present case. The Chamber recalls these rulings : (i) the evidence of Professor Deo Mbonyinkebe will not be considered where he has expressed opinions upon ultimate issues of fact in the trial[25]; (ii) the testimony of Dr. Binaifer Nowrojee that falls outside the scope of her expertise or that is an expression of opinion on ultimate issues of fact in the trial will not be considered[26]; (iii) as against Jérôme-Clément Bicamumpaka, the evidence of Witnesses GTA and DCH about the killing of John Vuningoma will not be considered in respect of Count 6 (Murder) of the Indictment[27]; (iv) as against Prosper

[23] *Kupreskic*, Judgement (AC), 23 October 2001, para. 31; *Musema*, Judgement (AC), 16 November 2001, para. 20; *Delalic et al.*, Judgement (AC), 20 February 2001, paras. 485; *Kajelijeli*, Judgement (TC), 1 December 2003, paras. 39-40; *Rutaganda*, Judgement (AC), 26 May 2003, paras. 34-35; *Akayesu*, Judgement (TC), 2 September 1998, paras. 142-143; *Bagosora et al.,* Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 10.

[24] *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 10.

[25] *Bizimungu et al.*, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 98 (C)), 2 September 2005.

[26] *Bizimungu et al.,* Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee, 8 July 2005.

[27] *Bizimungu et al.*, Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible, 24 November 2004.

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Mugiraneza, the evidence of Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ, GTE, GKP, and LY relating to acts of the Accused in Kibungo or Cyangugu *Préfectures* will be considered only in respect of Count 1 (Conspiracy to Commit Genocide) and Count 3 (Complicity to Commit Genocide) of the Indictment[28]; (v) as against Casimir Bizimungu, the evidence of Witnesses AEI, GKE, GKF, GKI, GKB, GAP, GKC, GKD and GFA will not be considered in relation to acts of the Accused in Ruhengeri *Préfecture*[29].

*Count 1 :*
*Conspiracy to Commit Genocide*

(i) *Introduction*

19. Count 1 of the Indictment charges all four Accused with the crime of conspiracy to commit genocide on the basis of both direct individual criminal responsibility, under Article 6 (1) of the Statute, and for imputed criminal responsibility, under Article 6 (3) of the Statute. The Indictment alleges that the Accused conspired together and with others to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group, and thereby committed conspiracy to commit genocide. All of the Accused seek acquittal on the Count of Conspiracy to Commit Genocide under Article 6 (1) of the Statute. Casimir Bizimungu and Jérôme-Clément Bicamumpaka also seek acquittal under Article 6 (3) of the Statute.

20. The relevant time period identified in the Indictment is between late 1990 an July 1994[30]. The Tribunal's jurisdiction is limited to crimes committed during 1994[31]. However, the Chamber notes that conspiracy is a crime of a continuing nature[32]. For this reason, evidence of acts occurring prior to 1994 may be relied upon as evidence of crimes committed during the period between 1 January 1994 and 31 December 1994.

21. Count 1 of the Indictment alleges that the Accused persons "conspired together and with others …". The paragraphs of the Indictment which relate to the count of conspiracy name a number of co-conspirators. They are, first, in relation to each Accused, the three remaining co-Accused, and, second, the following persons : André

[28] *Bizimungu et al.*, Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004, 4 October 2004.

[29] *Bizimungu et al.*, Decision on Motion from Casimir Bizimungu Opposing the Testimony of Witnesses AEI, GKE, GKF, and GKI, 3 February 2004; Decision on Motion from Casmir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA, 23 January 2004.

[30] Indictment, para. 5.1.

[31] Statute, Article 1.

[32] *Nahimana et al.*, Judgement (TC), 3 December 2003, paras. 100-104, 1044.

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Ntagerura[33], Pauline Nyiramasuhuko[34], Eliézer Niyitegeka[35], Théoneste Bagosora[36], Édouard Karemera[37], André Rwamakuba[38], Mathieu Ngirumpatse[39], Joseph Nzirorera,[40] Juvénal Kajelijeli[41]. In those paragraphs which allege the Accused persons' commission of the crime of conspiracy, additional references are made to Prime Minister Jean Kambanda[42], Callixte Nzabonimana[43], Arsène Shalom Ntahobali[44], President Sindikubwabo[45], Tharcisse Renzaho[46], Félicien Kabuga[47], and Anatole Nsengiyumva[48]. It should also be noted that, while the Prosecution has named a number of alleged co-conspirators, the count itself uses the term "and others", as do a number

[33] Indictment, paras. 5.1, 6.9, 6.18, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.23, 6.26, 6.30, 6.31, 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.68.

[34] Indictment, paras. 5.1, 5.14, 6.9, 6.18, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.23, 6.24, 6.26, 6.30, 6.31, 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.68.

[35] Indictment, paras. 5.1, 6.9, 6.18, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.26, 6.30, 6.31, 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.68.

[36] Indictment, paras. 5.1, 6.5, 6.8, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.46 (refers to "the Interim Government"), 6.66 (refers to "members of the Interim Government, political leaders"), 6.68.

[37] Indictment, paras. 5.1, 6.8, 6.9, 6.14, 6.18, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.26, 6.30, 6.31, 6.34, 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.67, 6.68.

[38] Indictment, paras. 5.1, 6.9, 6.14, 6.18, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.26, 6.30, 6.31, 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.67, 6.68.

[39] Indictment, paras. 5.1, 6.8, 6.14, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.34, 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.67, 6.68.

[40] Indictment, paras. 5.1, 5.14, 6.8, 6.14, 6.17, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.67, 6.68.

[41] Indictment, paras. 5.1, 6.14, 6.19 (refers to "participation of all the Government ministers"), 6.21 (refers to "the Interim Government"), 6.22 (refers to "the Government" and "the Ministers"), 6.46 (refers to "the Interim Government"), 6.64, 6.66 (refers to "members of the Interim Government, political leaders"), 6.67, 6.68.

[42] Indictment, paras. 6.9, 6.26, 6.30, 6.32, and 6.50.

[43] Indictment, para. 6.23.

[44] Indictment, para. 6.24.

[45] Indictment, para. 6.44.

[46] Indictment, para. 6.68.

[47] Indictment, para. 6.34.

[48] Indictment, para. 6.34.

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of the relevant paragraphs of the Indictment[49]. Neither the count nor the paragraphs in the Indictment, therefore, name exhaustively, the alleged co-conspirators.

22. Conspiracy to commit genocide is punishable under Article 2 (3) (b) of the Statute. Genocide is defined in Article 2 (2) of the Statute as :

> [a]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :
>
> Killing members of the group;
>
> Causing serious bodily or mental harm to members of the group;
>
> Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> Imposing measures intended to prevent births within the group;
>
> Forcibly transferring children of the group to another group.

23. Conspiracy is constituted when two or more persons agree on a common objective, the objective being a criminal act[50]. The *actus reus* of conspiracy to commit genocide is the act of entering into an agreement, the common object of which is to commit genocide; the *mens rea* is the intent to enter into such an agreement. Neither the *actus reus* nor the *mens rea* exists unless the perpetrator has, in common with his or her co-conspirators, the requisite specific intent of the crime of genocide[51]. Intent may be proved by what the perpetrator said or, as with any crime, by drawing inferences from conduct which may show intent[52]. The offence is complete upon the agreement itself : the criminal object of the agreement need not be achieved. The agreement can be inferred from conduct[53]. However, conspiracy cannot be committed by omission[54]. Circumstantial evidence may be relied upon to prove the existence of the agreement[55], for example, where evidence of coordinated action, by the Accused persons, in pursuit of the unlawful act, points irresistibly to an inference of an agreement to commit genocide[56].

24. The Chamber's task, therefore, on the basis of the legal principles concerning proof of conspiracy, as well as on the jurisprudence relating to Article 98 *bis* of the Statute discussed in paragraphs 3-7 above, is to determine whether there is evidence

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[49] For example, while paragraph 5.1 names a number of alleged co-conspirators, it states that the co-Accused conspired amongst themselves "*and with others, notably* ..." (emphasis added).

[50] *Bagosora et al.,* Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 12, referring to *Musema,* Judgement (TC), 27 January 2000, para. 190.

[51] *Bagosora et al.,* Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 12, referring to *Musema,* Judgement (TC), 27 January 2000, para. 192, "[W]ith respect to the *mens rea* of the crime to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is, to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such". See also *Niyitegeka*, Judgement (TC), 16 May 2003, para. 423.

[52] *Bagosora et al.,* Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 12, referring to *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 454.

[53] *Nahimana et al.,* Judgement, 3 December 2003, para. 1045.

[54] *Musema,* Judgement (TC), 27 January 2000, para. 198.

[55] *Niyitegeka*, Judgement (TC), 16 May 2003, paras. 427-428, as cited by *Nahimana et al.*, Judgement, 3 December 2003, para. 1046.

[56] *Bagosora et al.,* Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 12, referring to *Nahimana et al.,* Judgement (TC), 3 December 2003, paras. 1046-1049.

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upon which a reasonable trier of fact could find that a conspiracy to commit genocide was formed amongst the Accused persons, the co-conspirators named in the Indictment, and others.

(ii) *Legal Issues*

Conspiracy and Genocide

25. The Defence teams for Casimir Bizimungu, Justin Mugenzi, and Jérôme-Clément Bicamumpaka all raise similar arguments relating to the preclusion of simultaneous findings of guilt on the crimes of genocide and conspiracy to commit genocide. They submit that a conspiracy itself precedes the execution of that conspiracy. As such, in its proof of the existence of a conspiracy, the Prosecution should be precluded from relying upon evidence concerning the execution of a conspiracy as evidence of that conspiracy's existence. In the context of this case, the Defence argues that the Prosecution should be limited to alleging facts demonstrating a conspiracy prior to the shooting down of President Habyarimana's plane, since evidence of events after 7 April 1994 is evidence of the crime of genocide and not of the crime of conspiracy to commit genocide. In support of this argument, the Defence for Justin Mugenzi and the Defence for Jérôme-Clément Bicamumpaka rely upon the authority of *Prosecutor v. Musema*[57].

26. The Chamber does not share the Defence views on this issue. While an Accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same facts, *Prosecutor v. Musema* concerns ultimate determinations, at judgement stage, by the trier of fact – not a determination as to the sufficiency of evidence, under Rule 98 *bis*. Furthermore, the Defence argument regarding the alleged separation of the conspiracy into a planning phase, prior to 7 April 1994, and a commission phase, after 7 April 1994, fails to take into account the continuing nature of the offence, which may culminate in the commission of the act(s) contemplated by the conspiracy[58]. Accordingly, the Chamber is of the view that the Defence submission that evidence in respect of conspiracy to commit genocide should be compartmentalized into events that occurred either prior to or after 7 April 1994 is artificial. The time period covered by Count 1 is clearly articulated in the body of paragraph 5.1 of the Indictment : from late 1990 to July 1994.

27. While the date 7 April 1994 is indeed significant in this case, the Chamber does not agree that evidence concerning matters after that date should be considered in relation only to the crime of genocide. The Chamber is in no way precluded from considering evidence relating to events which occurred after 7 April 1994, which may show a meeting of the minds of the co-Accused and their co-conspirators, upon which an agreement to commit genocide could be inferred and the requisite intent established[59].

[57] *Musema*, Judgement (TC), 27 January 2000, paras. 186, 191, 193, and 198

[58] *Nahimana et al.*, Judgement (TC), 3 December 2003, para. 1044.

[59] For example, how massacres were carried out, whether massacres were coordinated, the presence of Accused persons and/or their alleged co-conspirators at such massacres, meetings held after 7 April 1994 involving the co-Accused and/ or their alleged co-conspirators and what is alleged to have been said at such meetings, the alleged movement of the co-Accused and their alleged co-conspirators throughout the Rwandan territory during the relevant period and how such movement might coincide with the commencement or augmentation in the killing of Tutsi civilians.

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Whether that evidence is identical to the evidence relied upon in relation to the crime of genocide is a matter which will be relevant at judgement stage. At this stage of the proceedings, the Chamber is being asked to decide whether there is sufficient evidence on which a reasonable trier of fact could convict the Accused of the counts in the Indictment. The Chamber, under Rule 98 *bis*, is not required to elect which count, if any, may ultimately be the most appropriate one upon which to enter a conviction.

(iii) *Enumeration of Co-conspirators*

28. In its Reply, the Defence for Prosper Mugiraneza makes an additional argument with respect to the count of conspiracy. The Defence submits that, in the course of the Prosecution case and in its Response, an entirely different conspiracy to that alleged in the Indictment has unfolded before the Chamber. Whereas only three of the co-conspirators relied upon by the Prosecution are referred to the Indictment[60], the Prosecution, in the course of its case, has alleged that Prosper Mugiraneza was involved in a conspiracy with a number of other persons, and has relied upon the evidence of this other alleged conspiracy in its Response[61]. The Defence also submits that the phrase "and others" used in the Indictment is not sufficient to define the alleged co-conspirators or to give the Accused notice of his alleged co-conspirators. In addition to the notice issue, the Defence argues that the conspiracy alleged in the Indictment must be the conspiracy proved at trial, and not another conspiracy. Evidence which may show that the Accused was in a conspiracy with persons who are not named in the Indictment is not sufficient to demonstrate that the Accused was a member of the conspiracy pled in the Indictment. The Defence asserts that, since there is no evidence of the Accused being in a conspiracy with the three persons named in the Indictment, the evidence adduced is insufficient and, as a matter of law, the Chamber must acquit the Accused on the count of conspiracy.

29. The Chamber does not accept this submission by the Mugiraneza Defence. The question before the Chamber is whether, upon the basis of the allegations in the Indictment and the evidence presented, a reasonable trier of fact could find the Accused guilty of the crime alleged. Therefore, the Chamber must decide whether a reasonable trier of fact could find that the Accused, Prosper Mugiraneza, entered into a conspiracy to commit genocide with the persons named in the Indictment – notably, his three co-Accused and the numerous other individuals named in the Indictment. Furthermore, the Prosecution's presentation of evidence of Prosper Mugiraneza's alleged involvement, during the relevant period, with other persons not named in the Indictment does not offend any legal principle. First, the Indictment alleges that the Accused conspired with certain named individuals "and others". In the Chamber's view, it may not be possible for the Prosecution to name every single individual with whom an accused person is alleged to have conspired. Second, the Defence has received notice of the evidence to be presented by the Prosecution witnesses, and therefore, has been on notice of what such witnesses might say concerning any connection between these individuals and Prosper Mugiraneza. Third, the evidence con-

[60] Namely, Prime Minister Kambanda, President Sindikubwabo, and Edouard Karemera.

[61] Namely, Colonel Rwagafilita, Augustine Munyaneza, Muliro and Rwatoro, Emmanuel Mugiraneza, Nchnguyinka, and Emmanuel Kabagame Rwagasore.

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cerning the Accused's connections with certain individuals does not mean that such evidence falls into the category of particulars not pleaded in the Indictment.

(iv) *Submissions on the Evidence*

Defence Motions

30. All the co-Accused submit that the Prosecution has failed to adduce sufficient evidence to prove the existence of a conspiracy between the persons named in the Indictment or the involvement of each co-Accused in a conspiracy, if one is found to exist. All the co-Accused also submit that they cannot be found guilty merely on the basis of their positions as Ministers of the Interim Government, which, they submit, is the basis of the Prosecution case.

31. The Defence for Casimir Bizimungu argues that conspiracy cannot be committed by omission, that the Accused must have actively participated in the alleged conspiracy, and that there is no such evidence against the Accused in this respect. The Defence for Justin Mugenzi asserts that the case against the Accused is *consistent with* rather than *probative of* a conspiracy to commit genocide. The Defence for Jérôme-Clément Bicamumpaka submits that the Prosecution is "proceeding backwards", assuming that the events of 1994 could have resulted only from a prior conspiracy. The Defence for both Jérôme-Clément Bicamumpaka and Casimir Bizimungu submit that mere presence is not sufficient to show that a person has entered into a conspiracy.

Prosecution Response

32. The Prosecution, in its Response, enumerates evidence against each of the four Accused upon which, it submits, a reasonable trier of fact could find each of them guilty of the crime of conspiracy to commit genocide[62].

Defence Replies

33. The Defence for Casimir Bizimungu, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza challenge several of the evidentiary summaries relied upon by the Prosecution in its Response[63]. Furthermore, the Defence for Casimir Bizimungu submits that, on the basis of Decisions rendered on 23 January 2004 and 3 February 2004, the Chamber may not rely, in respect of Count 1 of the Indictment, upon any evidence against Casimir Bizimungu regarding his activities in Ruhengeri *Préfecture*.

[62] The case against Casimir Bizimungu is presented in paragraphs 81-92 of the Prosecution Response; the case against Justin Mugenzi is presented in paragraphs 29-39 of the Prosecution Response; the case against Jérôme-Clément Bicamumpaka is presented in paragraphs 93-107 of the Prosecution Response; and the case against Prosper Mugiraneza is presented in paragraphs 108-120 of the Prosecution Response.

[63] Casimir Bizimungu, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza each filed a Reply to the Prosecution Response.

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(v) *Deliberations on the Evidence*

34. On the basis of the reasoning in paragraphs 25 and 26 above, it follows that the Chamber may consider all of the evidence before it pertaining to the count of conspiracy and is not limited to a consideration of evidence concerning events that occurred prior to 7 April 1994.

35. The Chamber must determine whether there is sufficient evidence upon which a reasonable trier of fact could find that a conspiracy to commit genocide was formed amongst the Accused persons, the co-conspirators named in the Indictment, and others, during the relevant period, and that they each had the requisite intent to commit genocide. The evidence is not based on direct observation of the Accused entering into an agreement with one another. Rather, the evidence concerns the words and conduct of the Accused, sometimes in the presence of one another and/or their alleged co-conspirators, which is said to be indicative of the existence of the alleged agreement. Furthermore, the manner in which events unfolded, following the shooting down of the President's plane, including the behaviour of the Accused, may be indicative of the existence of a conspiracy and of concerted planning prior to that date.

36. In its analysis, the Chamber has considered evidence including, but not limited to :

(1) Evidence concerning the alleged political affiliations of the co-Accused and the alleged institutional ethnic discrimination within those political parties at the relevant time and/or those parties' alleged involvement with the *Interahamwe*[64];

(2) Evidence concerning methods of organization and co-ordination during the period of late 1990 to July 1994 which may be evidence of pre-planning :

Meetings allegedly involving all of the co-Accused, or involving one or more co-Accused, sometimes in the presence of other alleged co-conspirators (timing, content, participation, location)[65];

[64] See Witness GTC, who testified that, as of 1993, the PL power faction was comprised only of Hutu members and that Justin Mugenzi was the leader of the PL (T. 1 March 2005, pp. 18-22). See also Witness GJQ, who testified that Prosper Mugiraneza participated, from September 1993 until 1994, in the recruitment of *Interahamwe* (T. 10 March 2005, pp. 35-41, 47-48). See also Witness GJW, who testified that Prosper Mugiraneza, a prominent a member of the MRND party, was in charge of party activities in Kigungo. (T. 22 March 2004, pp. 36-41, 52).

[65] See Witness Fidèle Uwizeye, who testified about two meetings at which all of the four co-Accused, as well as certain alleged co-conspirators, were present. According to the witness, Tutsi civilians and local administrators were killed subsequent to those meetings (T. 6 April 2005, pp. 52-53, 56; T. 7 April 2005 pp. 61-67). See also Witness UL, who testified about a meeting where the Accused Casimir Bizimungu told workers to get rid of corpses in the city of Kigali before white people took pictures of them (T. 2 March 2004, pp. 18-20). See also Witness GT, who testified about a meeting involving Casimir Bizimungu, Colonel Bagosora, and other military personalities, in Gisenyi *Préfecture* in May 1994 (T. 2 March 2005, pp. 1-13). See also Witness GMJ-G, who testified that, in July or August 1993, at a meeting in Nyanza, Justin Mugenzi said that Hutu should join forces and fight the common enemy, meaning the Tutsi and all Hutu who refused to fight the Tutsi (T. 5 March 2004, p. 31). See also Witness Harriet Sebera, who testified about the content of President Sindikubwabo's speech broadcast at the official installation ceremony of the new *préfet* of Butare, on 19 April 1994. (T. 20 October 2004, pp. 42-45). See also Witness D, who testified that, on 19 April 1994, following the President's speech at the installation ceremony, killings of Tutsi began in Butare (T. 15 June 2004, pp. 33, 40-41). See also Witness Isaie Sagahutu Murashi, who testified about Justin Mugenzi's speech delivered at the Palm Beach Hotel in Gisenyi on 20 April 1994 (T. 9 June 2004,

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Use of Government resources, roadblocks, military training[66], and distribution of arms[67];

Evidence concerning the movement of the Interim Government Ministers[68] within the territory of Rwanda, sometimes in the presence of alleged co-conspirators, during the relevant period, to their home *préfectures,* and how these movements coincide with the commencement or augmentation of violence against Tutsi civilians;

Expert evidence concerning organization.

(3) Evidence concerning the Accused persons'[69] and/or alleged co-conspirators' involvement in, or oversight of, massacres, killings and other acts of genocide[70] and the timing of such alleged involvement[71].

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p. 50). See Witness GHV, who testified that, in April 1994, sometime during the week following President Habyarimana's death, Jérôme-Clément Bicamumpaka spoke at a meeting, urging every Hutu to fight the enemy *Inyenzi*. (T. 4 March 2004 pp. 31-35; T. 5 March 2004 pp. 1-2). See also Witness GHY, who testified that, on the evening of 6 April 1994, following the downing of President Habyarimana's plane, Jérôme-Clément Bicamumpaka participated in a meeting at the home of the *Interahamwe* treasurer in Kabuga town (T. 29 September 2004 pp. 3, 5-6). See Witness GTA, who testified that, following a meeting held around 14 or 15 April 1994, at the MRND party hall in Cyangugu *Préfecture* in which Jérôme-Clément Bicamumpaka participated, mass killings of Tutsi occurred in the area (T. 9 March 2004, pp. 12, 14-15). See also Witness GJU, who testified about night meetings held at Prosper Mugiraneza's house or at Rwagafilita's house, to which only Hutu were invited, to prepare lists for military recruitment (T. 18 October 2004, pp. 15-17). See also Witness GTF, who testified about activities associated with a MRND political rally held in 1993, attended by Prosper Mugiraneza, Colonel Rwagafilita and Minister Karemera (T. 14 October 2004, pp. 12-15).

[66] See Witness QU, who testified that Casimir Bizimungu authorized the use of official Ministry of Health vehicles and fuel for *Interahamwe* "missions to kill" (T. 17 March 2004, pp. 5-7). See also Witness UL, an employee of the Ministry of Public Works, who testified that he dug graves and buried dead bodies in Kigali (between 11 and 22 April) and Butare (after 22 April) and that he excavated bodies at the *Centre Hopitalier de Kigali,* where there were many cadavers. (T. 2 March 2004, pp. 28, 37-42; T. 3 March 2004, pp. 37, 41).

[67] See Witness Fidèle Uwizeye, who testified that roadblocks were erected to stop fleeing Tutsi and that Tutsi were hunted down and killed. The witness also testified that, following the meeting of 18 April 1994, roadblocks were constructed in Gitarama and in the hills surrounding the Government seat, where Tutsi and their accomplices were killed (T. 6 April 2005, pp. 55, 58; T. 8 April 2005, p. 43).

[68] See Witness GT concerning Casimir Bizimungu's alleged involvement in the distribution of arms (T. 2 March 2005, pp. 1-17). See Witness GHU (T. 4 March 2004, pp. 6-9), Witness GHY (T. 29 September 2004 pp. 3, 5-6), and Witness GHT (T. 29 September 2004, pp. 3, 69) concerning Jérôme-Clément Bicamumpaka's alleged involvement in the distribution of arms. See Witness GJU concerning Prosper Mugiraneza's alleged involvement in military training of youth (T. 18 October 2004, pp. 15-18). See Witness GJT concerning Prosper Mugiraneza's alleged involvement in the distribution of weapons (T. 11 March 2004, pp. 24-25).

[69] See Professor Deo Mbonyinkebe's Expert Report (Prosecution Exhibit p. 95); Witness Dr. Alison Des Forges (T. 31 May 2005, pp. 45-58, 67-78, 82-86).

[70] See Witness D, who testified to being told by Prime Minister Kambanda that Ministers were sometimes sent to their home *préfectures* to incite the population to kill and that the *préfets* provided the Government with a progress report each morning on the killings in their respective regions. (T. 15 June 2004, p. 48).

[71] See Witness QU concerning Casimir Bizimungu's alleged involvement in genocide (T. 17 March 2004, pp. 27-28). See also Witness LEL concerning Justin Mugenzi's alleged involve-

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37. With respect to Article 6 (3) responsibility, there is no evidence that any persons, over whom the Accused exercised superior responsibility, joined or participated in the alleged conspiracy to commit genocide. Therefore, the Chamber finds, with respect to Article 6 (3), that there is insufficient evidence upon which a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of each of the co-Accused, on the basis of Article 6 (3) responsibility, and, as such, enters an acquittal with respect to that form of liability for all of the four Accused.

38. However, on the basis of the evidence presented above, the Chamber finds that there is sufficient evidence upon the basis of which, if believed, a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of each Accused under Article 6 (1) of the Statute.

*Count 2 : Genocide*

39. The Accused Prosper Mugiraneza and Jérôme-Clément Bicamumpaka request acquittal on Count 2 of the Indictment, charging Genocide, pursuant to Article 2 (3) (a) of the Statute, for alleged responsibility in killing or causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy it in whole or in part. The Defence for Mugiraneza challenges the sufficiency of the evidence concerning the Accused's responsibility as an individual and as a superior for alleged crimes of genocide, under both Articles 6 (1) and 6 (3) of the Statute[72]. The Defence for Bicamumpaka challenges the sufficiency of the evidence with regard to the Accused's alleged superior responsibility for the commission of the offences, under Article 6 (3) of the Statute.

40. The Chamber recalls the material acts of genocide discussed in paragraph 22 above :

Killing members of the group;

Causing serious bodily or mental harm to members of the group;

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Imposing measures intended to prevent births within the group;

Forcibly transferring children of the group to another group.

41. The evidence related to Prosper Mugiraneza's alleged individual commission of genocide will be evaluated in respect of the elements of Article 6 (1) of the Statute. An examination of the evidence in relation to the alleged superior responsibility of both Prosper Mugiraneza and Jérôme-Clément Bicamumpaka will be made in light of the elements of Article 6 (3) of the Statute.

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ment in genocide (T. 16 February 2004, pp. 25-27, 29). See also Witness GAP (T. 20 January 2004, pp. 19-20), Witness GHR (T. 18 March 2004, pp. 53-54; 19 March 2004, pp. 4-5), and Witness GHY (T. 29 September 2004 pp. 3, 6-9, 34, 36-37) concerning Jérôme-Clément Bicamumpaka's alleged involvement in genocide. See also Witness GJR (T. 19 June 2004, p. 28) and Witness Fidèle Uwizeye (T. 6 April 2005, pp. 48, 51) concerning Prosper Mugiraneza's alleged involvement in genocide.

[72] Mugiraneza Motion, paras. 74-83.

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*Prosper Mugiraneza : Sufficiency of Evidence Under Articles 6 (1) and 6 (3) of the Statute*

42. Preliminary to its consideration of the sufficiency of the evidence, the Chamber notes that, pursuant to its Decision of 4 October 2004, the testimonies of Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ, GTE, GKP, and LY have not been considered in relation to Mugiraneza's alleged crimes of genocide occurring in the *Préfectures* of Kibungo and Cyangugu[73].

43. There is evidence, other than that provided by excluded witness testimonies, referred to in paragraph 42 above, that Prosper Mugiraneza participated in acts of genocide in Gitarama *Préfecture*, by providing support and encouragement to *Interahamwe* to engage in genocide[74]. Witness Fidèle Uwizeye, *Préfet* of Gitarama, testified to seeing the Accused at a meeting of *Préfets* in Kigali on 11 April 1994. At this meeting a programme was "read out" for avenging the death of President Habyarimana[75], and a roadblock strategy explained "to fight the *Inkotanyi* or to fight the Tutsis"[76]. The day following this meeting, 12 April 1994, the Interim Government moved its headquarters from Kigali to Murambi, in Gitarama *Préfecture*. Shortly thereafter, the witness saw Prosper Mugiraneza, and other Interim Government Ministers, at Kamonyi Parish Secondary School, in Gitarama *Préfecture,* in the midst of a large attack by armed *Interahamwe*[77].

44. Evidence also exists to support the Prosecution allegation that the Accused, a Government Minister and a leader in the MRND Party, participated in formulating the policy of the Interim Government and that he was aware of and involved in planning and perpetrating the genocide[78]. According to Fidèle Uwizeye, *Préfet* of Gitarama in April 1994, many local leaders, including *bourgmestres*, became instrumentalities used by the Accused and others in the Interim Government to mobilize the population to carry out the genocide[79].

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[73] *Bizimungu et al.*, Decision: Reconsideration of the Trial Chamber's Decision of 5 February 2004, Pursuant to the Appeals Chamber's Decision of 15 July 2004, 4 October 2004, para. 35.

[74] T. 6 April 2005, pp. 48-51; T. 7 April 2005, pp. 60-62, 66-67.

[75] T. 7 April 2005, p. 60.

[76] T. 7 April 2005, p. 66.

[77] T. 7 April 2005, pp. 48-51. Fidèle Uwizeye testified that, after the Interim Government moved its headquarters from Kigali to Murambi, in Gitarama *Préfecture*, on 12 April 1994, an attack by *Interahamwe* occurred at Kamonyi Parish Secondary School. The Mother Superior of the school, Mama Francine, sought out the witness, who was the *préfet*, for assistance, "reporting that "*Interahamwe* had attacked the school". Upon his arrival at the site, the witness saw assailants with "guns – down the hill, near the school, in a place called Rwabashashya". The witness testified that "some of the ministers present here [in court] were there on that spot. They insulted me. I had no escort; I was driving myself, and I left this locality as a dog". The witness further testified, "Minister Prosper Mugiraneza was present, and he was with a Minister called Callixte" (T. 6 April 2005, pp. 48, 51).

[78] Witness Fidèle Uwizeye testified that the "senior leaders in the country" headquartered at Murambi "discredited the local leadership in Gitarama and brought about an atmosphere of looting, of killing and … set up the roadblocks in Gitarama". According to the witness, "Their main purpose was to organise the killing of people" (T. 6 April 2005, p. 51).

[79] Witness Fidèle Uwizeye testified about a meeting, held on 18 April 1994, at which Ministers Prosper Mugiraneza and Justin Mugenzi, as well as national and local leaders, including

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45. To establish an individual's liability for genocide, it is necessary to adduce evidence not only of the commission of one or more of the material genocidal crimes, as enumerated in Article 2 (2) of the Statute, but to establish evidence of an individual's specific intent to commit genocide. According to the jurisprudence of this Tribunal,

> "[T]he specific intent for genocide requires that the perpetrator target his victims because of their membership in a protected group, with the intent to destroy at least a substantial part of that group"[80].

46. In the absence of overt statements, an individual's intent to commit genocide may be inferred from the surrounding facts and circumstances, particularly the conduct of the individual. In *Jelisic*, the ICTY Appeals Chamber stated thus :

> As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive acts[81].

47. In view of the established jurisprudence cited above, the Chamber disagrees with the Defence assertion that genocidal intent cannot be inferred from "the fact that a perpetrator participates in the context of a wave of killings"[82].

48. Accordingly, on the basis of the evidence concerning the Accused's commission of crimes of genocide, along with all reasonable possible inferences from such commission, the Chamber is of the view that there is evidence which, if believed, could lead a reasonable trier of fact to conclude that Prosper Mugiraneza supported and encouraged acts of genocide against the Tutsi. Whether the Accused's support and encouragement, assuming that the evidence is believed, constitutes individual responsibility, under Article 6 (1) of the Statute, or superior responsibility, under Article 6 (3) of the Statute, is a question of fact and law to be determined after full arguments by the parties at the end of the proceedings. Accordingly, the Chamber denies Prosper Mugiraneza's Motion for a judgement of acquittal on Count 2, under both Articles 6 (1) and 6 (3) of the Statute.

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*bourgmestres* from Gitaramara *Préfecture* were present. At this meeting the Government's guidelines for the "civil defence" system were put in place, and it was suggested that anyone who did not support the Government policy should be removed from office (T. 6 April 2005, pp. 53, 56). The witness stated, "That's why after the 18th of April, the killings intensified and reached all the corners of the *préfecture*" (T. 6 April 2005, p. 63). The witness also testified that this meeting was a "turning point" in Gitarama *Préfecture*, following which many *bourgmestres* "changed and became – joined those who were doing the bad acts, the crimes" (T. 6 April 2005, p. 63).

[80] *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 454, citing *Krstic*, Judgement (AC), 19 April 2004, para. 12. ("The intent requirement of genocide under Article 4 of the [ICTY] statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group".).

[81] *Jelisic*, Judgement (AC), 5 July 2001, para. 47.

[82] *Mugiraneza* Motion, para. 78.

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*Jérôme-Clément Bicamumpaka : Sufficiency of Evidence Under Article 6 (3) of the Statute*

49. There is evidence concerning Jérôme-Clément Bicamumpaka's responsibility as a superior for acts of genocide committed in Rwanda in 1994. Indeed there is direct evidence of the Accused's effective control over local leaders, *Interahamwe*, and youth-wingers known as *JDR-Inkuba*, whom he encouraged, through his words, his presence, and the distribution of weapons, to engage in genocide[83]. There is evidence that, as a Minister in the Interim Government, the Accused exercised influence over local authorities. There is evidence that Jérôme-Clément Bicamumpaka knew or had reason to know of crimes of genocide committed by local leaders and members of the *Interahamwe* and that he failed to take the necessary and reasonable measures to prevent such crimes or to punish the perpetrators thereof[84]. Accordingly, the Chamber is satisfied that there is evidence which, if believed, could lead a reasonable trier of fact to conclude that the Accused is criminally responsible as a superior for genocidal killings, and denies the Defence Motion for acquittal of Count 2, under Article 6 (3) of the Statute.

*Count 3 : Complicity in Genocide*

50. Two Accused, Prosper Mugiraneza and Jérôme-Clément Bicamumpaka, request acquittal on Count 3 of the Indictment, Complicity in Genocide, pursuant to Article 2 (3) (e) of the Statute. Prosper Mugiraneza requests acquittal of the count under both Articles 6 (1) and 6 (3) of the Statute. Jérôme-Clément Bicamumpaka requests acquittal for responsibility as a superior, under Article 6 (3) of the Statute.

51. From a review of the jurisprudence of this Tribunal, the Chamber is of the view that complicity to commit genocide refers to

> "all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide"[85].

Thus, a finding of aiding and abetting genocide could also sustain a conviction for complicity in genocide[86]. The Chamber, therefore, considers that the same evidence

[83] Witness GHV testified that, during the second week of April 1994, the Accused addressed "the leaders, the people in power, the youth-wingers known as *JDR-Inkuba*" at a meeting, where the Accused explained to the audience that "all Hutu must be vigilant and fight the enemy … it was obvious he was calling upon Hutu to kill Tutsi" (T. 5 March 2004, pp. 2-3, 9). Witness GHT testified that, on 9 April 1994, she saw the Accused arrive at Sebisogo's house, at approximately 3.30 in the afternoon. According to the witness, the Accused came in a white pick-up with yellow Government plates, accompanied by another vehicle, which was loaded with weapons, including grenades, guns, small axes, clubs, and long screwdrivers. Shortly after the Accused entered Sebisogo's compound, the witness saw many *Interahamwe* who off-loaded the contents from the vehicle. The following day massacres were carried out in her area (T. 29 September 2004, pp. 3, 69).

[84] Witness Fidèle Uwizeye testified that the members of the Interim Government, while at Murambi, organized the killings in Gitarama *Préfecture* (T. 6 April 2005, p. 51). According to Witness GHV, "Bicamumpaka and company" went around all regions organizing meetings to incite the population to kill Tutsi (T. 5 March 2004, pp. 2-3, 9).

[85] *Semanza*, Judgement (TC), 15 May 2003, para. 395.

[86] *Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 21.

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discussed in the preceding two sections, if believed, is also relevant to the two Accused in relation to Count 3, Complicity in Genocide.

*Prosper Mugiraneza : Sufficiency of Evidence Under Articles 6 (1) and 6 (3) of the Statute*

52. The evidence concerning Prosper Mugiraneza on Count 3 of the Indictment includes the testimonies of witnesses about events that occurred in Kibungo and Cyangugu *Préfecture*s, which was excluded in respect of Count 2, Genocide[87]. However, in regard to the present count, the testimonies of these witnesses may be considered as evidence of the Accused's alleged acts of support and encouragement of *Interahamwe* and local authorities to participate in genocide[88].

53. Indeed an examination of the testimonies of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJU, GJX, and GTE indicates further evidence that Prosper Mugiraneza recruited membership for the *Interahamwe* and that he was involved in the training and distribution of weapons to the *Interahamwe*[89]. There is also evidence that the Accused exercised control over members of the *Interahamwe*, that he knew about the genocidal killings throughout Rwanda, and that he did nothing to prevent or punish these crimes[90]. Accordingly, at this stage of the proceedings, the Chamber is satisfied that sufficient evidence exists, if believed, to sustain a conviction of the Accused pursuant to his responsibility under Articles 6 (1) and 6 (3) of the Statute on the Count of Complicity in Genocide.

*Jérôme-Clément Bicamumpaka : Sufficiency of Evidence Under Article 6 (3) of the Statute*

54. The Chamber is of the view that the same evidence discussed in relation to Count 2, if believed, could be sufficient for a reasonable trier of fact to find Jérôme-Clément Bicamumpaka guilty, under Article 6 (3) of the Statute, of Complicity in Genocide.

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[87] *Bizimungu et al.*, Decision: Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004, 4 October 2004, para. 35.

[88] Witness GJQ testified that Mugiraneza not only participated in the planning and had knowledge of massacres of Tutsi civilians but supplied the *Interahamwe* with weapons, which they used against Tutsi (T. 14 March 2005, pp. 9, 16).

[89] Witness GJU testified that Prosper Mugiraneza and Celestin Rwagafilita invited grass-roots leaders to compile lists of youth for the purpose of training them for the *Interahamwe* and *Abajekaro* militia. One of the grass-roots leaders was Murwanashyaka, who trained the *Abajekaro* and incited them to massacre and loot Tutsi (T. 18 October 2004, pp. 7-8). Witnesses GKP and GJQ testified that the Accused distributed guns to the *Interahamwe*, which they used against the Tutsi (GKP : T. 8 December 2003, p. 8), (GJQ : T. 14 March 2005, pp. 9, 16).

[90] Witness GJQ testified that the Accused participated in the planning and had knowledge of massacres of Tutsi civilians (T. 14 March 2005, pp. 9, 16). According to Witness GJQ, the Accused was aware of the massacres occurring throughout the country; he "followed everything by the minute" (T. 10 March 2005, p. 47; T. 14 March 2005, pp. 3-4, 8-9, 11-18). Witness GTE also testified that Prosper Mugiraneza knew of the massacres throughout Rwanda (T. 1 December 2003 pp. 5-6, 11-12).

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*Count 4 : Direct and Public Incitement to Commit Genocide*

55. Two Accused, Prosper Mugiraneza and Jérôme-Clément Bicamumpaka, request acquittal on Count 4 of the Indictment, Direct and Public Incitement to Commit Genocide, as prescribed by Article 2 (3) (c) of the Statute. Prosper Mugiraneza requests acquittal of the count under both Articles 6 (1) and 6 (3) of the Statute. Jérôme-Clément Bicamumpaka requests acquittal for responsibility as a superior, under Article 6 (3) of the Statute.

56. The Chamber recalls the definition of Direct and Public Incitement to Commit Genocide articulated in *Prosecutor v. Akayesu* :

> Direct and public incitement must be defined for the purposes of interpreting Article 2 (3), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication[91].

57. In reviewing the meaning of each term in the definition of "direct and public incitement", the Chamber observes that incitement has been interpreted as "encouragement or provocation to commit an offence"[92]. To be direct, the incitement must be "more than mere vague or indirect suggestion"[93], but may be "implicit"[94]. The direct element of the crime should be viewed "in the light of its cultural and linguistic context" and assessed on a case-by-case basis by

> "focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof"[95].

58. The public element of incitement has been interpreted as a

> "call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media"[96].

In determining whether the incitement is public, two important factors to consider are : the place where the incitement occurred and whether or not the assistance was selective or limited[97]. The *mens rea* of the crime lies in the "intent to directly prompt

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[91] *Akayesu*, Judgement (TC), 2 September 1998, para. 559.

[92] *Nahimana et al.,* Judgement (TC), 3 December 2003, para. 1011; *Akayesu*, Judgement (TC), 2 September 1998, para. 555.

[93] *Bagosora et al*., Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 22; *Nahimana et al.,* Judgement (TC), 3 December 2003, para. 1011; *Akayesu*, Judgement (TC), 2 September 1998, para. 557.

[94] *Nahimana et al.,* Judgement (TC), 3 December 2003, para. 1011; *Akayesu*, Judgement (TC), 2 September 1998, para. 557.

[95] *Nahimana et al.,* Judgement (TC), 3 December 2003, para. 1011; *Akayesu*, Judgement (TC), 2 September 1998, para. 557.

[96] *Nahimana et al.,* Judgement (TC), 3 December 2003, para. 1011; *Akayesu*, Judgement (TC), 2 September 1998, para. 556, citing the definition of the International Law Commission in its Report to the General Assembly, 51 U.N. ORGA Supp. (n° 10) at 26, U.N. Doc A/5/10 (1996).

[97] *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis,* 13 October 2005, para. 61; *Nahimana et al*., Judgement (TC), 3 December 2003, para. 1011; *Niyitegeka*, Judgement (TC), 16 May 2003, para. 431; *Akayesu*, Judgement (TC), 2 September 1998, para. 557.

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or provoke another to commit genocide"[98]. When examining the evidence, the Chamber is mindful that direct and public incitement to commit genocide is an inchoate offence which is punishable even where such incitement proves unsuccessful[99].

*Prosper Mugiraneza : Sufficiency of Evidence Under Articles 6 (1) and 6 (3) of the Statute*

59. The Defence acknowledges evidence that

> "Mugiraneza made or was present at speeches and political rallies both before and during the Tribunal's temporal jurisdiction",

but asserts that this evidence fails to support a finding of direct and public incitement to commit genocide[100]. Specifically, the Defence challenges the sufficiency of the evidence in relation to the public character of the meetings and rallies and in relation to any speeches made by the Accused, in 1994, which could be construed as incitement[101].

60. There is also evidence that the Accused attended political meetings and rallies in 1994, where inciting words were spoken by speakers with whom he was politically associated. Specifically, Harriet Sebera testified that President Sindikubwabo exhorted the population to kill on the occasion of the swearing-in ceremony of the newly-appointed *Préfet* of Butare, on 19 April 1994. Although the Accused did not speak on this occasion, there is evidence that he was present as one of the Government Ministers in the President's entourage[102]. The witness, who listened to President Sindikubwabo's address broadcast live on public radio, testified to hearing him say repeatedly, "Get rid of them", referring to Tutsi, and to hearing him make "different statements ... inciting the people in Butare to kill Tutsi, who were considered as the enemy"[103]. The following day, massacres began in the region, with the killing of Queen Rosalie Gicanda, a Tutsi, and the former *préfet* of Butare, Jean-Baptiste Habyarimana, a Tutsi[104]. Witness Fidèle Uwizeye also testified that the Accused was present, on 18 April 1994, at a meeting in Gitarama *Préfecture*, led by Prime Minister Kambanda, following which "the killings intensified in Gitarama and reached all corners of the *préfecture*"[105].

61. In the Chamber's view, there is evidence concerning the Accused's participation or attendance at political meetings and rallies, which, if believed, could be sufficient

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[98] *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 13 October 2005, para. 61; *Bagosora et al.,* Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 22; *Akayesu*, Judgement (TC), 2 September 1998, para. 560.

[99] *Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 13 October 2005, para. 61; *Nahimana et al*., Judgement (TC), 3 December 2003, para. 1013; *Niyitegeka*, Judgement (TC), 16 May 2003, para. 431; *Akayesu*, Judgement (TC), 2 September 1998, para. 562.

[100] *Mugiraneza* Motion, para. 96.

[101] *Mugiraneza* Motion, para. 96.

[102] P.2 (22) E) pp. K012-4789-K012-4790.

[103] T. 20 October 2004 pp. 43-44.

[104] T. 20 October 2004 p. 44; T. 21 October 2004, pp. 8-15.

[105] T. 6 April 2004, p. 63.

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evidence to sustain a conviction for his responsibility, under Article 6 (1), for direct and public incitement to commit genocide. While no evidence has been presented that Prosper Mugiraneza spoke at the Government ceremony on 19 April 1994 in Butare, or at the Government meeting in Gitarama on 18 April 1994, the Chamber finds that evidence of his attendance at these public meetings, where Government officials incited massacres of Tutsi, could, if believed, be sufficient to lead to a finding beyond reasonable doubt that the Accused aided and abetted in the commission of incitement to commit genocide. Therefore, the Chamber denies Prosper Mugiraneza's Motion for a judgement of acquittal on Count 4, under Article 6 (1) of the Statute.

62. The Chamber has considered the evidence concerning Prosper Mugiraneza's authority, by virtue of his position as a Minister of the Interim Government, his leadership of the MRND Party, and his influence over local Government and MRND officials and leaders. There is evidence that he encouraged local leaders to incite others to engage in criminal conduct. There is evidence that Prosper Mugiraneza knew, or had reason to know, of the killing of Tutsi civilians instigated by local leaders through their speeches to the local population, and that he failed to take measures to punish or to prevent the commission of these crimes[106]. Accordingly, the Chamber is of the view that there is sufficient evidence which, if believed, could sustain a conviction of the Accused for his responsibility under Article 6 (3) for direct and public incitement to commit genocide, and denies the Defence Motion for acquittal on Count 4, under Article 6 (3) of the Statute.

*Jérôme-Clément Bicamumpaka : Sufficiency of Evidence Under Article 6 (3) of the Statute*

63. There is evidence that Jérôme-Clément Bicamumpaka, as a Minister of the Interim Government exercised *de jure* and *de facto* authority over local leaders and *Interahamwe*. There is also evidence capable of establishing the Accused's knowledge of several meetings organized by local leaders, including the *préfet* of Gitarama and an *Interahamwe* chief, where "people's heads were heated up and they started killing"[107]. The Chamber is of the view that this evidence, if believed, is sufficient to lead a reasonable trier of fact to find Jérôme-Clément Bicamumpaka guilty beyond a reasonable doubt of direct and public incitement to commit genocide, under Article 6 (3) of the Statute. Accordingly, the Defence Motion for acquittal of Count 4, under Article 6 (3) of the Statute, is denied.

*Count 6 : Murder as a Crime against Humanity*

64. Three Accused, Casimir Bizimungu, Justin Mugenzi, and Prosper Mugiraneza, request acquittal on Count 6 of the Indictment, Murder as a Crime against Humanity, under Articles 6 (1) and 6 (3) of the Statute. Jérôme-Clément Bicamumpaka requests that the Chamber enter a judgement for acquittal on all counts, including Count 6, for

[106] For example, Witness Fidèle Uwizeye offered evidence in respect of the Accused's alleged participation in, knowledge of , and influence over the widespread and mass killings throughout Rwanda (T. 6 April 2005 pp. 4-8, 11-15, 18-19).

[107] T. 19 March 2004, pp. 4, 24.

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Article 6 (3) liability, and further requests that the Chamber, *proprio motu*, grant acquittal on any count for which the Prosecution has not presented sufficient evidence.

65. The definition of Murder as a Crime against Humanity is not in controversy between the Parties. Both the Defence for Mugenzi and the Prosecution cite the definition of murder enunciated in *Prosecutor v. Ndindabahizi*.[108]

66. Furthermore, the Prosecution specifically supports the slightly higher threshold of the definition of murder requiring premeditation :

> In brief, the *mens rea* of murder is a premeditated intent to kill or inflict grievous bodily harm, with knowledge of and reckless [disregard] toward the likelihood that this harm will cause the victim's death[109].

67. The Trial Chamber in *Prosecutor v. Muhimana* articulated substantially the same standard as that applied by the Trial Chamber in *Prosecutor v. Ndindabahizi*, stating that :

> Murder is the intentional killing of a person, or intentional infliction of grievous bodily harm committed with the knowledge that such harm, will likely cause the victim's death, and with no lawful justification or excuse. Murder, like rape, is punishable as a crime against humanity, "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[110].

68. The Chamber endorses this definition of murder, with the requirement that the intentional killing be premeditated.

69. The Chamber has carefully examined the record, and is persuaded that there is sufficient evidence to establish that during the period April-July 1994, widespread, if not also systematic, attacks were committed in Rwanda.

*Casimir Bizimungu : Sufficiency of Evidence Under Articles 6 (1) and 6 (3) of the Statute*

70. The Defence for Casimir Bizimungu admits that Witness GTD presented evidence linking the Accused to the murder of a soldier and a child named Védaste at a bar in Gitarama. However, according to the Defence, this evidence was "riddled with improbabilities and contradictions". The Defence submits that the Prosecution case in respect of the alleged murder "completely broke down" and that no reasonable trier of fact could conclude that Casimir Bizimungu had the necessary *mens rea* to be found guilty of this alleged crime.

71. The Chamber has examined the record, particularly the evidence presented by Witness GTD[111], connecting Casimir Bizimungu with the events leading to the killing of a soldier and a child named Védaste at a bar in Gitarama. Although the Defence has characterized this evidence as unreliable, the Chamber cannot say that the evidence is so lacking in credibility that no reasonable trier of fact could find the Accused guilty under either Article 6 (1) or 6 (3) of the Statute for Murder as a Crime

[108] Mugenzi Motion, para. 49; Prosecution Response, para. 329.
[109] Prosecution Response, para. 238.
[110] *Muhimana*, Judgement and Sentence (TC), 28 April 2005, para. 568.
[111] T. 1 July 2004 pp. 22-24.

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Against Humanity. Consequently, the Chamber cannot enter a judgement of acquittal for Casimir Bizimungu, in respect of Count 6, under Article 6 (1) or 6 (3) of the Statute, and denies the Defence motion on this count. The Chamber's ultimate determination must be based on findings of fact which can be made only at the end of the proceedings, when all the evidence has been presented.

*Justin Mugenzi : Sufficiency of Evidence Under Articles 6 (1) and 6 (3) of the Statute*

72. The Defence for Justin Mugenzi accepts, in general terms, that there is evidence regarding the commission of crimes against humanity in Rwanda in 1994. However, it disputes the sufficiency of evidence in relation to Count 6 of the Indictment against the Accused. The Defence argues that, for a conviction to be entered against the Accused on the alleged acts of murder, the Prosecution must establish a link between Justin Mugenzi and the killings.

73. The Prosecution responds that Witnesses GKJ and LEL gave evidence of Justin Mugenzi's direct link to the killings. Witness GKJ testified about the killing of Jean-Baptiste Muyango at Kivumu on an unspecified date in April 1994[112]. Witness LEL testified that she heard from others that Justin Mugenzi had sent a soldier to the church where she was taking refuge, and that that soldier removed from the Church a woman called Vestine prior to an attack on the church[113], which, according to the Prosecution, shows the selective use of Justin Mugenzi's authority to save people from being killed, his general influence and power, and his responsibility for the deaths of the refugees who remained in the church.

74. After considering the parties' submissions, the Chamber cannot say that there is no evidence linking Justin Mugenzi to the killing of identifiable individuals during the events of 1994 in Rwanda. The Chamber notes, in particular, Witness GKJ's testimony relating to the death of Jean-Baptiste Muyango, which goes to the Accused's responsibility, as a superior for the crime of murder, under Article 6 (3) of the Statute. Therefore, the Chamber denies the Defence motion for acquittal on Count 6, under Article 6 (3) of the Indictment.

75. The Chamber can find no evidence on which a reasonable trier of fact could convict Justin Mugenzi for Article 6 (1) responsibility for the crime of murder. Consequently, the Chamber enters a judgement of acquittal in respect of Article 6 (1) of the Statute for Justin Mugenzi on Count 6 of the Indictment.

*Prosper Mugiraneza : Sufficiency of Evidence Under Articles 6 (1) and 6 (3) of the Statute*

76. The Defence for Prosper Mugiraneza submits that there is no admissible evidence linking Prosper Mugiraneza to any murder or no evidence that any of Prosper Mugiraneza's subordinates in the Ministry for Civil Service was involved in the commission of murders. The Defence further asserts that no evidence was adduced to establish a superior-subordinate relationship between the Accused and anyone outside

[112] T. 23 September 2004, pp. 39-40.
[113] T. 16 February 2004, pp. 28-33.

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of the Ministry for Civil Service, and that, therefore, he cannot be held responsible for crimes of murder committed by the general population.

77. The Prosecution in its Response cites no evidence linking Prosper Mugiraneza to the killing of clearly identifiable individuals. The Chamber is unable to accept the Prosecution argument that Prosper Mugiraneza may be found guilty of murder for the generalized killings that occurred in Rwanda between April and July 1994, without sufficient evidence establishing a link between the commission of a specific killing of an identifiable individual by the Accused, or by one or more persons over whom the Accused exercised authority.

78. The Chamber recalls the evidence of Witness GKS, who testified that, on 11 April 1994, a Tutsi man called Musonera was disarmed by *Bourgmestre* Emmanuel Mugiraneza on the instructions of Prosper Mugiraneza, and was later killed that same day[114]. However, this testimony, in relation to the present count of the Indictment against the Accused, was excluded by the Chamber in its Decision of 4 October 2004[115]. Other than this testimony, no other evidence has been presented in relation to the allegations against the Accused on Count 6. Consequently, the Chamber grants the Motion of Prosper Mugiraneza for a judgement of acquittal on Count 6 of the Indictment, under both Articles 6 (1) and 6 (3) of the Statute.

*Jérôme-Clément Bicamumpaka : Sufficiency of Evidence Under Articles 6 (1) and 6 (3) of the Statute*

79. In its Response, the Prosecution does not provide the Chamber with any examples of the Accused's criminal responsibility for commission of murder, apparently proceeding on the basis that the Defence has not requested acquittal on Count 6, although, in fact, the Defence seeks "a judgement of acquittal on all counts of the Indictment with regards to their commission pursuant to Article 6 (3)" and on any count, *proprio motu*, for which insufficient evidence has been adduced.[116]

80. Having examined the record, the Chamber finds the only evidence against the Accused, in respect of Count 6, to be testimony of his alleged involvement in the killing of John Vuningoma, which evidence the Chamber excluded, on this count, in its Decision of 24 November 2004.[117] Other than this excluded testimony, the Chamber finds no evidence on which a reasonable trier of fact could convict the Accused for the crime of murder either under Article 6 (1) or Article 6 (3) of the Statute. Therefore, the Chamber enters a judgement of acquittal for Jérôme-Clément Bicamumpaka in respect of Count 6 of the Indictment, under both Articles 6 (1) and 6 (3) of the Statute.

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[114] T. 24 March 2004 pp. 57-60; T. 25 March 2004 pp.1-5.

[115] *Bizimungu et al.*, Decision: Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004, 4 October 2004, para. 35.

[116] Bicamumpaka Motion, para. 31.

[117] *Bizimungu et al.*, Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible, 24 November 2004, in which the Chamber held that it "will disregard the evidence of Witnesses GTA and DCH on the killing of John Vuningoma in relation to Count Six of the Indictment".

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*Count 7 : Extermination as a Crime against Humanity*

81. Two Accused, Prosper Mugiraneza and Jérôme-Clément Bicamumpaka, request a judgement of acquittal on Count 7 of the Indictment, Extermination as a Crime against Humanity. Prosper Mugiraneza requests acquittal of the count under both Articles 6 (1) and 6 (3) of the Statute. Jérôme-Clément Bicamumpaka requests acquittal for responsibility as a superior, under Article 6 (3) of the Statute.

82. The Appeals Chamber has recently defined extermination as participation in the widespread or systematic killing of a group or systematically subjecting a number of people to conditions of living that would inevitably lead to their deaths[118]. The Appeals Chamber stressed that the Prosecution is not required to establish that the perpetrator is individually responsible for killing any specific individual (by the forms of commission set out in Article 6 (1) of the Statute) and that the victims need not be named or described in the Indictment[119]. In contrast with the crime of murder, whose material element may be satisfied by the killing of an individual and proof that the perpetrator intended the death of that individual, as part of a widespread or systematic attack, extermination is directed at a group collectively, resulting in the killing of a large number of victims. Whether the participation is sufficient to constitute extermination depends on a complete evaluation of the facts[120].

*Prosper Mugiraneza : Sufficiency of Evidence Under Article 6 (1) of the Statute*

83. In view of the evidence concerning Prosper Mugiraneza discussed in regard to the charge of genocide, the Chamber is satisfied that there is evidence which, if believed, could lead a reasonable trier of fact to conclude that the Accused participated in activities whose purpose and effect was to cause the mass death of Tutsi civilians. Additionally, there is evidence that such mass killings did indeed occur. The Chamber, therefore, denies the Defence motion for judgement of acquittal on Count 7 of the Indictment, under Article 6 (1) of the Statute.

*Prosper Mugiraneza and Jérôme-Clément Bicamumpaka : Sufficiency of Evidence Under Article 6 (3) of the Statute*

84. Evidence has been presented that both Prosper Mugiraneza and Jérôme-Clément Bicamumpaka wielded authority and influence over local Government officials and leaders of the *Interahamwe*. Evidence also has been adduced that both Accused were informed of crimes of mass killings directed by identified local Government officials and MRND leaders, and that the Accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the perpetrators thereof. The evidence of the relationship between the Accused and local Government and MRND officials and *Interahamwe* leaders could, if believed, establish a superior-subordinate relation-

[118] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 522.

[119] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 522, 546; *Bagosora et al*., Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 28.

[120] *Ntakirutimana,* Judgement (AC), 13 December 2004, paras. 542, 546; *Ndindabahizi*, Judgement (TC), 15 July 2004, paras. 479, 482; *Akayesu*, Judgement (TC), 2 September 1998, para. 591; *Bagosora et al.,* Decision on Defence Motions Pursuant to Rule 98 *bis*, 2 February 2005, para. 28.

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ship. That finding, of course, must be based on determinations of fact which the Chamber can make only at the end of the proceedings, in light of the full arguments of the parties. Accordingly, the Chamber denies the Motions of both Prosper Mugiraneza and Jérôme-Clément Bicamumpaka for acquittal on Count 7 of the Indictment, under Article 6 (3) of the Statute.

*Count 8 : Rape as a Crime against Humanity*

85. The four Accused, Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, request a judgement of acquittal, on Count 8, Rape as a Crime against Humanity, pursuant to Article 3 (g) of the Statute. All Accused request acquittal under both Articles 6 (1) and 6 (3) of the Statute.

*Justin Mugenzi : Sufficiency of the Evidence Under Articles 6 (1) and 6 (3) of the Statute*

86. The Defence for Justin Mugenzi argues that charges on Count 8 should be dismissed for lack of any evidence linking the Accused with alleged acts of rape in Rwanda in 1994, under Article 6 (1) or Article 6 (3) of the Statute. With respect to the Accused's alleged liability under Article 6 (1) of the Statute, the Defence submits that neither the Indictment nor the Pre-Trial Brief nor any admissible evidence indicates Justin Mugenzi's involvement, directly or indirectly, in acts of rape.

87. With respect to Justin Mugenzi's alleged liability under Article 6 (3), the Defence submits that no evidence has been adduced to establish the existence of a superior-subordinate relationship between Justin Mugenzi and any individual who is shown to have committed acts of rape. The Defence further argues that there is no evidence that the Accused knew or should have known of any acts of rape. The assertion that Justin Mugenzi, by virtue of his position as a Government Minister, had or should have had knowledge of individual crimes of rape is both "unrealistic" and "wholly unsupported by any evidence". In support of this argument, the Defence refers to the evidence presented by the *préfet* of Gitarama, who testified to having no knowledge of any rape in his *préfecture* until after the period of the Tribunal's temporal jurisdiction[121]. The Defence also reminds the Chamber that, as parts of Dr. Nowrojee's testimony were declared inadmissible, any evidence demonstrating the Accused's alleged knowledge of crimes of rape, under Article 6 (3), is "utterly missing" from the Prosecution case.

88. The Chamber recalls the evidence presented by Witness LEL, who testified to the rape of a certain Uwera. The Chamber notes that Witness LEL was the only witness to have mentioned Justin Mugenzi during the course of testimony. According to this witness, some refugees, who had sought shelter in a church, mentioned the Accused's name, after a soldier had entered and left the church[122]. The witness later heard it said that Justin Mugenzi was responsible for the attack on this church[123].

[121] Mugenzi Motion, para. 88.
[122] T. 16 February 2004 pp. 28-29.
[123] T. 16 February 2004 p. 32.

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89. Having closely reviewed Witness LEL's testimony, the Chamber finds no evidence to implicate Justin Mugenzi with the rape of Uwera. The witness's testimony does not provide a link between the Accused and the alleged perpetrator of Uwera's rape so as to establish a superior-subordinate relationship; nor does the record show that the Accused knew or had reason to know of the rape of Uwera.

90. The Chamber finds that Justin Mugenzi has no case to answer in respect of any rape committed under the Tribunal's jurisdiction. Consequently, the Chamber grants a judgement of acquittal to Justin Mugenzi on this count, under both Article 6 (1) and Article 6 (3) of the Statute.

*Casimir Bizimungu : Sufficiency of the Evidence Under Articles 6 (1) and 6 (3) of the Statute*

91. The Defence argues that the Prosecution has not accused Casimir Bizimungu of rape under Article 6 (1) of the Statute. Indeed, the relevant paragraphs of the Indictment (5.37 and 6.65) are not listed among the factual elements, in support of Count 8. Furthermore, according to the Defence, no evidence has been adduced to establish the Accused's responsibility for the crime of rape either by individual commission, aiding and abetting, or incitement.

92. The Defence further submits that no evidence has been adduced to demonstrate that Casimir Bizimungu was aware that any of his subordinates committed acts of rape. In support of its argument, the Defence refers to the testimony of the *préfet* of Gitarama that the authorities only learned of the commission of crimes of rapes well after July 1994. The Defence also refers to the Chamber's Decision of 8 July 2005 in respect of the inadmissibility of Dr. Binaifer Nowrojee's opinion regarding government authorities' knowledge of rapes throughout Rwanda in 1994.

93. The Chamber notes that, by virtue of the Decision issued on 23 January 2004, the testimonies of Witnesses GKB and GAP are inadmissible as evidence against Casimir Bizimungu. Although Witness GAT testified to sexual threats from members of the *Interahamwe* who worked at the Ministry of Health, the witness did not provide any evidence of any act of rape against an identified individual or any evidence that linked the Accused with any crime of rape[124]. Accordingly, the Chamber finds that Casimir Bizimungu has no case to answer in respect of Count 8, and the Chamber grants his Motion for a judgement for acquittal, under Article 6 (1) and Article 6 (3) of the Statute.

*Jérôme-Clément Bicamumpaka and Prosper Mugiraneza : Sufficiency of the Evidence Under Articles 6 (1) and 6 (3) of the Statute*

94. The Defence for Jérôme-Clément Bicamumpaka argues that no evidence has been presented to associate the Accused with the offence of rape. The Defence further asserts that the Accused was ignorant of "occurrences of rape", as supported by the testimony of Fidèle Uwizeye, *Préfet* of Ruhengeri in April 1994, that reports by victims of rape were not made to the authorities until well after the genocide.

[124] T. 26 February 2004, pp. 11, 17.

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95. The Defence for Prosper Mugiraneza argues that the Indictment does not specify the dates, locations, and identities of the victims and perpetrators in respect of the alleged rapes and that the Indictment cannot therefore support a conviction. Furthermore, the Defence submits, the knowledge requirement, under Article 6 (3) of this crime is not met, insofar as there is no evidence that the Interim Government knew or had reason to know of widespread rapes.

96. The Chamber notes that none of the witnesses who presented evidence on Count 8 has mentioned Jérôme-Clément Bicamumpaka or Prosper Mugiraneza in connection with any crime of rape. Although there is expert testimony as to the widespread and systematic nature of rapes between April and July 1994 in Rwanda, the Chamber cannot infer knowledge on the part of the Accused of these crimes, in respect of Article 6 (3) responsibility[125]. Accordingly, the Chamber finds that there is insufficient evidence against Jérôme-Clément Bicamumpaka and Prosper Mugiraneza for a reasonable trier of fact to find guilt beyond a reasonable doubt for the commission of rape, under either Article 6 (1) or Article 6 (3). Therefore, the Chamber grants the Motions for a judgement of acquittal in respect of Count 8 for both Jérôme-Clément Bicamumpaka and Prosper Mugiraneza, under Articles 6 (1) and 6 (3) of the Statute.

*Count 9 : Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II Violence to Life, Health and Physical or Mental Well-Being of Civilians as Part of an Internal Armed Conflict*

97. Three of the Accused, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, seek acquittal on Count 9 of the Indictment, under both Articles 6 (1) and 6 (3) of the Statute.

98. The Indictment charges the Accused with causing violence to life, health, and physical or mental well-being of persons, acts prescribed by Article 4 (a) of the Statute, which criminalizes serious violations of Article 3 common to the 1949 Geneva Convention, and of Additional Protocol II thereof.

99. The following three pre-requisites must be met for the applicability of a crime under Article 4 of the Statute : the existence of a non-international armed conflict in the territory of the concerned state; a nexus between the alleged violation and the armed conflict; and the status of the victims, specifically, that the victims were not directly taking part in the hostilities at the time of the alleged violations[126].

(i) *Nature of the Conflict*

100. The Defence for Justin Mugenzi argues that evidence has not been adduced to demonstrate the non-international character of the conflict in Rwanda[127]. In its Response, the Prosecution challenges the Defence submission and requests the Cham-

[125] *Bizimungu et al.*, Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee, 8 July 2005 (in which this Chamber ruled "inadmissible those portions of Dr. Nowrojee's evidence that fall outside the scope of her expertise or express opinions on ultimate issues before the Chamber").

[126] *Kunarac et al.,* Judgement (AC), 12 June 2002, para. 59.

[127] Mugenzi Motion, paras. 19-23.

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ber to take judicial notice that the conflict which occurred in Rwanda between April and July 1994 was of a non-international nature[128]. The Chamber has determined that judicial notice is not appropriate in this instance[129]. However, on the basis of the evidence presented, the Chamber is satisfied that the conflict within Rwanda was not international in character. The conflict was between Government forces and the Rwandan Patriotic Front (the "RPF"), which consisted of Rwandan refugees, seeking to exercise their right of return. Accordingly, the Chamber does not agree with the Defence submission.

(ii) *Nexus Between the Alleged Violation and the Armed Conflict*

101. The Defence for Jérôme-Clément Bicamumpaka submits that that Accused should be acquitted on Count 9 because no nexus exists between the armed conflict and the offences charged[130]. The Chamber, at this stage of the proceedings, does not agree with the Defence submission.

102. For a criminal offence to fall within the ambit of Article 4 of the Statute, the Chamber must be satisfied that a nexus existed between the alleged breach of Common Article 3 or of Additional Protocol II and the underlying armed conflict[131]. It is the view of both the ICTR and the ICTY Appeals Chambers that the nexus requirement is met if the alleged offence is "closely related to the armed conflict"[132]. Specifically, the Appeals Chambers have stated,

> "[I]f it can be established that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict"[133].

103. In the instant case, there is evidence that the Accused participated in meetings on 11 April 1994 in Kigali and on 18 April 1994 in Gitarama to implement a Government civil defence programme, purportedly in response to armed incursions by the RPF[134]. There is evidence that the civil defence programme included setting up roadblocks, establishing patrols, and training in the use of firearms. There is evidence that, following these meetings, roadblocks were established by *Interahamwe* civil militia, and that many civilians, protected under Article 4 of the Statute, were detained and killed at the roadblocks. There is also evidence that *Interahamwe* were involved in acts of violence against victims, who were civilians protected under Common Article 3 to the

[128] Prosecution Response, para. 422.

[129] See *Bizimungu et al.,* Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004, in which this Chamber rejected the Prosecution request for judicial notice of the non-international character of the conflict in Rwanda in 1994.

[130] Bicamumpaka Motion, paras. 20-26.

[131] *Rutaganda*, Judgement (TC), 6 December 1999, paras. 102-103; *Akayesu*, Judgement (TC), 2 September 1998, paras. 635-636.

[132] *Rutaganda*, Judgement (AC), 26 May 2003, para. 569, citing *Kunarac et al.*, Judgement (AC), 12 June 2002, para. 58.

[133] *Rutaganda*, Judgement (AC), 26 May 2003, para. 569, citing *Kunarac et al.*, Judgement (AC), 12 June 2002, para. 58.

[134] Witness Fidèle Uwizeye, then *préfet* of Gitarama, testified that the subject matter of both meetings was civil defence, which included setting up roadblocks, establishing patrols, and providing training in the use of firearms (T. 6 April 2005, pp. 52-53, 56; T. 7 April 2005, pp. 61-67).

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Geneva Conventions and Additional Protocol II to the Geneva Conventions, over which this Tribunal has jurisdiction, pursuant to Article 4 of the Statute[135].

104. On the basis of this evidence, the Chamber is satisfied that a reasonable trier of fact could find that the requisite nexus existed between the alleged offence and the armed conflict, under Article 4 of the Statute, during the Tribunal's temporal jurisdiction. The Chamber's final determination on this matter will be made at the end of the trial, when all of the evidence has been presented.

(iii) *Status of the Victims*

105. There is evidence that civilians, protected under Article 4 of the Statute, were victims of the Government's civil defence measures in force between April and July 1994[136]. Accordingly, the Chamber is satisfied that a reasonable trier of fact could find that the third prerequisite of crimes enumerated under Article 4 existed during the relevant time in Rwanda.

(iv) *Principle of* Nullum Crimen Sine Lege

106. The Defence for Prosper Mugiraneza argues that a conviction of the Accused on Count 9 of the Indictment would violate the principle of *nullum crimen sine lege*. The Chamber does not agree with the Defence submission. Indeed the Tribunal has already determined that Common Article 3 and Additional Protocol II were applicable in Rwanda in 1994 as a matter of convention and custom[137]. Rwanda became a party to the Geneva Conventions of 1949 on 5 May 1964 through succession[138], and, through ratification, to the Additional Protocol II thereto on 19 November 1984[139]. Moreover, the Article 4 offences named in the Indictment constituted crimes under the laws of Rwanda in 1994[140]. The Chamber, therefore, finds that Common Article 3 and Additional Protocol II were in force in Rwanda in 1994 and that the application of Article 4 of the Statute to the situation in Rwanda during the Tribunal's temporal jurisdiction does not violate the *nullum crimen sine lege* principle.

107. Accordingly, the Chamber finds that there is evidence upon which a reasonable trier of fact could determine that each of the general pre-requisites for crimes enumerated in Article 4 (a) existed during the Tribunal's temporal jurisdiction : that an armed conflict occurred in Rwanda during this period; that a close relationship existed between the armed conflict and the alleged crimes; and that many of the victims were

[135] T. 6 April 2005 pp. 52-53, 56; T. 7 April 2005 pp. 61-67.

[136] See testimonies of Witness Fidèle Uwizeye (T. 6 April 2005 pp. 48-50, 65) and Harriet Sebera (T. 20 October 2004, pp. 43-44; T. 21 October 2004, pp. 8-20).

[137] *Semanza*, Judgement (TC), 15 May 2003, para. 353; *Baglishema*, Judgement (TC), 7 June 2001, para. 98; *Akayesu*, Judgement (TC), 2 September 1998, para. 617.

[138] The Geneva Conventions of 1949 entered into force for Rwanda with a retroactive effect as from 1 July 1962, the date of Rwanda's independence. See www.icrc.org/ihl.nsf.

[139] See *Bizimungu et al.*, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004, in which this Chamber judicially noticed that Rwanda acceded to the Geneva Conventions of 12th August 1949 on 5th May 1964 and acceded to Protocols additional thereto of 8th June 1977 on 19th November 1984.

[140] See *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, para. 157; *Akayesu*, Judgement (TC), 2 September 1998, para. 617.

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civilians who were not taking part in the hostilities. Moreover, there is evidence of killings and cruel treatment of civilians, for which, if believed, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza could be held criminally responsible[141].

108. Consequently, the Chamber is satisfied that there is evidence which, if believed, could lead a reasonable trier of fact to conclude that the Accused participated in activities which constitute violations of the crimes charged under Count 9. The evidence could ground a conviction under both Articles 6 (1) and 6 (3). The Chamber, therefore, denies the Defence Motions for the acquittal of Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza on this count, under both Articles 6 (1) and 6 (3) of the Statute.

*Count 10 : Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II – Outrages Upon Personal Dignity, in particular Humiliating and Degrading Treatment, Rape and Indecent Assault, as Part of an Internal Armed Conflict*

109. All four Accused, Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, request acquittal on Count 10 of the Indictment, for which they are charged with both individual and superior responsibility, under Articles 6 (1) and 6 (3) of the Statute. The crime of Outrages Upon Personal Dignity, charged under Count 10, is prescribed by Article 4 (e) of the Statute, which criminalizes serious violations of Article 3 common to the 1949 Geneva Conventions and of Additional Protocol II thereof. In light of the evidence presented, the Chamber finds that the pre-requisites, articulated in relation to Count 9, for the applicability of this crime have been satisfied.

110. All Accused have specifically challenged the alleged acts of rape, which the Prosecution, in its Response, identifies as relevant to this charge[142]. Having reviewed the evidence cited by the Prosecution and, in light of the foregoing discussion in respect of Count 8, Rape as a Crime against Humanity, the Chamber considers that there is insufficient evidence connecting any of the Accused to acts of rape. Furthermore, the Chamber finds no evidence linking the Accused to any other crimes which

[141] In respect of crimes charged under Count 9 against Justin Mugenzi: see the testimonies of Witness Isaie Sagahutu Murashi (T. 9 June 2004, pp. 49-50) and Witness Fidèle Uwizeye (T. 6 April 2005 p. 65), who presented evidence that the Accused enjoined local officials, including the newly appointed *préfet* of Gisenyi, to participate in the Government's civil defence programme, which included killing Tutsi civilians. In respect of crimes charged under Count 9 against Jérôme-Clément Bicamumpaka: *see* the testimonies of Witness GHV (T. 4 March 2004, p. 35) and Witness GAP (T. 20 January 2004, pp. 19-20), who presented evidence that the Accused incited the population in several meetings to participate in the Government's civil defence programme by killing Tutsi civilians. In respect of crimes charged under Count 9 against Prosper Mugiraneza: *see* the testimony of Witness Fidèle Uwizeye (T. 6 April 2005, pp. 48-50), who presented evidence that the Accused, by his words and his presence at public meetings and at one massacre site (the Kamonyi Parish Secondary School), encouraged violence against Tutsi civilians as part of the Government's civil defence programme.

[142] The four Accused have challenged the sufficiency of the evidence in respect of Count 8, Rape as a Crime against Humanity, which the Chamber has discussed above.

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could fall under this count. Accordingly, the Chamber grants the Motions for acquittal on Count 10 of the Indictment, under both Articles 6 (1) and 6 (3) of the Statute.

FOR THE ABOVE REASONS, THE CHAMBER

ENTERS A JUDGEMENT OF ACQUITTAL for Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza on Count 1 (Conspiracy to Commit Genocide) of the Indictment in respect of Article 6 (3) responsibility only;

ENTERS A JUDGEMENT OF ACQUITTAL for Justin Mugenzi on Count 6 (Murder as a Crime Against Humanity) of the Indictment in respect of Article 6 (1) responsibility only;

ENTERS A JUDGEMENT OF ACQUITTAL for Jérôme-Clément Bicamumpaka and Prosper Mugiraneza on Count 6 (Murder as a Crime Against Humanity) of the Indictment in respect of both Article 6 (1) and Article 6 (3) responsibility;

ENTERS A JUDGEMENT OF ACQUITTAL for Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza on Count 8 (Rape as a Crime Against Humanity) of the Indictment in respect of both Article 6 (1) and Article 6 (3) responsibility;

ENTERS A JUDGEMENT OF ACQUITTAL for Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza on Count 10 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II – Outrages Upon Personal Dignity, in particular Humiliating and Degrading Treatment, Rape and Indecent Assault, as Part of an Internal Armed Conflict) of the Indictment in respect of both Article 6 (1) and Article 6 (3) responsibility;

DENIES the Defence Motions in all other respects.

Arusha, 22 November 2005.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga Emile Francis Short

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## *Decision on Prosecution Appeal of Witness Protection Measures 29 November 2005 (ICTR-99-50-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Andrésia Vaz

*Jérôme Bicamumpaka, Casimir Bizumungu, Justin Mugenzi and Prosper Mugiraneza – Discretionary power of the Appeals Chamber to review decision, Grounds for review, Incorrect interpretation of governing law – Protective measures for witnesses,*

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*Disclosure to the "Prosecution team in this case" only, Obligation of the Prosecutor to disclose exculpatory material – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 68 and 73 (B)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Prosecutor's Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decisions on Motions for Protection of Defence Witnesses Dated 27 June 2005, 4 July 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 (ICTR-98-41)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Slobodan Milošević, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 (IT-02-54)*

## I. Procedural Background

1. On 27 June 2005, Trial Chamber II of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Trial Chamber" and "Tribunal", respectively), rendered decisions on Casimir Bizimungu's ("Bizimungu") Motion for Protection of Defence Witnesses, Justin Mugenzi's ("Mugenzi") Motion for Protection of Defence Witnesses, and Jérôme-Clément Bicamumpaka's ("Bicamumpaka") Motion for Protection of Defence Witnesses (collectively, the "Impugned Decisions")[1].

2. On 4 July 2005, the Prosecution filed its motion, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") for certification to appeal a holding – repeated verbatim in each of the Impugned Decisions – that restricts dis-

[1] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses, 27 June 2005; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka's Motion for Protection of Defence Witnesses, 27 June 2005.

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closure of information pertaining to the identity of a protected witness to members of the "immediate Prosecution team" and not to anyone else within the Office of the Prosecutor[1]. On 28 September 2005, Trial Chamber II rendered its decision on the Prosecution's motion for certification ("Decision Granting Certification"), granting certification of the interlocutory appeal pursuant to Rule 73 (B)[2]. The Prosecution filed its interlocutory appeal on 4 October 2005 ("Prosecution Appeal")[3], and Bizimungu filed his response to the Prosecution Appeal on 13 October 2005[4].

## II. Standard of Review

3. A Trial Chamber exercises its discretion in many different situations, including when deciding points of practice or procedure[5]. A Trial Chamber must exercise such discretion in deciding whether to grant protective measures for witnesses, taking into account the particular threats posed to the witness and the practical demands of the case. These fact-intensive Trial Chamber decisions require "a complex balancing of intangibles in crafting a case-specific order"[6]. Therefore, in reviewing the Trial Chamber's exercise of discretion, "the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion", but rather whether the Trial Chamber has reasonably exercised its discretion in reaching that decision[7]. To prevail in their appeal, the appellants must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion, or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly[8]. The Appeals Chamber has held that

[1] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Prosecutor's Motion, Pursuant to Rule 73 (B), for Certification to Appeal the Trial Chamber's Decisions on Motions for Protection of Defence Witnesses Dated 27 June 2005, 4 July 2005.

[2] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

[3] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, Prosecutor's Interlocutory Appeal, Pursuant to Rule 73 (C), Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses, 4 October 2005.

[4] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, *Mémoire de l'intimé Casimir Bizimungu en réponse à l'Appel du Procureur contre les trois Décisions de la Chambre de première instance datées du 27 juin 2005*, 13 October 2005.

[5] *Prosecutor v. Milošević*, Case N° IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9 ("*Milošević* Appeal Decision on Assignment of Counsel").

[6] *Cf. Milošević* Appeal Decision on Assignment of Counsel, para. 9 (discussing reasons for the Trial Chamber's discretion in cases involving assignment of counsel).

[7] *Milošević* Appeal Decision on Assignment of Counsel, para. 10 (internal citation omitted).

[8] *Milošević* Appeal Decision on Assignment of Counsel, para. 10 (internal citation omitted).

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> "a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion"[9].

## III. Discussion

3. The provisions on witness protection measures at issue in this case are similar to those that were the subject of a recent appeal in *Prosecutor v. Bagosora et al.* ("*Bagosora et al.* Decision")[10]. In that case, the Appeals Chamber held that a protective order restricting access to defence witness identities "to the Prosecution team in this case" impermissibly contravened the Prosecutor's obligation to disclose exculpatory material, pursuant to Rule 68 of the Rules, that

> "rest[s] on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations"[11].

The Appeals Chamber in the *Bagosora et al.* Decision consequently held that the Trial Chamber's construction of the witness protection orders restricting disclosure to the immediate Prosecution team was an error of law meriting reversal and remand for reconsideration[12]. The Appeals Chamber finds that, in the present case, the Trial Chamber's framing of the witness protection orders is also contrary to the requirements of the Rules. Therefore, and in light of the *Bagasora et al.* Decision, the restrictions on disclosure in the Impugned Decisions amount to an error of law meriting reversal and remand for reconsideration.

4. The Prosecution also requests a review[13] of the restrictive order in the Trial Chamber's decision granting witness protection measures to the fourth co-Accused, Prosper Mugiraneza ("Mugiraneza")[14]. That decision was rendered separately on 2 February 2005 ("*Mugiraneza* Decision"), but the Prosecution raised no objection and the Decision was not certified for appeal at that time[15]. The Prosecution requested reconsideration of the *Mugiraneza* Decision only in conjunction with its motion for certification to appeal the Impugned Decisions in relation to Bizimungu, Mugenzi and

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[9] *Milošević* Appeal Decision on Assignment of Counsel, para. 10.

[10] *Prosecutor v. Bagosora et al.,* Case Nos. ICTR-98-41-AR73 & ICTR-98-41-AR73 (B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005.

[11] *Id.*, para. 43.

[12] *Id.*, para. 46.

[13] Prosecution Appeal, para. 2.

[14] *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005.

[15] See *Prosecutor v. Bizimungu et al.,* Case n° ICTR-99-50-AR73, Prosecution's Consolidated Response and Reply to "Prosper Mugiraneza's Motion to Dismiss Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses" and "Prosper Mugiraneza's Brief in Response to Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses", 14 October 2005, p. 2 ("Prosecution Reply").

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Bicamumpaka[16]. The Trial Chamber did not rule on the Prosecution's request for reconsideration in the Impugned Decisions[17], and makes no reference to it in the Decision Granting Certification[18], but the Prosecution nonetheless argues that the relevant clauses of the *Mugiraneza* Decision are before the Appeals Chamber after having been "implicitly" certified by the Trial Chamber for review[19].

5. The Appeals Chamber does not consider that the Prosecution's request for reconsideration of the *Mugiraneza* Decision is properly before it, since it was not certified for appeal by the Trial Chamber. The Appeals Chamber, however, notes that the request for reconsideration was filed before the Trial Chamber, and anticipates that the Trial Chamber will dispose of the Prosecution's request for reconsideration in a manner consistent with the present decision and the *Bagosora et al.* Decision.

6. For the foregoing reasons, the Appeals Chamber GRANTS the Prosecution Appeal in part, QUASHES the holding of the Impugned Decisions that restricts disclosure of information pertaining to the identity of a protected witness to members of the immediate Prosecution team and not to anyone else within the Office of the Prosecutor, and REMITS the Impugned Decisions to the Trial Chamber for reconsideration consistent with this decision.

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

Done this 16th day of November 2005, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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[16] See Prosecution Reply, p. 2; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, Prosper Mugiraneza's Brief in Response to Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses, 10 October 2005; *Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-AR73, Prosper Mugiraneza's Motion to Dismiss Prosecutor's Interlocutory Appeal Pursuant to Rule 73 (C) Respecting the Decisions of Trial Chamber II on the Protection of Defence Witnesses, 10 October 2005.

[17] The Prosecution admits that the Impugned Decisions do not dispose of the request for reconsideration. Prosecution Reply, p. 3. In fact, each of the Impugned Decisions appears to only reference the request for reconsideration in its fourth preambulatory paragraph because the Prosecution consolidated it with a *corrigendum* to its response to the Defence motions for witness protection measures, but does not address the contents of the request for reconsideration. *Cf. Prosecutor v. Bizimungu et al.,* Case N° ICTR-99-50-T, Decision on Casimir Bizimungu's Motion for Protection of Defence Witnesses, 27 June 2005, p. 2.

[18] The Trial Chamber only recalls the three Impugned Decisions and makes no reference to the *Mugiraneza* Decision. See Decision Granting Certification, p. 2 (preambulatory paragraph 5).

[19] Prosecution Reply, p. 3.