Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana 23 June 2004 (ICTR-98-41-T)

(Original :Not specified)

Trial Chamber I

Judge : Sergei Alekseevich Egorov

Cooperation of States, Ghana – subpoena – reasonable attempts by the defence – relevance of the evidence – information can not be obtain by other means – fair conduct of the trial – government member, official capacity – motion granted

International instruments cited : Statute, art. 28 – Rules of procedure and evidence, Rules 54, 73 (A)

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean Paul Akayesu, *Decision on the Motion to Subpoena a Witness, 19 November 1997 (ICTR-96-4-T) – Trial Chamber II,* Le Procureur c. Jean de Dieu Kamuhanda, *Decision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54, 20 August 2002 (ICTR-99-54A,* Reports 2002, *p. X) – Trial Chamber I,* 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-T,* Reports 2003, *p. 144) – Trial Chamber I,* Prosecutor v. Théoneste Bagosora et al, *Requête ex parte de la défense de Théoneste Bagosora visant à obtenir la coopération de la République du Ghana pour faciliter la rencontre avec un témoin, 6 May 2004 (ICTR-98-41-T,* Reports 2004, *p. X) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al, *Decision on the Defense for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41-T,* Reports 2004, *p. X) – Trial Chamber I,* The Prosecutor v. Bagosora et al, *Decision on Requests for Subpoenas, 10 June 2004 (ICTR-98-41-T,* Reports 2004, *p. X)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Blaskic, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 (IT-95-14) – Appeals Chamber,* The Prosecutor v. Kristic, *Decision of Application for Subpoena, 1 July 2003 (IT-98-33-A) – Appeals Chamber,* The Prosecutor v. Halilovic, *Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48-AR73)*

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-T)

(Original : anglais)

Chambre de première instance I

Juge : Sergei Alekseevich Egorov

Coopération des Etats, Ghana – injonction de comparaître – efforts préalables de la défense – pertinence des éléments de preuve – pas d'autre moyen d'obtenir l'information – conduite équitable du procès – membre de gouvernement, fonctions officielles – requête accordée

Instruments internationaux cités : Statut, art. 28 – Règlement de procédure et de preuve, art. 54, 73 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Jean-Paul Akayesu*, Décision faisant suite à une requête aux fins d'une citation à témoin, 19 septembre 1997 (ICTR-96-4-T) – Chambre de première instance II,* Le Procureur c. Jean de Dieu Kamuhanda*, Décision sur la requête en extrême urgence aux fins de citation d'un témoin - conformément à l'article 54 du Règlement de procédure et de preuve, 20 août 2002 (ICTR-99-54A,* Recueil 2002*, p. X) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts*, Demande de coopération et d'entraide judiciaire adressée au gouvernement du Royaume de Belgique, conformément à l'article 28 du Statut du Tribunal, 17 septembre 2003 (ICTR-98-41-T,* Recueil 2003*, p. 145) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts*, Requête ex parte de la défense de Théoneste Bagosora visant à obtenir la coopération de la République du Ghana pour faciliter la rencontre avec un témoin, 6 mai 2004 (ICTR-98-4l-T,* Recueil 2004*, p. X) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts*, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 mai 2004 (ICTR-98-41-T,* Recueil 2004*, p. X) – Chambre de première instance I,* Le Procureur c. Bagosora et consorts*, «Decision for Request for Subpoenas», 10 juin 2004 (ICTR-98-41-T,* Recueil 2004*, p. X)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Blaskic*, Arrêt relatif à la requête de la République de Croatie aux fins d'examen de la décision de la Chambre de première instance II rendue le 18 juillet 1997, 29 octobre 1997 (IT-95-14) – Chambre d'appel,* Le Procureur c. Krstic*, Arrêt relatif à la demande d'injonctions, 1er juillet 2003 (IT-98-33-A) – Chambre d'appel,* Le Procureur c. Halilovic*, Décision relative à la délivrance d'injonctions, 21 juin 2004 (IT-01-48-AR73)*

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

SITTING as Judge Sergei Alekseevich Egorov, as designated by Trial Chamber I pursuant 73 (A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the "*Mémoire* ex parte *de la défense de Théoneste Bagosora sur la demande en coopération de la République du Ghana afin qu'elle facilite l'interview d'un témoin*", filed on 9 June 2004;

CONSIDERING the "Submission of the Registrar under Rule 33 (B) of the Rules of Procedure and Evidence regarding the Order of the Chamber on the Defence request to obtain cooperation of the Republic of Ghana dated 25th May 2004", filed on 27 May 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 6 May 2004, the Defence sought an order requesting the cooperation of the Republic of Ghana in arranging a meeting between the Defence for Bagosora and Major General Yaache, a former sector commander and military observer of the United Nations Assistance Mission in Rwanda (UNAMIR) and current Chief of Staff of the Ghanian army[1]. In that motion, the Defence for Bagosora outlined and documented efforts to obtain the voluntary cooperation of Major General Yaache. The Defence for Bagosora also consulted with the United Nations and obtained its consent for such a meeting[2]. In its decision of 25 May 2004, the Chamber requested the assistance of the Republic of Ghana in facilitating the voluntary cooperation of Major General Yaache[3]. The Chamber noted that neither Major General Yaache, after being provided with material to refresh his memory, nor the Republic of Ghana had expressly refused to cooperate[4].

2. On 27 May 2004, the Registrar informed the Chamber of the existence of a diplomatic note sent by the Government of Ghana on 24 April 2004, which indicated that Major General Yaache was not in a position to offer any assistance to the Defence even after having received the additional materials. This information had not been conveyed to the Chamber prior to its decision of 25 May 2004.

[1] *Prosecutor v. Bagosora et al*, Case No ICTR-98-41-T, Requête ex parte de la défense de Théoneste Bagosora visant à obtenir la coopération de la République du Ghana pour faciliter la rencontre avec un témoin (TC), 6 May 2004 ("Bagosora Ghana Request").

[2] Bagosora Ghana Request, supra note 1, Annexe 3.

[3] *Bagosora et al*, Decision on the Defense for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004.

[4] *Ibid.* at para 7.

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la personne du juge Sergei Alekseevich Egorov, désigné par la Chambre de première instance I en vertu de l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement»),

SAISI du mémoire intitulé «Mémoire *ex parte* de la défense de Théoneste Bagosora sur la demande en coopération de la République du Ghana afin qu'elle facilite l'interview d'un témoin», déposé le 9 juin 2004,

VU le document présenté par le Greffier, intitulé *Submission of the Registrar under Rule 33 (B) of the Rules of Procedure and Evidenee regarding the Order of the Chamber on the Defence request to obtain cooperation of the Republic of Ghana dated 25th May 2004*, déposé le 27 mai 2004,

STATUE à présent sur la requête.

IINTRODUCTION

1. Le 6 mai 2004, la défense a demandé au Tribunal de solliciter la coopération de la République du Ghana en vue de l'organisation d'un entretien entre le conseil de Bagosora et le général de division Yaache, un ancien commandant de secteur et observateur militaire de la Mission des Nations Unies au Rwanda (MINUAR), actuellement Chef d'État major de l'armée ghanéenne[1]. Dans cette requête, le conseil de Bagosora a souligné et décrit les efforts déployés pour obtenir la coopération volontaire du général de division Yaache. Le conseil de Bagosora a également consulté l'ONU et obtenu le consentement de celle-ci pour cette rencontre[2]. Dans sa décision du 25 mai 2004, la Chambre a demandé à la République du Ghana de faciliter la coopération volontaire du général de division Yaache[3]. La Chambre a pris note que ni le général de division Yaache, au reçu des pièces devant lui permettre de se remettre les choses en mémoire, ni la République du Ghana n'avaient expressément refusé leur coopération[4].

2. Le 27 mai 2004, le Greffier a informé la Chambre de l'existence d'une note diplomatique envoyée par le gouvernement ghanéen le 24 avril 2004 et indiquant que le général de division Yaache ne pourrait être d'aucun secours pour la défense, même après qu'il eut reçu des éléments complémentaires. Ces informations n'avaient pas été communiquées à la Chambre préalablement à la décision du 25 mai 2004.

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[1] *Le Procureur c. Bagosora et consorts*, affaire n° ICTR-98-4 l-T, Requête *ex parte* de la défense de Théoneste Bagosora visant à obtenir la coopération de la République du Ghana pour faciliter la rencontre avec un témoin (Chambre de première instance), 6 mai 2004 [«Requête *Bagosora* (Ghana)»].

[2] Requête *Bagosora* (Ghana), note supra, Annexe 3.

[3] *Bagosora et consorts*, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (Chambre de première instance), 25 mai 2004.

[4] *Ibid*., au para 7.

SUBMISSIONS

3. In its motion, the Defence for Bagosora recalls its submissions that Major General Yaache is in a position to provide relevant evidence because he observed the events at issue and that it has made repeated efforts to directly approach Major General Yaache to obtain his cooperation. The Defence for Bagosora notes that the Chamber's earlier ruling was based in part on lack of information about Major General Yaache's position after the receipt of additional materials, and that it is now clear that he will not voluntarily cooperate. The Defence for Bagosora therefore requests that the Chamber issue a subpoena, under Rule 54, compelling Major General Yaache to attend a meeting with the Defence. It further seeks an order, pursuant to Article 28 of the Statute of the Tribunal ("the Statute"), requesting the cooperation of the Republic of Ghana in facilitating the meeting through service of the subpoena.

DELIBERATIONS

4. Under the Statute, the Chamber has incidental and ancillary jurisdiction over persons, other than an accused, that may assist the Tribunal in its pursuit of criminal justice[5]. Rule 54 lays down the different mechanisms through which such testimony may be compelled including orders, summonses, subpoenas, warrants and transfer orders issued by the Chamber when deemed necessary for the preparation and conduct of the trial. 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[6]. However, the Defence must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful[7]. Additionally, the Defence must have a reasonable belief that the prospective witness can materially assist in the preparation

[5] *Prosecutor v. Halilovic*, Case No IT-01-48-AR73, Decision on Issuance of Subpoenas (AC), 21 June 2004, para. 5; *Prosecutor v. Kristic*, IT-98-33-A, Decision of Application for Subpoena (AC), 1 July 2003, para. 10; *Prosecutor v. Blaskic*, Case No IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 48. See also *Bagosora et al*, Decision on Requests for Subpoenas (TC), 10 June 2004; Kamuhanda, Decision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54 (TC), 20 August 2002.

[6] Prosecutor v. Kristic, IT-98-33-A, Decision of Application for Subpoena (AC), 1 July 2003, pars 6-8.

[7] See generally *Bagasora et al*, Decision on the Defence For Bagosora's Request to Obtain Cooperation of the Republic of Ghana (TC), 25 May 2004, para. 7; *Bagosora et al*, Request to the Government of Belgium for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 17 September 2003.

ARGUMENTS DE LA DÉFENSE

3. Dans sa requête, le conseil de Bagosora rappelle que le général de division Yaach est en mesure de fournir un témoignage pertinent parce qu'il a assisté aux événements dont il est question. Il rappelle aussi les efforts incessants déployés par la défense pour prendre directement contact avec le général de division Yaache et obtenir sa coopération. Et de relever que la précédente décision de la Chambre était fondée en partie sur un défaut d'informations concernant la position du général de division Yaache après réception d'éléments complémentaires et qu'il était clair à présent qu'il ne coopérerait pas volontairement. Le conseil de Bagosora demande donc à la Chambre de délivrer une injonction de comparaître, en vertu de l'article 54 du Règlement, obligeant le général de division Yaache à accepter un entretien avec la défense. Il demande en outre à la Chambre de rendre une ordonnance, conformément à l'article 28 du Statut, pour solliciter la coopération de la République du Ghana afin de faciliter cet entretien en notifiant l'injonction de comparaître.

APRÈS AVOIR DÉLIBÉRÉ

4. Le Statut confère à la Chambre une compétence incidente et accessoire sur des personnes autres que les accusés qui pourraient aider le Tribunal dans sa mission d'administration de la justice pénale[5]. L'article 54 expose les différents mécanismes par lesquels ces injonctions peuvent être délivrées, notamment des ordonnances, citations à comparaître, assignations, mandats et ordres de transfert délivrés, lorsque la Chambre le juge nécessaire pour la préparation ou la conduite du procès. Lorsque la défense ne connaît pas la nature précise et la pertinence des éléments de preuve qu'un témoin éventuel peut fournir, il est dans l'intérêt de la justice de lui permettre de rencontrer le témoin et d'évaluer sa déposition[6]. Toutefois, la défense doit d'abord établir qu'elle a fait des efforts raisonnables pour obtenir la coopération volontaire des parties concernées et n'y est pas parvenue[7]. De plus, elle doit avoir des motifs raisonnables de croire que le témoin éventuel sera en mesure d'apporter une aide sensible à la pré-

[5] *Le Procureur c. Halilovic*, affaire n° IT-01-48-AR73, Décision relative à la délivrance d'injonctions (Chambre d'appel), 21 juin 2004, par. 5 *LeProcureur c. Krstic*, IT-98-33-A, Arrêt relatif à l a demande d'injonctions (Chambre d'appel), 1er juillet 2003, para. 10; *Le Procureur c. Blaskic*, affaire n° IT-95-14, Arrêt relatif à la requête de la République de Croatie aux fins d'examen de la décision de ta Chambre de première instance II rendue le 18 juillet 1997 (Chambre d'appel), 29 octobre 1997, para. 48. Voir également *Bagosora et consorts*, «Decision for Request for Subpoenas» (Chambre de première instance), 10 juin 2004; *Kamuhanda*, Décision sur la requête en extrême urgence aux fins de citation d'un témoin - conformément à l'article 54 du Règlement de procédure et de preuve (Chambre de première instance), 20 août 2002.

[6] *Le Procureur e. Krstic*, IT-98-33-A, Arrêt relatif à la demande d'injonctions (Chambre d'appel), 1er juillet 2003, para. 6 à 8.

[7] Voir globalement *Bagosora et consorts*, «Decision on the Defence For Bagosora's Request to Obtain Cooperation of the Republic of Ghana» (Chambre de première instance), 25 mai 2004, par. 7; *Bagosora et consorts*, Demande de coopération et d'entraide judiciaire adressée au gouvernement du Royaume de Belgique, conformément à l'article 28 du Statut du Tribunal (Chambre de première instance), septembre 2003.

of its case[8]. Indeed, subpoenas should not be issued lightly[9]. Major General Yaache's position as an official of UNAMIR and his meetings with the Accused Bagosora indicate that he had the opportunity to observe the events at issue and obtain information that may be relevant to these proceedings. Given that the Defence for Bagosora is interested in Major General Yaache's personal observations, the Chamber is satisfied that the information he may provide could not be obtained by other means. In light of the Chamber's determination that the Defence for Bagosora has met the requisite requirements, issuance of a subpoena to Major General Yaache is appropriate to the fair conduct of this trial.

5. The Chamber notes that Major General Yaache's prospective testimony is based on events he may have witnessed while serving as a member of UNAMIR. As such, he may be treated somewhat differently than as member of his government operating in an official capacity[10]. Consequently, he may be subpoenaed by the Tribunal[11]. The Chamber emphasizes that the United Nations has indicated that it has no objections to an interview between Major General Yaache and the Defence[12].

6. Under Article 28 of the Statute, the Tribunal may request the assistance of member States in the service of documents as well as other forms of cooperation. Article 28(1) imposes an obligation on States to "cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". Article 28 (2) requires States to comply with requests for assistance issued by a Trial Chamber. Accordingly, the Chamber requests that the Republic of Ghana effect service of the subpoena of Major General Yaache and grant its permission, to the extent required, to allow the meeting to take place. The Chamber further requests that the Republic of Ghana provide any other relevant assistance that may be reasonably required by the Defence for Bagosora to facilitate their meeting.

7. The Chamber notes that the Defence for Bagosora did not specify a particular time and venue for its proposed meeting with Major General Yaache. Therefore, the Chamber requests the Registry to communicate with Defence for Bagosora, Major

[8] *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6-7; Kristic, Decision of Application for Subpoena (AC), 1 July 2003, paras. 10-11.

[9] *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6,10.

[10] *Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 50. ("The situation differs for a state official (e.g., a general) who acts as a member of an international peace-keeping or peace enforcement force… he should be treated by the International Tribunal qua an individual").

[11] *Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 50. See also *Akayesu*, Decision on the Motion to Subpoena a Witness (TC), 19 November 1997 (Subpoena issued to UNAMIR official).

[12] Bagosora Ghana Request, supra note 1, Annexe 3.

paration de son dossier[8]. En effet, les injonctions de comparaître ne sauraient être délivrées à la légère[9]. Compte tenu des responsabilités qu'il exerçait à la MINUAR et des entretiens qu'il a eus avec l'accusé Bagosora, le général de division Yaache doit avoir pu observer les événements en question et obtenir des informations qui pourraient être pertinents en l'espèce. Étant donné que le conseil de Bagosora est intéressé par les observations personnelles du général de division Yaache, la Chambre est d'avis que les informations que celui-ci pourrait fournir ne peuvent pas être obtenues par d'autres moyens. La Chambre ayant conclu que le conseil de Bagosora remplissait les conditions requises, la délivrance d'une injonction de comparaître au général de division Yaache est nécessaire à la conduite équitable du procès.

5. La Chambre relève que la déposition éventuelle du général de division Yaache repose sur des événements dont il aurait pu être témoin alors qu'il faisait partie de la MINUAR. En tant que tel, il doit être traité autrement que ne le serait un membre du gouvernement agissant dans l'exercice de ces fonctions officielles[10]. Il peut donc être cité à comparaître devant le Tribunal[11]. La Chambre insiste sur le fait que l'ONU a indiqué qu'elle ne voyait aucune objection à un entretien du général de division Yaache et de la défense[12].

6. Selon l'article 28 du Statut, le Tribunal peut demander l'assistance d'un État membre pour l'expédition des documents, ainsi que d'autres formes de coopération. L'article 28 (1) fait obligation aux États de «collaborer 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». L'article 28 (2) impose aux États de répondre aux demandes émanant d'une Chambre de première instance. En conséquence, la Chambre prie la République du Ghana de notifier au général de division Yaache l'injonction de comparaître qui lui est faite et d'autoriser, dans la mesure requise, la tenue de l'entretien sollicité. Elle demande en outre que la République du Ghana fournisse toute autre assistance dont le conseil de Bagosora aurait légitimement besoin pour cet entretien.

7. La Chambre observe que le conseil de Bagosora n'a pas précisé le moment ni le lieu de l'entretien envisagé avec le général de division Yaache. Aussi, la Chambre invite-t-elle le Greffe à prendre contact avec le conseil de Bagosora, le général de

[8] *Halilovic*, Décision relative à ta délivrance d'injonctions (Chambre d'appel), 2l juin 2004, par. 6 et *Krstic*, Arrêt relatif à la demande d'injonctions (Chambre d'appel), 1er juillet 2003, par. 10 et 11.

[9] *Halilovic*, Décision relative à la délivrance d'injonctions (Chambre d'appel), 21 juin 2004, par. 6 et 10.

[10] *Blaskic*, Arrêt relatif à la requête de la République de Croatie aux fins d'examen de la décision de la Chambre de première instance II rendue le 18 juillet 1997 (Chambre d'appel), 29 octobre 1997, par. 50. («La situation est différente en ce qui concerne un responsable officiel (par exemple, un général) agissant en qualité de membre d'une force internationale de maintien ou d'imposition de la paix, le Tribunal devrait le considérer comme une personne agissant à titre privé»).

[11] *Blaskic*, Arrêt relatif à la requête de la République de Croatie aux fins d'examen de la décision de la Chambre de première instance II rendue le 18 juillet 1997 (Chambre d'appel), 29 octobre 1997, par. 50. Voir également *Akayesu*, Décision faisant suite à une requête aux fins d'une citation à témoin, 19 septembre 1997 (Injonction adressée à un officiel de la MINUAR).

[12] Requête *Bagosora* (Ghana), note supra, Annexe 3.

General Yaache, and any relevant Ghanaian authorities in order to determine an appropriate time and venue for the meeting, taking due consideration of the needs of judicial economy.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registrar to prepare a subpoena in accordance with this decision, addressed to Major General Yaache, and to communicate it, with a copy of the present decision, to the Republic of Ghana;

REQUESTS the Republic of Ghana to serve the subpoena on Major General Yaache as soon as possible, to grant its permission, to the extent necessary, for Major General Yaache to meet with the Defence for Bagosora, and additionally to provide any other relevant assistance that may be reasonably required to facilitate their meeting;

DIRECTS the Registrar to determine an appropriate time and venue for the meeting after communicating with the relevant parties and taking due consideration of the needs of judicial economy.

Arusha, 23 June 2004

[Signed] : Sergei Alekseevich Egorov

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Decision on Request for Subpoena for Witness BW 24 June 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judge : Erik Møse

Subpoena – efforts from the Prosecutor – relevant information – assistance of States, Switzerland – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73 (A) – Security Council Resolution 955

International case cited : Trial Chamber I, The Prosecutor v. Théoneste Bagosora et al.*, Decision on Requests for Subpoenas, 10 June 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

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

division Yaache et toutes autorités ghanéennes compétentes afin de déterminer un moment et un lieu appropriés pour l'entretien, en tenant dûment compte des besoins d'économie judiciaire.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête;

INVITE le Greffier à établir une injonction de comparaître dans la ligne de la présente décision, adressée au général de division Yaache, et de la communiquer, avec une copie de la présente décision, à la République du Ghana;

DEMANDE à la République du Ghana de notifier, dès que possible, l'injonction de comparaître au général de division Yaache, d'autoriser celui-ci, dans la mesure requise, à avoir un entretien avec le conseil de Bagosora et en outre de fournir toute assistance nécessaire qui pourrait être légitimement sollicitée pour faciliter cet entretien;

CHARGE le Greffier de fixer un moment et un lieu appropriés pour l'entretien après avoir consulté les parties concernées et en prenant dûment en considération les besoins d'économie judiciaire.

Arusha, le 23 juin 2004

[Signé] :Sergei Alekseevich Egorov

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Décision relative à la citation à comparaître du témoin BW 24 juin 2004 (ICTR-98-41-T)

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse

Citation de témoin à comparaître – efforts du Procureur – informations utiles – coopération des Etats, Suisse – requête accordée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73 (A) – Résolution 955 du Conseil de sécurité

Jurisprudence internationale citée : Chambre de première instance I, Le Procureur c. Bagosora et consorts*, Décision relative aux requêtes aux fins de citation à comparaître afin de témoigner, 10 juin 2004 (ICTR-98-41-T,* Recueil 2004*, p. X)*

LE TRUBINAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

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 Prosecution "Request for a Subpoena Compelling Witness BW to Appear for Testimony", filed on 17 June 2004;

CONSIDERING the "Réponse" of the Defence for Bagosora, filed on 22 June 2004;

HEREBY DECIDES the motion.

1. The Prosecution requests that a subpoena be issued by the Chamber to Witness BW who refuses to come to Arusha to testify before the Tribunal despite "repeated strenuous" efforts to secure his voluntary appearance. According to the Prosecution, the witness's refusal is based on a lack of faith in the integrity of the Tribunal. The subpoena requested would compel the witness to appear at the seat of the Tribunal in Arusha for testimony. Though not opposing the issuance of the subpoena as such, the Defence argues that the witnesses for whom the Prosecution has sought subpoenas, in this and other motions, have limited knowledge. Meanwhile, subpoenas have not been requested for other witnesses of much greater significance, and their names have been withdrawn from the witness list without explanation. The Defence alleges that the Prosecution's purpose in its selection of witnesses to subpoena is to secure the conviction of the Accused, rather than to present all the facts of the case, in violation of the letter and spirit of Security Council Resolution 955.

2. The Chamber recently considered its power to issue subpoenas under the Statute of the Tribunal and its Rules of Procedure and Evidence, and decided to issue seven subpoenas requiring the attendance of witnesses[1]. For the reasons set forth in that decision, the Chamber is competent to issue such subpoenas.

3. The Chamber considers the present request for a subpoena to be justified, based on the Prosecution's submissions. The individual concerned appears on the Prosecution witness list; the witness's sworn statement indicates that he has knowledge relevant to the present trial; and, according to the Prosecution, the individual refuses to come to the Tribunal to testify, despite the best efforts of the Prosecution and the Registry. Under these circumstances, the issuance of a subpoena is necessary and appropriate for the conduct of the present trial. The Registry shall prepare a subpoena addressed to Witness BW, ordering his appearance at the Tribunal, at a date and time to be specified by the Registry, to give evidence in the matter of *The Prosecutor v. Bagosora et al.*

4. Although the subpoenas shall be addressed directly to the prospective witness, the Chamber recalls that the notification and assistance of the Government of Switzerland, where the witness is presently located, is desirable. Article 28 of the Statute expressly identifies the service of documents as one of the forms of cooperation which the Tribunal may request of a State. The Chamber requests the Government of Switzerland to effect service on the addressee of the subpoena which is filed in

[1] *Bagosora et al.*, Decision on Requests for Subpoenas (TC), 10 June 2004.

SIÉGEANT en la Chambre de première instance, en la personne du juge Erik Møse, désigné par la Chambre en vertu de l'article 73 (A) du Règlement de procédure et de preuve,

SAISI de la requête du Procureur tendant à voir citer à comparaître le témoin BW, déposée le 17 juin 2004,

VU la réponse déposée par la défense de Bagosora le 22 juin 2004,

STATUANT sur la requête.

1. Le Procureur prie la Chambre de citer à comparaître le témoin BW qui refuse de se rendre à Arusha pour déposer devant le Tribunal malgré les efforts «sérieux et renouvelés» faits pour l'amener à comparaître de son propre gré. D'après le Procureur, le refus du témoin s'expliquerait par ceci qu'il n'a pas foi dans l'intégrité du Tribunal. La citation à comparaître demandée l'obligerait à comparaître au siège du Tribunal à Arusha. Sans s'opposer à la délivrance d'une citation à comparaître en soi, la défense fait valoir que les témoins s'agissant desquels le Procureur demande citation à comparaître, dans la présente requête comme dans d'autres, ne possèdent guère d'infractions utiles. Par contre, il n'a pas cherché à faire citer à comparaître d'autres témoins présentant beaucoup plus d'intérêt, dont les noms ont été retirés de la liste des témoins sans explication. La défense allègue qu'en choisissant ainsi les témoins à faire citer à comparaître, le Procureur ne cherche qu'à obtenir la condamnation de l'accusé, et non à présenter les faits relatifs de la cause, violant, de ce fait, la lettre et l'esprit de la résolution 955 du Conseil de sécurité.

2. Ayant récemment examiné le pouvoir que le Statut du Tribunal et le Règlement de procédure et de preuve lui confèrent en cette matière, la Chambre a cité à comparaître sept témoins[1]. Par les motifs exposés dans ladite décision, la Chambre a compétence pour délivrer de telles citations à comparaître.

3. La Chambre considère que, vu les arguments avancés par le Procureur, la présente requête en citation à comparaître est fondée. L'intéressé figure sur la liste des témoins à charge; il ressort de sa déclaration sous serment qu'il détient des informations utiles en l'espèce et, selon le Procureur, il refuse de venir déposer devant le Tribunal malgré tous les efforts déployés par le Procureur et le Greffe. Cela étant, il est utile et nécessaire aux fins de la présente espèce que la Chambre délivre une citation à comparaître. Le Greffe adressera au témoin BW une citation à comparaître devant le Tribunal, à une date et heure à fixer par le Greffe, pour déposer en l'affaire *Le Procureur c. Bagosora et consorts*.

4. Même si la citation à comparaître est à personne, la Chambre rappelle qu'il serait souhaitable d'en informer le Gouvernement de la Suisse où le témoin se trouve à l'heure actuelle, et de demander son assistance. L'article 28 du Statut énumère l'expédition des documents au nombre des formes de coopération que le Tribunal peut demander à un État. La Chambre demande au Gouvernement suisse de faire signifier à personne la convocation déposée en exécution de la présente décision et de prêter

[1] Affaire *Bagosora et consorts*, Décision relative aux requêtes aux fins de citation à comparaître afin de témoigner (Chambre de première instance), 10 juin 2004.

accordance with this decision, and to provide any assistance that may be requested by the Registry to facilitate the attendance of the witness.

5. The witness is scheduled to appear during the ongoing trial session, which is scheduled to end on 14 July 2004. Service of, and prompt compliance with, the subpoena authorized by the present decision is, therefore, a matter of urgency.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to prepare a subpoena in accordance with this decision, addressed to the Prosecution witness designated by the pseudonym BW, and to communicate it, with a copy of the present decision, to the Government of Switzerland;

REQUESTS the Government of Switzerland to serve the subpoena on the addressee as soon as possible, and to provide any other assistance that may be requested by the Registry to facilitate his attendance.

Arusha, 24 June 2004

[Signed] : Erik Møse

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Decision on Prosecutor's Request for Certification Under Rule 73 With Regard to Trial Chamber's "Decision on Prosecutor's Request for a Suspension of the Time Limit" 14 July 2004 (ICTR-98-41-T)

(Original : Anglais)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora, Kabiligi, Ntabakuze – Interlocutory appeal of decisions on motions, certification – suspension of the time-limit – fair and expeditious conduct of the Proceedings – motion denied

International instruments cited : Rules of procedure and evidence, Rule 73 (B) and (C) – addition of witnesses

International cases cited :

I.C.T.R. : -– Trial Chamber I, 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-T,* Reports 2003*, p. 245); Trial Chamber I,* 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-*

telle assistance que le Greffe pourrait lui demander afin de pourvoir à la comparution du témoin.

5. Le témoin doit en principe comparaître lors de la partie des débats en cours du procès, qui devraient se terminer le14 juillet 2004. La signification et la prompte réponse à la convocation autorisée par la présente décision revêtent dès lors un caractère urgent.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête.

ORDONNE au Greffe d'adresser comme suite à la présente décision, une convocation au témoin à charge désigné sous le pseudonyme BW, à transmettre, accompagnée du texte de la présente décision, au Gouvernement suisse.

DEMANDE au Gouvernement suisse de faire signifier à personne la convocation dans les meilleurs délais, et de prêter au Greffe telle assistance qu'il pourrait demander afin de pourvoir à la comparution du témoin.

Fait à Arusha, le 24 juin 2004

[Signé] : Erik Møse

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Décision sur la demande de certification du Procureur déposée en vertu de l'article 73 relativement à la **Decision on Prosecutor's Request for a Suspension of Time-Limit** *14 juillet 2004 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Eric Mose, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora, Kabiligi, Ntabakuze – Appel interlocutoire de décisions sur requête, certification – suspension des délais – adjonction de témoins – équité et rapidité du procès – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73 (B) et (C)

Jurisprudence internationale citée :

T.P.I.R. :, Chambre de première instance I, Le Procureur c. Théoneste Bagosora et consorts*,* Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA*, 5 décembre 2003 (ICTR-98-41-T,* Recueil 2003*, p. 245) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts*,* Decision on Certification of Appeal Concerning Admission of Written Statement of

41-T, Reports 2003*, p. 249) – Trial Chamber II,* The Prosecutor v. Arsène Shalom Ntahobali 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-T,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Prosecutor's Request for Certification Under Rule 73 with Regard to Trial Chamber's '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)'", filed on 23 June 2004;

CONSIDERING the Ntabakuze Defence Response, the Kabiligi Defence Response and the Bagosora Defence Response, all filed on 28 June 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 21 May 2004, the Chamber issued its Decision regarding an application by the Prosecution to vary its witness list. The Prosecution was allowed to add Witnesses AAA, ABQ, AFJ and Commander Maxwell Nkole (another witness, Witness AL, had already been added during the trial, before the Decision was rendered). The Chamber denied the motion in respect of Witnesses AJP, AMI, ANC and ANE, citing, inter alia, the lateness of the disclosure of the statements of these witnesses to the Defence and the advanced stage of proceedings. The Prosecution filed a motion on 28 May 2004 for the suspension of the time-limit for certification of the Decision, which was denied on 16 June 2004. On 1 June 2004, the Prosecution filed a motion for reconsideration of the 21 May Decision, which was denied on 15 June 2004. The Prosecution now seeks certification to appeal the decision of 16 June 2004. The Prosecution has additionally filed a second reconsideration motion on 2 July 2004 in respect of the same witnesses as the first reconsideration motion which was denied.

SUBMISSIONS

2. The Prosecution seeks certification to appeal the Suspension Decision, pursuant to Rule 73 (B), which contains two cumulative prongs: (a) the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (b) the impugned decision involves an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Prosecution need not demonstrate that the impugned decision involved an error, which is properly to be argued before the Appeals Cham-

Witness XXO*, 11 décembre 2003 (ICTR-98-41-T,* Recueil 2003*, p. 249) – Chambre de première instance II,* Le Procureur c. Arsène Shalom Ntahobali et consorts*,* Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defense Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmisible"*, 18 mars 2004 (ICTR-98-42-T,* Recueil 2004*, p. X)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»);

SIÉGEANT en la Chambre de première instance I composée des juges Eric Mose, Président de Chambre, Jai Rarn Reddy et Sergei Alekseevich Egorov,

SAISI de la demande en certification déposée en vertu de l'article 73 relativement à la *Decision on Prosecutor's Request for a Suspension of 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)* rendue le 23 juin 2004,

VU les réponses respectives des conseils de la défense de Ntabakuze, de Kabiligi et de Bagosora, toutes déposées le 28 juin 2004,

Statuant ci-après sur la requête,

INTRODUCTION

1. Le 21 mai 2004, la Chambre a rendu sa Décision relative à la requête du Procureur en modification de la liste de ses témoins autorisant que soit ajoutée à la liste des témoins à charge les témoins AAA, ABQ, AFJ et le commandant Maxwell Nkole (un autre témoin, AL, avait déjà été ajouté à cette liste en cours de procès avant que ne soit survenue ladite Décision). Ladite requête a été rejetée par la Chambre relativement aux témoins AP, AMI, ANC et ANE, motif pris, notamment, du caractère tardif de la communication des déclarations de ces témoins à la défense ainsi que du stade avancé de la procédure. Le 28 mai 2004, le Procureur avait déposé une requête aux fins de suspension des délais prescrits pour la certification de l'appel, laquelle requête a été rejetée le 16 juin 2004. Le le' juin 2004, Le Procureur a déposé une requête en réexamen de la Décision du 21 mai, laquelle requête a été rejetée le 15 juin 2004. Le Procureur sollicite à présent une certification propre à lui permettre de faire appel de la décision du 16 juin 2004. De surcroît, il a déposé, le 2 juillet 2004, une deuxième requête en réexamen concernant les mêmes témoins que ceux visés dans sa première requête en réexamen qui avait été rejetée.

ARGUMENTS DES PARTIES

2. Le Procureur prie la Chambre de faire droit à sa demande tendant à interjeter appel de la décision sur la requête en suspension sur la base de l'article 73 (B) dont le jeu suppose que soient réunies l'une et l'autre des deux conditions énoncées ci-après : (a) la décision attaquée touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès ou son issue; (b) la décision attaquée touche une question dont le règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure. Il n'y a pas lieu pour le Procureur de démontrer que la décision

ber. It is argued that the decision involves an issue of the fairness and expeditiousness of the proceedings and the outcome of the trial, because the Prosecution has been unfairly penalized for attempting to save judicial resources by seeking reconsideration prior to certification, and because the Prosecution has been deprived of the ability to seek relief from the Chamber's decision of 21 May 2004. The Prosecution asserts that it acted in good faith and with diligence in preserving its procedural rights. According to the Prosecution, the Chamber acknowledged the existence of "good cause" when it held that certification should have been sought instead of reconsideration, and therefore it would be an unfair abuse of the Chamber's discretionary power to suspend the time-limit. The decision could also significantly affect the outcome of the trial as it excluded material evidence. For the same reasons, and because an appeal would resolve the issue of the power to grant suspension under Rule 73 (C), the Prosecution submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Further, it would be in the interests of justice, as the new evidence would not be raised on appeal.

3. The Ntabakuze Defence submits that the Prosecution's multi-stepped appeal initiative in relation to the original motion to vary the witness list has not been in the interests of judicial economy. In order to succeed in this motion, the Prosecution has a persuasive burden to show that there was an abuse of discretion. Agreeing with the two-pronged approach to Rule 73 (B), the Ntabakuze Defence contends that there was no unfairness in the Suspension Decision that followed the Rules. The Ntabakuze Defence points out that the Prosecution has not explained why it chose to file a reconsideration motion, rather than a certification motion. It also notes that the Chamber found no "good cause" to suspend the time-limit, even if it had the power to do so, and therefore resolving the question of the existence of the discretion to suspend would not materially advance the proceedings. Even if the Prosecution has met the conditions for certification, the Chamber still retains the discretion as to whether or not to certify.

4. The Kabiligi Defence argues that unlike Rule 72, Rule 73 does not provide for the waiver of the time-limit, and therefore the Chamber was correct in doubting its power to suspend the time-limit. Even if there was such a power, which the Prosecution has not shown, there must be a showing of good cause, which the Prosecution has not demonstrated. Where there is good cause, the Chamber still has the discretion whether or not to grant the suspension, taking into consideration other factors like the interests of justice. The interests of justice do not require suspension of the time-limit, nor clarity on the issue of the power to suspend the time-limit. As the Prosecution did not highlight any error in the Suspension Decision, the two prongs of the certification test are not met.

contestée touche une erreur qu'il est fondé à plaider devant la Chambre d'appel. Le Procureur fait valoir que la décision touche une question d'équité et de rapidité ainsi que l'issue du procès, motif pris de ce qu'il avait été injustement pénalisé pour avoir tenté d'économiser les ressources du Tribunal en invitant la Chambre à réexaminer sa requête avant de déposer une demande de certification, et de ce qu'il s'était vu interdire la possibilité d'introduire un recours contre la décision de la Chambre datée du 21 mai 2004. Le Procureur soutient avoir agi de bonne foi et avec diligence aux fins de la protection des droits qui lui sont reconnus par les règles de procédure. À ses yeux, la Chambre a admis l'existence d'une «raison valable» en affirmant que la certification aurait dû être sollicitée en lieu et place du réexamen, et que dès lors, toute décision de sa part serait constitutive d'un abus du pouvoir discrétionnaire dont elle serait investie. En outre, une décision de suspension des délais prescrits serait de nature à compromettre sensiblement l'issue du procès, attendu qu'elle entraînerait l'exclusion d'importants témoignages. Pour les mêmes raisons, et parce qu'un appel permettrait de régler la question de savoir si oui ou non la Chambre est investie du pouvoir d'ordonner une suspension en vertu de l'article 73 (C), le Procureur fait valoir qu'un règlement immédiat de la question par la Chambre d'appel pourrait concrètement faire avancer la procédure. De surcroît, cette démarche serait dans l'intérêt de la justice dès lors que la question de ces nouveaux témoignages ne serait plus soulevée en appel.

3. La défense de Ntabakuze soutient que l'initiative prise par le Procureur à l'effet d'interjeter appel en plusieurs étapes relativement à sa première requête en modification de la liste des témoins à charge n'était pas de nature à économiser les ressources du Tribunal. Pour voir sa requête prospérer, le Procureur se doit de prouver que la Chambre a abusé du pouvoir discrétionnaire dont elle est investie. La défense de Ntabakuze, tout en souscrivant à la double condition imposée par l'article 73 (B), soutient que la décision relative à la demande de suspension rendue en conformité avec le Règlement n'était entachée d'aucune injustice. Elle souligne que le Procureur n'a pas expliqué pourquoi il a choisi de déposer une requête en réexamen au lieu d'une demande de certification. Elle fait également valoir que la Chambre n'avait pas estimé qu'il y avait une «raison valable» pour qu'elle ordonne la suspension des délais prescrits même si elle avait le pouvoir de le faire. Par conséquent, le fait de régler la question de savoir si la Chambre est investie ou non du pouvoir discrétionnaire de suspendre les délais ne concourrait en rien à faire progresser concrètement la procédure. Même si le Procureur satisfaisait aux conditions exigées pour la certification, la Chambre demeurerait investie du pouvoir souverain de certifier ou de ne pas certifier.

4. La défense de Kabiligi soutient que contrairement à l'article 72, l'article 73 ne prévoit aucune dérogation au délai prescrit et, par conséquent, la Chambre avait raison de se demander si elle était habilitée à suspendre les délais prescrits. Même si elle était investie d'un tel pouvoir, ce que le Procureur n'a pas rapporté, il faudrait que soit prouvée l'existence d'une «raison valable», ce que le Procureur n'a pas davantage établi. Même si l'existence d'une «raison valable» était démontrée, la Chambre demeurerait investie du pouvoir discrétionnaire de faire droit ou non à la demande de suspension, en tenant compte d'autres éléments tels que l'intérêt de la justice. L'intérêt de la justice ne commande ni la suspension des délais prescrits ni le règlement de la question du pouvoir discrétionnaire de la Chambre de suspendre les délais prescrits. Dès lors que le Procureur n'a pas rapporté que la décision relative à la demande de suspension était entachée d'erreur, la défense de Kabiligi considère que les conditions requises pour qu'il y ait certification font défaut.

5. The Bagosora Defence joins in the responses of the Ntabakuze and Kabiligi Defence, emphasizing that the Chamber held in the impugned decision that even if it had the power to suspend the time-limit, it declined it do so. The issue is therefore not a live one and its resolution would not materially advance the proceedings.

DELIBERATION

6. Rule 73 (B) and (C), which provides for interlocutory appeals, states 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.

7. Decisions on motions are generally without interlocutory appeal unless the conditions in Rule 73 (B) are satisfied, in which case the Chamber may certify a matter for interlocutory appeal[1]. The Chamber has previously taken into consideration, in deciding whether or not to certify for appeal, whether there was an error of law or abuse of discretion in the impugned decision[2].

8. The motion involves an examination of the issue of a suspension of the time-limit under Rule 73 (C), rather than the substantive issue of the addition of Witnesses AMI, ANC and ANE. The issue must significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and must be an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Chamber considers that the issue of suspension of the time-limit would unduly prolong the proceedings and cause potential prejudice to the Accused by abrogating the Rules of the Tribunal. For these reasons, the Chamber considers that the issue would not significantly affect the fair and expeditious conduct of the proceedings.

9. Although it is not necessary to consider the second cumulative prong, the Chamber nonetheless notes that appellate resolution of this issue would not materially advance the case. If the appeal was certified and succeeded, the Appeals Chamber would only remit the matter back to the Chamber for consideration of whether there was "good cause" to suspend the time-limit. This would not advance the proceedings

[1] *Ntahobali 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, paras. 14-1 5.

[2] *Bagosora et al*., Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA (TC), 5 December 2003; Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO (TC), 11 December 2003.

5. La défense de Bagosora fait siennes les réponses données par les défenses de Ntabakuze et de Kabiligi, en soulignant que la Chambre a fait valoir, dans sa décision attaquée, qu'à supposer même qu'elle ait été investie du pouvoir de suspendre les délais prescrits, elle avait choisi de ne pas s'en prévaloir. La question est par conséquent tout à fait théorique et son règlement ne pourrait pas faire progresser concrètement la procédure.

DÉLIBÉRATIONS

6. L'article 73 (B) et (C) qui régit les appels interlocutoires est ainsi libellé :

> (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.

7. Les décisions sur les requêtes ne sont généralement pas susceptibles d'appel interlocutoire, sauf si les conditions prévues par l'article 73 (B) sont remplies. Dans de tels cas, la Chambre peut certifier que la question est susceptible d'appel interlocutoire[1]. La Chambre, avant de décider si oui ou non elle devait certifier l'appel interlocutoire, avait déjà examiné la question de savoir si oui ou non la décision contestée[2] était entachée d'une erreur de droit ou d'un abus du pouvoir discrétionnaire dont elle est investie.

8. La requête du Procureur fait appel à l'examen de la question de la suspension des délais prescrits en vertu de l'article 73 (C) plutôt qu'à celui de la question substantielle de l'adjonction des témoins AMI, ANC et ANE à la liste des témoins à charge. Cette question devrait être susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et constituer un problème dont le règlement par la Chambre d'appel pourrait concrètement faire progresser la procédure. La Chambre considère que l'examen de la suspension des délais prescrits serait de nature à prolonger indûment la procédure et à porter préjudice à l'accusé, en faisant table rase du Règlement du Tribunal. Pour ces motifs, la Chambre estime que la question de la suspension des délais prescrits n'est pas susceptible de compromettre sensiblement l'équité et la rapidité du procès.

9. Même s'il n'y a pas lieu pour elle d'examiner la deuxième condition exigée par l'article 73, la Chambre relève néanmoins que le règlement de cette question par la Chambre d'appel ne pourrait pas concrètement faire progresser la procédure. A supposer même qu'il y ait certification et que l'appel prospère, la Chambre d'appel ne

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[1] *Ntahobali et consorts*, *Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defense Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmisible"* (Chambre de première instance), 18 mars 2004, paras. 14 et 15.

[2] *Bagosora et consorts*, *Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP and DA* (Chambre de première instance), 5 décembre 2003; *Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO* (Chambre de première instance), 11 décembre 2003.

as the Chamber indicated in its Suspension Decision that even if it had the power to grant suspension, it was not inclined to suspend the time-limit. The issue is many steps removed from the substantive issue of the addition of the witnesses. If the time-limit was suspended and the certification motion filed, the Chamber would still then have to consider whether or not to certify the matter for appeal. If certified, only then would the matter be sent to the Appeals Chamber for a consideration of the substantive issue of the addition of the witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 July 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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procéderait qu'à un simple renvoi de l'affaire devant la Chambre de première instance afin qu'elle statue sur l'existence d'une «raison valable» pour ordonner de suspendre les délais prescrits. Cette procédure serait de nature à faire progresser le procès, comme l'a déjà si bien indiqué la Chambre dans sa décision relative à la demande de suspension, en déclarant notamment que même si elle avait le pouvoir de l'ordonner, elle ne penchait pas en faveur d'une suspension des délais prescrits. Cette question se trouve aux antipodes de la question substantielle de l'adjonction des témoins à la liste du Procureur. A supposer aussi que les délais prescrits aient été suspendus et la requête en certification déposée, la Chambre aurait toujours eu à se prononcer sur la question de savoir si, oui ou non, elle doit certifier l'appel. Ce n'est qu'en cas de certification que l'affaire serait renvoyée devant la Chambre d'appel afin qu'elle statue sur la question substantielle de l'adjonction des témoins à la liste des témoins à charge.

POUR CES MOTIFS,

REJETTE la requête.

Arusha, le 14 juillet 2004

[Signé] : Eric Mose; Jai Ram Reddy; Sergei Alekseevich Egorov

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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-T)*

(Original : English)

Trial Chamber I

Judges : Judge Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora, Kabiligi, Ntabakuez – reconsideration – particular circumstances – delay in the close of the Prosecution's case, new circumstance – interests of justice – fair trial, cross-examination – motion denied

International instruments cited : Rules of procedure and evidence, Rules 66, 73 bis (E)

International case cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Théoneste Bagosora*, Decision on Prosecutor's 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)", 15 June 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Prosecutor's 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)'", etc., filed on 2 July 2004;

CONSIDERING the Ntabakuze Defence Response, filed on 5 July 2004; the Nsengiyumva Defence Response, filed on 6 July 2004; the Bagosora Defence Response, filed on 7 July 2004; and the Kabiligi Defence Response, filed on 7 July 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 21 May 2004, the Chamber issued its Decision regarding an application by the Prosecution to vary its witness list. The Prosecution was allowed to add Witnesses AAA, ABQ, AFJ and Commander Maxwell Nkole (another witness, Witness AL, had already been added during the trial, before the Decision was rendered). The Chamber denied the motion in respect of Witnesses AJP, AMI, ANC and ANE, citing, *inter alia*, the lateness of the disclosure of the statements of these witnesses to the Defence and the advanced stage of proceedings. The Prosecution filed a motion on 28 May 2004 for the suspension of the time-limit for certification of the Decision, which was

denied on 16 June 2004. On 1 June 2004, the Prosecution filed a motion for reconsideration of the 21 May decision, which was denied on 15 June 2004. The Prosecution sought certification to appeal the decision of 16 June 2004 by way of a motion filed on 23 June 2004. The Prosecution has now additionally filed a second reconsideration motion in respect of the same witnesses as the first reconsideration motion which was denied.

SUBMISSIONS

2. The Prosecution wishes the Chamber to reconsider its 21 May Decision with respect to Witnesses AMI, ANC and ANE on the ground that new circumstances have arisen. As the Prosecution case will not end on 14 July 2004, as previously anticipated, but will continue for another trial session, the Prosecution argues that this alleviates the concerns of late disclosure at an advanced stage of the proceedings and will give the Defence time to prepare for these material witnesses.

3. The Ntabakuze Defence asserts that there are no new circumstances as it was always obvious that the Prosecution case would not close on 14 July 2004. Further, there are four months from the filing of the motion to the anticipated close of the case, which was the case with the original motion to vary the witness list - therefore there are no new circumstances. The Defence should know the Prosecution's case before the commencement of trial and most of the Prosecution case has now been heard. Finally, Witness ANC should not be added as he provides the same evidence as Witness DAZ who has since returned to complete his testimony.

4. The Nsengiyumva Defence echoes the objections of the Ntabakuze Defence and adds that addition of the witnesses would compel the Defence to seek to recall previous Prosecution witnesses who testified to similar issues in order to question them.

5. The Bagosora Defence joins in the Ntabakuze Defence response and contends that there are no new circumstances, adding that the trial is presently at an even later stage than at the time of the 21 May Decision.

6. The Kabiligi Defence seeks the rejection of the motion, making similar arguments as the other Defence teams, and submits that under the Rules, the Prosecution files its list of witnesses prior to the trial, after which the list may be varied only if in the interests of justice.

DELIBERATIONS

7. The Chamber has previously held that reconsideration is an exceptional measure that is available only in particular circumstances, including where new circumstances have arisen since the filing of the impugned Decision that affect the premise of the impugned Decision[1]. The Chamber notes that the Prosecution did not mention in its

[1] *Bagosora*, Decision on Prosecutor's 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), 15 June 2004, paras. 7-9.

motion that it is presently seeking a second reconsideration of the impugned decision after an unfavourable ruling.

8. The Prosecution argues that the delay in the close of the Prosecution's case, to sometime after the previously anticipated date of 14 July 2004, qualifies as a new circumstance warranting reconsideration. As it permits the Defence more time since disclosure of these witnesses to prepare for their cross-examination, it resolves the problem of unfair surprise to the Defence. The Prosecution has failed to comprehend the Chamber's rulings on this matter. The re-scheduling of the close of its case does not constitute a new circumstance, or a change in circumstance, that affects the premise of the impugned decision. The delayed close of the Prosecution case does not change the fact that the new witnesses would be added at a very advanced stage of the Prosecution case, meaning that most the Prosecution case has now already been heard.

9. The Chamber reiterates that Rule 66 provides the framework in which disclosure by the Prosecution is to take place; Rule 73 *bis* (E) is an exceptional measure where the interests of justice mandate a departure from Rule 66. The Chamber considers that it would be unfair to the Defence to be faced with entirely new witnesses when their reasonable expectation would be that the Prosecution is closing its case and the Defence is already aware of all the evidence to be called. If the witnesses were to be added, the Defence would have been deprived of the opportunity to use the evidence of these new witnesses to cross-examine previous Prosecution witnesses who testified to similar issues, in order to test the totality of the evidence and the credibility of all the witnesses testifying to similar issues. The Chamber therefore finds that there are no grounds for reconsideration and will not proceed to examine the merits of the motion.

10. This motion represents the fifth filing of the Prosecution on the issue of varying the witness list. While either party is clearly entitled to challenge a decision by reconsideration, appeal or certification to appeal, the Prosecution has continued to file motions challenging the Chamber's rulings after these avenues have been exhausted. A court ruling cannot be subjected to an infinite process of reconsiderations and certifications; the Chamber urges Counsel to exercise judgment in these matters, and to make informed and reasoned choices in the conduct of their cases.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 July 2004.

[Signed] : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Prosecutor's Request for a Subpoena regarding Witness BT 25 August 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Subpoena – video-link testimony, deposition – relevant information to the trial – refusal to come to Arusha – Prosecutor – cooperation of States, Belgium – motion granted

International instruments cited : Statute, art. 28 – Rules of procedure and evidence, Rule 54

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Théoneste Bagosora et al., *Decision on Requests for Subpoenas, 10 June 2004 (ICTR-98-41-T,* Reports 2004*, p. X) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion to Compel the Prosecution to File A Revised Witness List, 15 June 2004 (ICTR-98-41-T,* Reports 2004*, p. X) – Trial Chamber I,* 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-T,* Reports 2004*, p. X) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Subpoena for Witness BW, 24 June 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

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 "Prosecutor's Urgent and Confidential Request for a Subpoena Compelling Protected Prosecution Witness BT to Appear for Testimony and a Request for Cooperation from the Kingdom of Belgium to Facilitate Such Testimony", filed on 19 July 2004;

CONSIDERING the Bagosora Defence's Response filed on 26 July 2004; the Ntabakuze Defence's Response filed on 27 July 2004; and the Defence for Kabiligi's Response filed on 30 July 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. Witness BT appears as a protected Prosecution witness on the Prosecution's list of witnesses filed on 30 April 2003. Subsequently, the witness was removed from the list of 28 May 2004. However, in a previous decision, the Chamber noted that the

Prosecution had maintained in other communication that it intended to call Witness BT[1].

SUBMISSIONS

2. The Prosecution requests the Chamber to solicit the Belgian authorities to compel Witness BT to testify in person, alternatively, via video-link from Belgium. As a second alternative, the Prosecution wishes the testimony of the witness to be given by way of a deposition. The Prosecution submits that the Chamber has the power to issue subpoenas, and that Belgium, by way of enacted law, has an obligation to serve the subpoena. Witness BT has material information for the Prosecution case, relating to statements made by the Accused Bagosora at a meeting attended by the Accused Ntabakuze as well. The witness also has evidence of the Accused Bagosora's role in a plan to eliminate Government members in favour of the Arusha Accords. Furthermore, Witness BT has information on the Accused Bagosora's and Ntabakuze's whereabouts and conduct during the killing of ten Belgian UNAMIR peacekeepers. The witness refuses to travel to Arusha or to testify via video-link, but has not provided the reasons for this refusal.

3. The Bagosora Defence takes no position on the merits of the Prosecution's request for a subpoena, but asserts that it is premature for the Prosecution to seek video-link testimony or a deposition, as they are not alternatives to a subpoena. Video-link testimony is granted where there is a security risk, which has not been demonstrated. A deposition equally has pre-conditions which are not satisfied here.

4. The Ntabakuze Defence submits that Witness BT should not be permitted to testify as the witness has never agreed to speak to the Prosecution or to testify, and was not re-instated as a witness with the leave of the Chamber. The allegation that Witness BT will speak to has been dropped from the Indictment in the Military II case, and should therefore be withdrawn in respect of the Accused in the case at bar. The Prosecution has not proved the Belgian laws to support its motion, and the legal basis of Belgian enforcement of the subpoena is unclear. The Ntabakuze Defence notes that other than the Accused Bagosora's statement regarding the beginning of "work", the witness's evidence has been or can be provided by other witnesses. With respect to the alternative requests, the Ntabakuze Defence submits that video-link testimony is a tool relating to witness protection, not a tool to compel testimony; its use here would be unjust. As for the second alternative of a deposition, it is argued that if the subpoena cannot be enforced outside Belgium, that is not an exceptional circumstance warranting a deposition.

5. The Kabiligi Defence questions whether it is appropriate in this instance for the Chamber to exercise its discretion to subpoena a witness, and whether Belgian law provides for such a measure. The video-link device cannot be used for reluctant witnesses, and there are no exceptional circumstances warranting a deposition.

[1] *Bagosora et al.*, Decision on Defence Motion to Compel the Prosecution to File A Revised Witness List (TC), 15 June 2004, para. 6.

DELIBERATIONS

6. The Chamber's power to issue a subpoena, "an order commanding the attendance of a witness, under threat of penalty to the addressee for non-compliance", is derived from the Statute and Rule 54 of the Rules of Procedure and Evidence ("the Rules")[2]. Rule 54 permits the issuance of "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".

7. The Prosecution has maintained its stated intention to call Witness BT as a witness. Witness BT has information relevant to the issues at trial, and refuses to come to Arusha to testify. The issuance of a subpoena is necessary and appropriate to the conduct of the trial. The request for a subpoena is therefore justified, and the Chamber has previously granted such requests in these circumstances[3]. The Registry shall prepare a subpoena addressed to Witness BT, ordering her appearance at the Tribunal, at a date and time to be specified by the Registry, to give evidence in the matter of *The Prosecutor v. Bagosora et al*.

8. Although the subpoena shall be addressed directly to Witness BT, the Chamber notes that the Prosecution seeks the cooperation of the Kingdom of Belgium, where the witness is presently located, and that such notification and assistance are desirable. Article 28 of the Statute expressly identifies the service of documents as one of the forms of cooperation which the Tribunal may request of a State. The Chamber requests the Kingdom of Belgium to effect service on the addressee of the subpoena which is filed in accordance with this decision, and to provide any assistance that may be requested by the Registry to facilitate the attendance of the witness.

9. The witness is scheduled to appear during the next trial session which begins on 6 September 2004. Service of, and prompt compliance with the subpoena authorized by the present decision is, therefore, a matter of urgency.

10. As the request for a subpoena is being granted, it would be premature at this juncture to consider the alternative requests for video-link testimony or deposition.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to prepare a subpoena in accordance with this decision, addressed to the Prosecution witness designated by the pseudonym BT, and to communicate it, with a copy of the present decision, to the Kingdom of Belgium;

REQUESTS the Kingdom of Belgium to serve the subpoena on the addressee as soon as possible, and to provide any other assistance that may be requested by the Registry to facilitate his attendance.

[2] *Bagosora et al*., Decision on Requests for Subpoenas (TC), 10 June 2004, paras. 2-3; Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4; Decision on Request for Subpoena for Witness BW (TC), 24 June 2004, para. 2.

[3] *Ibid*.

Arusha, 25 August 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Prosecutor's Motion to Allow Witness DBO to Give Testimony by Means of Deposition 25 August 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Deposition – exceptional circumstance, poor health, evidence – interest of justice, criteria – importance of the testimony – Prosecutor – motion denied

International instruments cited : Rules of procedure and evidence, Rules 71 (A), (B) and 90 (A)

International cases cited :

I.C.T.R. : Trial Chamber III, The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecutor's Motion for Deposition of Witness OW, 5 December 2001 (ICTR-98-41-I,* Reports 2001*, p. 1112) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana et al.*, Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition, 10 April 2003 (ICTR-99-52-I,* Reports 2003*, p. 319)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Delalic et al.*, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997 (IT-96-21)*

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 "Prosecutor's Confidential Motion to Allow Witness DBO to Give Testimony by Means of Deposition Pursuant to Rule 71 of the Rules of Procedure and Evidence", filed on 14 July 2004;

CONSIDERING the "Defence for Kabiligi's Response", filed by Counsel for Kabiligi on 20 July 2004; the "Nsengiyumva Defence Response", filed by Counsel for Nsengiyumva on 21 July 2004; the "Bagosora Defence Response", filed by Counsel for Bagosora on 26 July 2004; and the "Ntabakuze Defence Response", filed by Counsel for Ntabakuze on 27 July 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 8 June 2004, the Prosecution requested a subpoena to compel Witness DBO, who is presently living in Germany, to appear to testify. The request was granted by the Chamber on 10 June 2004. In a letter of 25 June 2004, the German Embassy to Tanzania has informed the Tribunal that the witness is not prepared to travel to Arusha on grounds of psychiatric indication. On 14 July 2004, the Prosecution filed the present motion.

SUBMISSIONS

2. The Prosecution submits that the evidence of Witness DBO should be heard by deposition, pursuant to Rule 71, because exceptional circumstances exist and it would be in the interests of justice. The witness suffers from post-traumatic stress disorder, and the Prosecution contends that her fragile psychological condition and poor health constitute exceptional circumstances. The witness has a first-hand account of a meeting with Bagosora and his ordering of soldiers in May 1994, and it would be in the interests of justice to hear her. Moreover, the Prosecution submits that the decision by the Chamber to subpoena Witness DBO presupposes that the Chamber has already determined that allowing the witness to testify is in the interests of justice. The Prosecution proposes that the deposition be taken in Germany during the next trial session from 6 September 2004, with the Defence being allowed to cross-examine.

3. The Kabiligi Defence argues that the witness's psychiatric condition makes her unable to give evidence and directly affects her credibility. Evidence of her condition has not been given to the Chamber, other than a letter from the German Embassy stating that the witness "is not prepared to travel to Arusha on grounds of psychiatric indication". The Kabiligi Defence additionally argues that the interests of justice would not be served by granting the motion.

4. The Nsengiyumva Defence objects to the motion on similar grounds, in that the witness may be unable to testify irrespective of her location, the reliability of her testimony is questionable given her condition, and no medical documentation evidencing her condition has been provided. Additionally, the Prosecution has not demonstrated the materiality of the testimony, the existence of exceptional circumstances and how the deposition would be in the interests of justice.

5. The Bagosora Defence joins in the Nsengiyumva response, pointing out the lack of a medical certificate and the bearing on credibility of the witness's psychological problems. Although the Chamber ordered a subpoena in respect of Witness DBO, it does not mean that it would be in the interests of justice to hear the witness by deposition.

6. The Ntabakuze Defence similarly submits that no evidence of the witness's condition has been provided, and argues that a psychiatric evaluation needs to be ordered.

The reliability of the witness's testimony is also questioned, as it is not known if the witness is fit to testify.

DELIBERATIONS

7. The Rules provide that depositions are an exceptional measure, and the principle is that witnesses should be heard directly by the Chamber. Rules 90 (A) and 71 (A) are set out below.

> Rule 90 (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.
>
> Rule 71 (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.

8. A deposition *may* be ordered by a Chamber where exceptional circumstances exist and where it would be in the interests of justice to hear the witness by deposition. Additionally, the formal requirements of Rule 71 (B) must be met. Previous cases have determined that poor health constitutes exceptional circumstances, and that the interests of justice would be assessed by considering the importance of the witness's anticipated testimony[1]. In an earlier decision in the instant case, the Chamber considered four criteria in determining the "interests of justice" prong : 1) that the testimony of the witness is sufficiently important to make it unfair to proceed without it; 2) that the witness is unable or unwilling to come to the Tribunal; 3) that the Accused will not thereby be prejudiced in the exercise of his right to confront the witness; and 4) that the practical considerations (including logistical difficulty, expense, and security risks) of holding a deposition in the proposed location do not outweigh the potential benefits to be gained by doing so[2].

9. In previous cases before the Chamber, the moving party provided evidence in support of its contention that the witness was in poor health and could not travel, by way of a medical certificate or an affidavit. The Prosecution has not offered any similar evidence in support of the alleged exceptional circumstances; the letter from the German Embassy only indicates that Witness DBO is "not prepared to travel to Arusha on grounds of psychiatric indication". The Chamber accepts that the witness's poor health constitutes exceptional circumstances and that her anticipated testimony may be of some importance. However, based on information now available to the Chamber concerning her medical condition, the Chamber is convinced that compelling the witness to testify would seriously affect her health, even if the testimony were

[1] *Nahimana et al*., Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition (TC), 10 April 2003, paras. 7-8; Muvunyi et al., Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX (TC), 11 November 2003, para. 10.

[2] *Bagosora et al*., Decision on Prosecutor's Motion for Deposition of Witness OW (TC), 5 December 2001, paras. 12-14, citing *Delalic et al*., Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference (TC), 28 May 1997.

given by deposition. The deleterious effect the deposition may have on the witness's psychiatric condition is an overriding concern. For this reason, in the exercise of its discretion, the Chamber denies the motion.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 25 August 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Defence Request for Additional Disclosure of Investigative Reports and Statements 25 August 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, Presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora, Ntabakuze – material disclosure – investigative reports, statements – exculpatory material – initial responsibility of the Prosecutor – motion denied

International instruments cited : Rules of procedure and evidence, Rule 68 (A), 70

International cases cited : Trial Chamber III, The Prosecutor v. Joseph Nzirorera, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 octobre 2003 (ICTR-98-44-I, Reports 2003, p. 1382)

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 oral Defence request for disclosure of witness statements of all the individuals interviewed by ICTR investigator Pierre Duclos in relation to the *Semanza* case, as well as any investigative reports prepared by him in connection with the Ruhanga massacre, made on 29 and 30 June 2004;

CONSIDERING the "Prosecutor's Written Submissions Regarding Oral Defence Request for Additional Disclosure of Investigative Reports and Statements & Concerning the Cross-examination of Witness DCH", filed on 2 July 2004; and the Ntabakuze Defence Response, filed on 8 July 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 29 and 30 June 2004, the Defences for Ntabakuze and Bagosora requested the Chamber to order the Prosecution to disclose the witness statements of all of the individuals interviewed by ICTR investigator Pierre Duclos in relation to the case against Laurent Semanza. The Defence further requested disclosure of any investigative reports prepared by Duclos in connection with the Ruhanga massacre.

SUBMISSIONS

2. The Defence submits that the testimony of Pierre Duclos during the *Semanza* trial supports the inference that reports dealing with the Ruhanga massacre exist and

Décision relative à la requête de la défense demandant communication de rapports d'enquête et de déclarations 25 août 2004 (ICTR-98-41-T)

Original : Anglais

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora, Ntabakuze – communication de pièces – rapports d'enquête, déclarations – pièces à décharge – responsabilité première du Procureur – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 68 (A), 70

Jurisprudence internationale citée : Chambre de première instance III, Le Procureur c. Joseph Nzirorera, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 octobre 2003 (ICTR-98-44-I, Recueil 2003, p. 1382)

LE TRIUBUNAL 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 orale de la défense demandant communication des déclarations de tous les témoins interrogés par l'enquêteur du TPIR Pierre Duclos dans le cadre de l'affaire *Semanza*, ainsi que des rapports d'enquête établis par lui les 29 et 30 juin 2004 au sujet du massacre de Ruhanga,

VU les «Conclusions du Procureur relatives à la requête orale de la défense demandant communication complémentaire de rapports d'enquête et déclarations concernant le contre-interrogatoire du témoin DCH», déposées le 2 juillet 2004, et la réponse des conseils de Ntabakuze, déposée le 8 juillet 2004,

STATUE SUR ladite requête.

INTRODUCTION

1. Les 29 et 30 juin 2004, les conseils de Ntabakuze et Bagosora ont demandé à la Chambre d'enjoindre au Procureur de leur communiquer les déclarations de tous les témoins interrogés par l'enquêteur du TPIR Pierre Duclos dans le cadre de l'instance engagée contre Laurent Semanza. La défense a également demandé communication des rapports d'enquête établis par M. Duclos au sujet du massacre de Ruhanga.

ARGUMENTATION

2. La défense affirme que la déposition de Pierre Duclos au procès *Semanza* permet de conclure à l'existence de rapports concernant le massacre de Ruhanga, rapports

are in the possession of the Prosecutor. The Defence contends that these reports and the requested witness statements may suggest that para-commandos were not present at Ruhanga and that the massacre occurred as a single event on 10 April 1994, rather than as a series of rolling massacres between 14 and 17 April 1994, as alleged by Witness DCH. The Defence argues that this material is exculpatory and may affect the credibility of a Prosecution witness. The Prosecution is thus obliged to disclose it to the Defence under Rule 68 (A) of the Rules of Procedure and Evidence ("the Rules").

3. The Prosecution asserts that there is no identifiable document referred to as the Duclos report dealing with the Ruhanga massacre. Investigator Duclos worked extensively on the preparation of various aspects of the *Semanza* case, and the Prosecution argues that the materials submitted by him are largely subject to the disclosure exemptions provided for in Rule 70 of the Rules. Moreover, the Prosecution submits that it has examined the material requested by the Defence and is satisfied that all exculpatory material on this issue has already been disclosed.

DELIBERATIONS

4. The Chamber agrees that material indicating that para-commandos did not participate in the Ruhanga massacre, or suggesting that the massacre occurred solely on 10 April 1994, may be exculpatory or have some impact on the credibility of a Prosecution witness and should be disclosed.

5. Rule 68 of the Rules provides that

> "The Prosecutor shall, as soon as practicable, disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of the prosecution evidence."

Under Rule 68, the Prosecutor is responsible for making the initial determination about the exculpatory nature of the evidence[1].

6. The Prosecution has repeatedly stated that there is no identifiable report by Pierre Duclos concerning the Ruhanga massacre. Additionally, the Prosecution asserts that it has reviewed the material requested by the Defence and submits that all exculpatory material has already been disclosed. The Chamber accepts these representations and has no reason to dispute the Prosecution's submissions, notwithstanding general references to an unspecified report in Duclos's testimony in the Semanza case. There are no indications that the Prosecution did not properly exercise its discretion in determining what evidence falls under Rule 68.

7. The Defence points to the testimony of Pierre Duclos, dealing with the scope of his investigation, and to a list of more than forty witnesses that he interviewed in connection with the *Semanza* case. However, the Ruhanga massacre was merely one

[1] *Nzirorera*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para 10.

qui, selon elle, sont en la possession du Procureur. Elle soutient que ces rapports et les déclarations de témoins sollicitées peuvent donner à croire qu'il n'y avait pas de commandos parachutistes à Ruhanga et que le massacre a constitué un fait unique survenu le 10 avril 1994, et non une série de faits survenus entre le 14 et le 17 avril 1994, comme l'a affirmé le témoin DCH. Elle a fait valoir qu'il s'agit là de pièces à décharge, susceptibles d'affecter la crédibilité du témoin à charge. Le Procureur est donc tenu de les communiquer à la Défense conformément à l'article 68 (A) du Règlement de procédure et de preuve (ci-après le «Règlement»).

3. Le Procureur affirme qu'il n'existe pas de document qui constituerait le rapport Duclos sur le massacre de Ruhanga. Il précise que l'inspecteur Duclos a longuement travaillé sur divers aspects de l'affaire *Semanza*, et que les pièces que celui-ci a communiquées sont en grande partie visées par l'exception à l'obligation de communication (art. 70 du Règlement). En outre, il fait observer qu'après avoir examiné les pièces sollicitées par la défense, il est convaincu que les éléments à décharge relatifs à cette question ont déjà été communiqués.

DÉLIBÉRATIONS

4. La Chambre considère que des pièces indiquant que des commandos parachutistes n'ont pas participé au massacre de Ruhanga, ou pouvant laisser penser que le massacre s'est déroulé au cours de la seule journée du 10 avril 1994 peuvent être de nature à disculper l'accusé ou avoir une certaine incidence sur la crédibilité d'un témoin à charge et doivent être communiquées.

5. L'article 68 du Règlement est ainsi libellé :

> «Le Procureur informe la défense aussitôt que possible de l'existence des moyens de preuve dont il a connaissance qui sont propres à disculper l'accusé ou à atténuer sa culpabilité, ou qui pourraient porter atteinte à la crédibilité des moyens de preuve à charge.»

En vertu de l'article 68, le Procureur a la responsabilité de déterminer, en premier, si les éléments de preuve sont susceptibles de disculper l'accusé[1].

6. Le Procureur a indiqué à plusieurs reprises qu'il n'existait pas de rapport Duclos en tant que tel, concernant le massacre de Ruhanga. Il dit en outre qu'il a examiné les documents sollicités par la défense et que toutes les pièces à décharge ont déjà été communiquées à celle-ci. La chambre accepte ces observations et n'a pas de raison de contester les arguments du Procureur, nonobstant les références d'ordre général à un vague rapport figurant dans la déposition de Duclos relatives à l'affaire *Semanza*. Rien ne permet d'affirmer que le Procureur n'a pas correctement utilisé son pouvoir discrétionnaire lorsqu'il a déterminé les éléments de preuve relevant de l'article 68 du Règlement.

7. La défense se réfère à la déposition de Pierre Dulos, relative à la portée de son enquête, et à une liste de plus de 40 témoins qu'il a interrogés dans le cadre de l'affaire *Semanza*. Cependant, le massacre de Ruhanga s'inscrit dans un ensemble plus

[1] *Nzirorera*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 octobre 2003, par. 10.

element of a larger case against Semanza involving several massacres at different locations. Given the broad scope of the *Semanza* case, the Chamber has no reason to conclude from the evidence of his investigation, a general reference to an unspecified report, or the existence of the witness list that such material, other than that already disclosed to the Defence, deals with the Ruhanga massacre in an exculpatory manner.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence request.

Arusha, 25 August 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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vaste d'éléments à charge retenus contre Semanza, qui doit répondre de plusieurs massacres commis en divers lieux. Compte tenu de la portée générale de l'affaire *Semanza*, la Chambre n'a pas de raison de conclure, compte tenu des éléments de l'enquête, à partir des références d'ordre général à un vague rapport ou de l'existence de la liste de témoins, que des pièces, autres que celles déjà communiquées à la défense, ont trait au massacre de Ruhanga et sont susceptibles de constituer des éléments à décharge.

Par ces motifs, le Tribunal

REJETTE la requête de la défense.

Arusha, le 25 août 2004

[Signé] : Erik Møse, Jai Ram Reddy, Sergei Alekseevich Egorov

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Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute 31 August 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Cooperation of States, Rwanda – transfer of witness – Prosecutor – competence of the Chamber – relevant testimony – motion granted

International instruments cited : Statute, art. 28 – Rules of procedure and evidence, Rules 54, 90 bis (B)

International cases cited : Trial Chamber I, 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-T,* Reports 2004*, p. X) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Order for the Transfer of Witnesses, 15 April 2004 (ICTR-98-41-T,* Reports 2004*, p. X) – Trial Chamber I,* 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-T,* Reports 2004*, p. X) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Requests for Subpoenas, 10 June 2004 (ICTR-98-41-T,* Reports 2004*, p. X) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecutor's Request for a Subpoena Regarding Witness BT, 25 August 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

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 "Request for an Order to the Government of Rwanda to Cooperate in the Transfer of Witness XXQ to Arusha, Tanzania", filed on 15 June 2004;

HEREBY DECIDES the motion.

1. The Prosecution requests the Chamber, under Article 28 of the Statute of the Tribunal ("the Statute"), to order the Government of Rwanda to transfer a person known under the pseudonym Witness XXQ, currently detained in Rwanda, into the temporary custody of the Tribunal so that he may give testimony in the present case. The Prosecution asserts that it received informal assurances earlier this year from the Government of Rwanda that the witness would be transferred voluntarily. On this basis, the Chamber issued an order for the transfer of that witness and five others on 15 April 2004, in accordance with Rule 90 *bis* (B) of the Rules of Procedure and

Evidence ("the Rules")[1]. However, on 20 May 2004, the Registry is said to have reported that it was unable to contact Witness XXQ because of actions of the Rwandan authorities. Further attempts by the Prosecution to obtain his voluntary transfer were unsuccessful.

2. Article 28 (1) of the Statute imposes an obligation on States to "cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". Article 28 (2) enumerates types of requests and orders which may be issued by a Trial Chamber. Although the transfer of prospective witnesses is not specifically mentioned, the Chamber's power is "not limited to" the list, but may include any order whose purpose is to assist the Tribunal in its mandate. Article 28 (2) empowers a Chamber to "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 a trial." Rule 54 of the Rules specifies that a Judge or 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." Acting under this provision, this Chamber has in the past commanded prospective witnesses to attend at the Tribunal to give testimony and, further, has requested States under Article 28 to facilitate the attendance of those witnesses[2]. On the basis of these powers, the Chamber is competent to issue a request for the temporary transfer to the Tribunal of a detainee of a State.

3. As with other applications for an Article 28 request, the applicant 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[3]. Further, the applicant should identify the nature of the assistance requested with particularity.

4. Based on the submissions of the Prosecution, the Chamber finds that the conditions for an Article 28 request are met. Witness XXQ is amongst the remaining Prosecution witnesses, and the Prosecution has offered detailed submissions on the purported relevance of his testimony. The Prosecution indicates that it has made several requests for the transfer of the witness, without success.

5. The Chamber recalls that the next session of the trial, at which Witness XXQ is expected to testify, is scheduled for 6 September through 15 October 2004.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

DIRECTS the Registrar to transmit the present decision, along with the protected identity of Witness XXQ, to the Government of Rwanda, and to report back on its implementation;

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[1] *Bagosora et al.*, Order for the Transfer of Witnesses (TC), 15 April 2004.

[2] *Bagosora et al.*, Decision on Requests for Subpoenas (TC), 10 June 2004; *Bagosora et al.*, Decision on Prosecutor's Request for a Subpoena Regarding Witness BT (TC), 25 August 2004. See Richard May, Marieke Wierda, International Criminal Evidence (New York : Transnational Publishers, 2002), pp. 190-91.

[3] *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.

RESPECTFULLY REQUESTS the Government of Rwanda, under Article 28 of the Tribunal's Statute, to temporarily transfer Witness XXQ into the custody of the Tribunal for the purpose of testifying in the present case.

Arusha, 31 August 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Order for Transfer of Prosecution Witnesses AI and AOM 3 September 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judge : Erik Møse

Transfer of witnesses – presence of the witnesses not required for any criminal proceedings in the requested State, transfer of the witness does not extend the period of his detention – order extension – Prosecutor – cooperation of States, Rwanda – motion granted

International instruments cited : Rules of procedure and evidence, Rules 73 (A), 90 bis *(A) and (B)*

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

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 the Prosecution "Motion for an Order for the Transfer of Detained Witnesses", etc., filed on 26 August 2004;

HEREBY DECIDES the motion.

1. Pursuant to Rule 90 *bis* (A) of the Rules "[a]ny detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Union of the Tribunal, conditional on his return within the period decided by the Tribunal". Rule 90 *bis* (B) requires prior verification of two conditions for such an order :

(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.

2. The Prosecution moves the Trial Chamber for an order authorizing the transfer of two of its prospective witnesses currently detained in Rwanda, known by the pseudonyms AI and AOM. These witnesses were previously the object of a 90 *bis* transfer order of the Chamber which expired on 29 June 2004. The present request is, in effect, for an extension of that order to permit the transfer of those witnesses during the upcoming trial session, scheduled for 6 September through 15 October 2004.

3. In relation to the requirements of Rule 90 *bis* (B), the Prosecution has submitted a letter dated 31 May 2004 from the Government of Rwanda indicating the availability of, *inter alia*, Witnesses AI and AOM. The Chamber was advised on 3 September 2004 by an official of the Government of Rwanda that the letter continued to be valid through 29 October 2004. The Chamber was further advised that neither Witness AI nor Witness AOM were required for judicial proceedings through 29 October 2004, and that their transfer would not extend their period of detention. On the basis of these assurances, the Chamber is satisfied that the conditions for an order under Rule 90 *bis* (B) are met in relation to these witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, pursuant to Rule 90 *bis* of the Rules, that the individuals designated by the pseudonyms AI and AOM be transferred to the Detention Unit in Arusha, and returned to Rwanda no later than 29 October 2004;

REQUESTS the Government of Rwanda to comply with this order and to arrange for the transfer in cooperation with the Registrar and the Tanzanian Government;

INSTRUCTS the Registrar to :

A) transmit this decision to the Governments of Rwanda and Tanzania;

B) ensure the proper conduct of the transfer, including the supervision of the witnesses in the Tribunal's detention facilities;

C) 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, 3 September 2004

[Signed] : Erik Møse

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Decision on Motion for Postponement of Testimony of Witness REYNTJENS 9 September 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Ntabakuze – postponement of testimony – expert report, disclosure 21 days before the testimony – language of a report disclosure – defence rights, translation – voluminous disclosure – effective cross-examination – motion denied

International instruments cited : Statute, art. 20 – Rules of procedure and evidence, Rule 94 bis *(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 "Motion to Postpone the Testimony of Professor Filip Reyntjens Due to Issues of Untimely Disclosure and Filing", filed by the Defence for Ntabakuze on 6 September 2004;

CONSIDERING the Prosecution "Response" thereto, filed on 7 September 2004; and the oral submissions by the Defence for Ntabakuze and Bagosora, on 7 and 8 September 2004, respectively; and the "Nsengiyumva Defence Motion Joining Ntabakuze Defence Motion", etc., filed on 8 September 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Prosecution has indicated that one of its expert witnesses, Filip Reyntjens, is expected to testify during the week commencing 13 September 2004.

SUBMISSIONS

2. The Ntabakuze Defence objects that disclosure by the Prosecution of the witness's expert report has been untimely. Rule 94 *bis* (A) requires that an expert report be disclosed twenty-one days in advance of the date on which testimony is expected. The Defence contends that the report must be disclosed in both of the working languages of the Tribunal for effective disclosure to have taken place. It is submitted that the "full" statement of the expert witness referred to in Rule 94 *bis* (A) includes both the English and French versions of the statement, these being the official working languages of the Tribunal and one or the other of these being the exclusive work-

ing languages of many Counsel and Judges at the Tribunal. As translations of the two documents constituting the expert report were only received on 1 September 2004, the testimony of the witness should be postponed to no earlier than 22 September 2004[1]. The Defence also complains that the Prosecution disclosed a large volume of documents, comprising approximately 2,500 pages, on 6 September 2004 which may be used as exhibits. The disclosure of this volume of documents so close to the date of expected testimony is said to represent an unreasonable burden on the Defence.

3. The Prosecution responds that the two documents disclosed as Witness Reyntjens expert report have long been available to the Defence in their original language. The first document, portions of a book in French entitled *Trois jours qui ont fait basculer l'Histoire*, was tendered into evidence by another defence team on 25 September 2002. The Prosecution diligently and in good faith requested its translation into English as early as 2002, but resource constraints in the Registry delayed its completion. The second document constituting the expert report, a four-page document in English, was disclosed to the Defence on 21 June 2004, and available filed in English on 1 September 2004. The Prosecution argues that Rule 94 *bis* (A) permits disclosure in either of the Tribunal's working languages. It further argues that the prejudice to the Prosecution of postponement, which would lead to the non-attendance of the witness, outweighs the burden placed on the Defence to prepare for the imminent appearance of the witness. In respect of the documents which may be used as exhibits during the testimony of the witness, the Prosecution argues that it was under no obligation to disclose those documents to the Defence and that, in any event, the majority of the documents were disclosed to the Defence in 2002.

DELIBERATIONS

4. Rule 94 *bis* (A) provides that "the full statement of any expert witness called by a party 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". No mention is made of the languages in which the filing of the statement is to be made. As French and English are, under Rule 3, the working languages of the Tribunal, the requirements of Rule 94 *bis* (A) may be satisfied by performance in either of those languages.

5. On 25 September 2002, the relevant portions of the book by Reyntjens were tendered into evidence by the Defence for Bagosora[2]. As early as 5 May 2004, the Prosecution clearly advised the Defence that the Reyntjens book would form part of the witness's expert report[3]. The second four-page document was filed on 21 June 2004. Accordingly, the Chamber is of the view that the Prosecution has complied with the time-limit prescribed by Rule 94 *bis* (A).

6. This does not imply that translation issues may not arise on the basis of, in particular, the 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

[1] The Defence of Nsengiyumva asserts that it did not receive translations until 3 September 2004.

[2] Exhibit DB 9.

[3] T. 5 May 2004, p. 13.

her, or the right of the Accused to have adequate time and facilities for the preparation of his or her defence, enshrined in Article 20 of the Statute. The Chamber is anxious to ensure that translations are provided to the parties with adequate time to discharge their duties effectively. The Ntabakuze Defence team has bilingual composition, and both counsel on that team understand English. Accordingly, the four-page report, disclosed in English on 21 June 2004, poses no difficulties of comprehension. The book *Trois jours* has long been in the possession of the Defence and, judging by the extent to which it has been used during proceedings in court, is a document with which all the Defence teams are familiar. Under the circumstances, the absence of translation of that document into English until two weeks before cross-examination does not impair the ability of the Defence to effectively cross-examine the witness.

7. The Chamber is not convinced that the voluminous disclosure of potential exhibits requires postponement of the expert witness's testimony. The Defence has not established that this disclosure was required under the Rules, or that any time-limits for disclosure were violated. Further, it appears that many of the documents disclosed had already been disclosed to the Defence in the past.

8. This trial is presently being heard during half-day sessions, alternating with another trial which is being heard concurrently by the Chamber. Accordingly, the Defence teams have greater time to prepare for cross-examination than would normally be the case. Under these circumstances, the Chamber is satisfied that the Defence is capable of conducting an effective cross-examination of the Prosecution witness on the basis of the disclosure of the expert report.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 9 September 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Admission of TAB 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole 13 September 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Admission of evidence – relevance, probative value, prima facie – indicia of reliability, authenticity – motion denied

International instruments cited : Rules of procedure and evidence, Rule 89 (C)

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Alfred Musema*, Judgement, 27 January 2000 (ICTR-96-13-A,* Reports 2000*, p. 1512)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Delalic et al.*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998 (IT-96-21) – Trial Chamber I,* The Prosecutor v. Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts, 1 December 2000 (IT-95-14/2) – Trial Chamber,* The Prosecutor v. Brdanin and Talic*, Order on the Standards Governing the Admission of Evidence, 15 February 2002 (IT-99-36)*

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 request by the Prosecution on 7 June 2004 to tender a document appearing at Tab 19 of a binder submitted to the Chamber in association with the testimony of Witness Maxwell Nkole;

HAVING CONSIDERED the oral submissions of the parties on 7 June 2004;

HEREBY DECIDES the request.

INTRODUCTION

1. On 7 and 8 June 2004, Prosecution investigator Maxwell Nkole testified before the Chamber. During the first day of testimony, the Prosecution elicited information from the witness concerning a document appearing at Tab 19 of a binder of documents distributed to the Chamber and the parties. On the basis of explanations by the Prosecution and Witness Nkole, three distinct sets of documents appear at Tab 19 of the Prosecution binder. One set of documents is a report by the Federal Bureau of Investigation (FBI) of an interview with a Rwandan official who describes a series of twenty-two documents which are annexed to the report. A second set of documents consists of two other situation reports, without any annexes attached. A third set of documents, bearing identification numbers L0008633 through L0008648, appears to be a series of telephone directories from 1994 for high government officials, UNAMIR, and the media.

2. The Prosecution withdrew the second set of documents, but tendered the first and third set of documents for admission as evidence[1]. The Defence objected. After hearing the oral arguments of the parties, the Chamber reserved its decision.

[1] T. 7 June 2004 pp. 69, 70.

SUBMISSIONS

3. Witness Nkole testified that he believed that the report had been prepared by investigators of the FBI, which had been active in Rwanda before the creation of the investigative section of the Tribunal. The document, including the twenty-two annexes, was thereafter given to Tribunal investigators by the Department of State of the United States of America[2]. The witness testified that the fifteen additional pages bearing identification numbers L0008633 through L0008648 were not meant to be part of the report, but had also been collected by FBI agents and handed over to the Tribunal[3].

4. The Prosecution submitted that the FBI report and its annexes should be admitted as evidence[4]. The annexes speak for themselves and their content corroborates other evidence that has already been heard by the Chamber. The FBI report itself provides an indication of the source of the annexes and should be admissible for that reason[5]. The Prosecution also argued that the fifteen pages of telephone information should also be admitted. Though not formally an annex, it may have been referred to in the FBI report. Further, it was a matter that should be of interest to the Chamber[6].

5. The Ntabakuze Defence argued that, in its present form, the FBI report and its annexes have none of the indicia of reliability that could give it any probative value. Its author is not present to testify. Nor could the report be admitted under Rule 92 *bis* as the relevant formalities had not been fulfilled. Further, the author of the FBI report does not describe how the documents were originally obtained, but rather recapitulates her interview with an official of the Government of Rwanda. Accordingly, the report itself provides only hearsay evidence of the provenance of the documents. Hearsay evidence is particularly unreliable where, as here, the hearsay speaker may be biased. Given the absence of the minimum requirements of reliability and probative value, the document should not be admitted[7].

6. The Bagosora Defence argued that there appeared to be discrepancies between the description of the documents given in the FBI report and the documents themselves. These discrepancies undermined the reliability of the report. It also argued that the Prosecution should have disclosed the document to the Defence earlier under Rule 67 (A). For both of these reasons, the document should not be admitted[8].

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[2] T. 7 June 2004 pp. 62-65.

[3] *Ibid.*, pp. 65-68.

[4] At one point during its submissions, the Prosecution appeared to also withdraw its effort to tender the FBI report. T. 7 June 2004 p. 77 ("Mr. President : But what I hear you saying now is really that you are not insisting on the report itself, because that is, in fact, an interview with – with a person who is not being called for cross-examination, so what is left for us to decide is the 22. Ms. Mulvaney : And that's absolutely correct.") But later the Prosecution seemed to retract this submission. *Ibid.*, p. 80 ("[O]ne thing I wanted to say is that one of the counsel had said that I agreed that the report is not admissible, and that's not what I said. I think it's really important that we follow the rules of the Tribunal and that we err on the side of admission as opposed to omission.") The Chamber will assume that the Prosecution wishes the admission of the report.

[5] T. 7 June 2004 pp. 75-77.

[6] *Ibid.*, pp. 69-70.

[7] *Ibid.*, pp. 73-75, 77.

[8] *Ibid.*, pp. 70-72.

DELIBERATIONS

7. Rule 89 (C) defines the standard for admission of evidence before the Chamber, including documents : "A Chamber may admit any relevant evidence which it deems to have probative value." At the admissibility stage, relevance and probative value are threshold standards. The moving party need only make a *prima facie* showing that the document is relevant and has probative value. A finding in favour of admission in no way determines what weight, if any, should be accorded to the document in the Chamber's ultimate findings of fact[9]. The purpose of the standards set forth in Rule 89 (C) is to ensure that the Chamber is not burdened by evidence for which no reasonable showing of relevance or probative value has been made.

8. In offering a document for admission as evidence, the moving party must as an initial matter explain what the document is. The moving party must further provide indications that the document is authentic – that is, that the document is actually what the moving party purports it to be. There are no technical rules or preconditions for authentication of a document, but there must be "sufficient indicia of reliability" to justify its admission. Indicia of reliability which have justified admission of documents in the jurisprudence of the *ad hoc* Tribunals include : the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting[10]. Authenticity and reliability are overlapping concepts : the fact that the document is what it purports to be enhances the likely truth of the contents thereof. On the other hand, if the document is not what the moving party purports it to be, the contents of the document cannot be considered reliable, or as having probative value.

9. The Prosecution has submitted that the twenty-two annexes are accurately identified in the FBI report appearing at Tab 19 of its binder. In summary, the report states that the annexes are lists of names of people who wished to join the army or militia, or who wished to train in the use of firearms; lists of people responsible for road-

[9] *Musema*, Judgement (TC), para. 56 ("The admission of evidence requires, under sub-Rule 89 (C), the establishment in the evidence of some relevance and some probative value. Accordingly, the standard of proof required for admissibility should be lower than the standard of proof required in the final determination of the matter at hand through the weighing up of the probative value of all the evidence before the Chamber. The admission of evidence does not require the ascertainment of the exact probative value of the evidence by the Chamber; that comes later. Admission requires simply the proof that the evidence has some probative value.") *Delalic et al.*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), para. 17 ("At the stage of admission of the evidence, the implicit requirement of reliability means no more than that there must be sufficient indicia of reliability to make out a prima facie case.")

[10] *Delalic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18; *Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts (TC), 1 December 2000, paras. 43-44; *Brdanin and Talic*, Order on the Standards Governing the Admission of Evidence (TC), 15 February 2002, para. 20.

blocks, and locations where the roadblocks should be set up; lists of people to whom weapons should be distributed; and the minutes of a "crisis committee" meeting after the crash of the President's plane. The basis for this description is information given to the author of the FBI report during an interview with a Rwandan government official who was part of a team charged with discovering and archiving documents "concerning the planning of the war". The FBI report further states that the twenty-two documents were photocopied by the FBI official on 27 September 1994 and constitute the annexes to the report. The Rwandan official was unable to say where the documents had been discovered or by whom. The twenty-two documents are hand-written, and no authorship is ascribed to them by the FBI report itself, or by the Prosecution.

10. The Prosecution has not provided any indication of where the documents were found, by whom they were found, or the chain of custody between discovery and production in court. Even assuming that the FBI report itself could be considered in the absence of live testimony by its author, the report indicates that the interviewee was unable to verify the manner in which the documents were obtained. While the absence of such proof does not necessarily render a document inadmissible, the place and manner of discovery are important factors in assessing the authenticity of a document[11]. Nor has the Prosecution attempted to establish the authorship of the documents, another possible indicium of reliability[12]. Although the Prosecution attempted to correlate the contents of the documents with other evidence in the case, it did not do so with sufficient particularity to suggest that the documents are, indeed, authentic and reliable. Most of the documents are undated.

11. For these reasons, the Chamber finds that the twenty-two hand-written documents appearing at Tab 19 are not admissible. As the Prosecution argued that the FBI report was ancillary to the admission of the twenty-two document, the Chamber finds that the report itself is also inadmissible[13]. Finally, the Chamber finds that the fifteen pages of telephone directories are also inadmissible, in the absence of reliable information verifying their origin.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution application for admission into evidence of portions of Tab 19 of the binder relating to Witness Maxwell Nkole.

Arusha, 13 September 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[11] See e.g. *Delalic et al*., Decision on the Motion of the Prosecution for the Admissibility of Evidence (TC), 19 January 1998, para. 31; *Delalic et al*., Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18.

[12] *Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts (TC), 1 December 2000, para. 44.

[13] T. 7 June 2004 p. 77 ("The report to me is just a guide to get you through the documents.")

Decision on Discosure of Confidential Material Requested by Defence NTAHOBALI 24 September 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Ntahobali – disclosure of protected witness information from one proceeding to another – disclosure obligation – the party receiving the materials is bound by the protective measures – overlap between the cases, material assistance – no additional conditions – motion granted

International instruments cited : Rules of procedure and evidence, Rule 66 (A) (ii) and (B) – 75 (F)

International cases cited :

I.C.T.R. : Trial Chamber III, The Prosecutor v. Théoneste Bagosora at al.*, Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001 (ICTR-98-41-I,* Reports 2001*, p. 1082) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY, 3 October 2003 (ICTR-98-41-T,* Reports 2003*, p. 183) – Trial Chamber I,* The Prosecutor Ferdinand Nahimana et al.*, Decision on Disclosure of Transcripts and Exhibits of Witness X, 3 June 2004 (ICTR-96-11-T,* Reports 2004*, p. X)*

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 motion by the Defence for Ntahobali, an Accused in the case of *Prosecutor v. Nyiramasuhuko*, for access to confidential material arising from the testimony of Witnesses A and BY, filed on 9 September 2004;

HAVING CONSIDERED the Response filed by the Defence for Bagosora on 15 September 2004; and the Response filed by the Prosecution on 20 September 2004;

HEREBY DECIDES the request.

SUBMISSIONS

1. The Defence for Ntahobali, an Accused in the case of *Prosecutor v. Nyiramasuhuko et al.*, requests that it be given access to the closed session testimony and prior statements, in unredacted form, of Witnesses A and BY. It contends that Witnesses A

and BY testified at length about the *Interahamwe* in Rwanda, and in Butare prefecture in particular. This testimony could be useful and necessary to the Defence of the Accused, who is alleged to have been a leader, or member, of the *Interahamwe* in Butare. In particular, the Defence indicates that it wishes to review the testimony and statements in order to prepare for the cross-examination of a Prosecution expert witness, André Guichaoua, scheduled to begin on or around 27 September 2004. Relying on caselaw from the International Criminal Tribunal for the former Yugoslavia, the Defence argues that it has a right, under Article 20 of the Statute, to confidential material in other proceedings which may be of assistance to the Defence of the Accused.

2. The Prosecution does not oppose the request. It concedes that it has an obligation to disclose the material requested under Rule 66 (B), and offers to provide copies of the closed session transcripts of the witnesses' testimony, and of their unredacted statements, provided that the statements are not copied "to parties outside of this request", and that the statements are returned to the Prosecution at the end of the proceedings.

DELIBERATIONS

3. The designation and control of protected witness information in the present case is governed by the witness protection order issued by Trial Chamber III, dated 29 November 2001[1]. A subsequent witness protection decision in respect of Witnesses A and BY specifically ordered that "[i]nformation and documents disclosed by the Prosecution under this order … shall not be disclosed to any person, including any Accused in any other case or member of their Defence team, who is not an officially designated member of a Defence team, or an Accused, in this case."[2]

4. The Defence correctly notes that witness protection orders from one proceeding are routinely modified to permit disclosure of confidential statements to parties in another proceeding where a protected witness from the first proceeding is scheduled to testify in the second proceeding. Such disclosure is required by Rule 66 (A) (ii). A recent amendment the Rules of Procedure and Evidence, Rule 75 (F), was intended to create a mechanism for the routine disclosure of confidential statements, without the need for individualized applications to the Chambers[3]. In relevant part, it reads :

> (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 Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
>
> …
>
> (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 :

[1] *Bagosora at al*., Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses (TC), 29 November 2001.

[2] *Bagosora et al*., Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003, p. 5.

[3] See *Nahimana et al*., Decision on Disclosure of Transcripts and Exhibits of Witness X (TC), 3 June 2004, para. 4.

(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. Rule 75 (F) (ii) applies to "*any* disclosure obligation under the Rules". Accordingly, the Chamber is of the view that if the Prosecution is under a disclosure obligation in respect of these materials, then it has a responsibility to disclose the material notwithstanding the existence of protective measures. The party in receipt of the materials is then bound *mutatis mutandis* by the terms of the applicable protective measures in accordance with the provisions of Rule 75 (F).

6. The Prosecution here concedes that it has an obligation to disclose the material requested, under Rule 66 (B). Accordingly, Rule 75 (F) is applicable and the Prosecution is obliged to fulfil its disclosure obligations notwithstanding the applicable protective orders. Upon such disclosure, the party in the second proceeding is automatically bound *mutatis mutandis* by the protective orders. The authorization to make such disclosure, and the imposition of the witness protection obligations on the party in receipt of the materials, is automatic.

7. The Chamber sees no need in the present case to review the Prosecution's concession that an obligation does exist under Rule 66 (B) in relation to the materials sought by the Defence for Ntahobali. It notes, however, that the Appeals Chamber of the ICTY has held that "a party is always entitled to seek material from any source to assist in the preparation of its case if the documents sought have been identified or described by their general nature and if a legitimate forensic purpose for such access has been shown."[4] Access to confidential material in one case has been granted to a party in a second case where the party has shown that there is a geographic, temporal and substantive overlap between the cases, and where the material requested is likely to be of material assistance to the applicant[5].

8. The Prosecution requests that two conditions be imposed on the Defence for disclosure of the confidential material : that the statements not be copied or distributed to parties outside of this request; and that the statements be returned to the Prosecution at the end of the proceedings. However, such measures are already implicit in the provisions of the applicable witness protection order and are, therefore, unnecessary.

9. The Chamber concludes that the Prosecution may, in accordance with the terms of Rule 75 (F), disclose the material requested by the Defence for Ntahobali, which

[4] *Blaškić*, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić* (AC), 24 January 2003, p. 4. See *Kordic*, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordic and Cerkez* Case (AC), 19 July 2002.

[5] *Blaškić*, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić* (AC), 24 January 2003, p. 4.

is then automatically bound *mutatis mutandis* by the witness protection orders applicable in this case, namely, those of 29 November 2001 and 3 October 2003, cited herein.

10. As explained above, this result follows directly from Rule 75 (F) and does not, strictly speaking, require any decision by the Chamber. In view of the parties' submissions, however, the Chamber makes an explicit declaration.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES that the Prosecution may disclose, pursuant to Rule 75 (F), the material requested by the Defence for Ntahobali.

Arusha, 24 September 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Withdrawal of Prosecution Motion 24 September 2004 (ICTR.98-41-T)

(Original : English)

Trial Chamber I

Judge : Erik Møse

Motion withdrawal - Prosecutor

International instruments cited : Statute, art. 28 – Rules of procedure and evidence, Rule 73 (A)

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

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 the Prosecution "Urgent Request", relating to a decision of the Chamber under Article 28 of the Statute, filed on 14 September 2004;

HAVING CONSIDERED an email from the Prosecution on 23 September 2004 indicating that it wishes to withdraw the motion;

HEREBY DECLARES the motion to be withdrawn.

Arusha, 24 September 2004

[Signed] : Erik Møse

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Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens 28 September 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora, Kabiligi – expert statement – disclosure, admissibility, document 'to be filed' – expert testimony may assist the Chamber in understanding the evidence – reliability – cross-examination – motion denied

International instruments cited : Rules of procedure and evidence, Rule 94 bis

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana et al.*, Decision on the Expert Witnesses for the Defence, 24 January 2003 (ICTR-99-52-T,* Reports 2003*, p. 286)*

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 motion "En rejet du rapport de l'expert Reyntjens et notice en vertu de l'article 94 *bis* du R.P.P.", filed by the Defence for Bagosora on 30 June 2004; and of a motion to join the Bagosora motion, filed by the Defence for Kabiligi on 7 July 2004;

HAVING CONSIDERED the further written submissions of the Defence for Bagosora filed on 12 September 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 21 June 2004, the Prosecution filed a witness statement of its expert witness Professor Filip Reyntjens concerning "civilian self-defence". The statement indicates that it is based upon six documents "combined with other sources of information."

2. On 9 September 2004, the Chamber issued a decision dismissing objections to the timeliness of disclosure of the report on civilian self-defence, and of another witness statement of Professor Reyntjens previously disclosed by the Prosecution, entitled *Rwanda : Trois jours qui on fait basculer l'Histoire*. On 15 September 2004, the Chamber orally rejected the remaining objections raised by the Defence motions, relating specifically to the report on civilian self-defence. The present decision expresses the reasons for that ruling.

SUBMISSIONS

3. The Defence objects to this witness statement on two grounds. First, it complains that the statement does not concern a technical subject which is beyond the knowledge and experience of the Chamber as the trier of fact. It concedes that Professor Reyntjens is an expert on the past and contemporary history of Rwanda, but asserts that this expertise cannot properly extend to the development of civilian self-defence program; its role in the massacres; or the role of the Accused Bagosora in the program. Second, the Defence challenges the reliability of three of the documents upon which the expert statement is based. Hearing opinions based on unsubstantiated factual premises is a waste of judicial resources. As a remedy, the Defence requests that the witness statement be excluded, and that the Chamber declare that no testimony shall be heard in relation to the subject-matter of the statement.

4. The Prosecution made no submissions.

DELIBERATIONS

5. Rule 94 *bis* governs the testimony of expert witnesses, and the disclosure of their statements :

> (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.
>
> (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.

6. The first form of relief requested by the Defence, exclusion of the report on civilian self-defence, is not appropriate. Rule 94 *bis* (A), along with the other rules referred to therein, is a rule of disclosure, not admissibility. Its purpose is to ensure that the opposing party has sufficient notice of the content of the expert witness's testimony to effectively prepare for cross-examination and make objections thereto. The fact that the document is to be "filed" with the Trial Chamber does not mean that it thereby is admitted as evidence. Indeed, Rule 94 *bis* (C) states that an expert statement may be admitted without testimony only where the opposing party has accepted the statement. In the absence of such consent, admission of an expert statement is governed by the usual rules concerning admissibility of written statements. It is therefore inappropriate to speak of exclusion of a report which has been filed for purposes of disclosure as required by Rule 94 *bis* (A).

7. The other remedy requested by the Defence is a declaration that the witness may not testify on the subject-matter of the witness statement filed on 21 June 2004. The first basis for this request is that the Chamber is itself perfectly capable of assessing the documents upon which the expert bases his opinion and that, accordingly, no expert opinion is required.

8. 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. Expert witnesses have been authorized to testify on such matters as the role of military forces in Rwanda in 1994; the socio-economic and political situation leading up to 1994; the role of the media in Rwandan society; the perpetration of human rights violations in 1994; and even on the very subject-matter now in issue, the organization of civil defence[1]. 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[2]. Having reviewed the witness's statement, the Chamber is of the view that his testimony may assist in understanding the evidence referred to therein.

9. The second objection raised by the Defence is that the expert opinions expressed in the statement are based upon documents which have previously been challenged by the Defence as unreliable. Having reviewed the expert witness's statement in light of the objections raised by the Defence, the Chamber is of the view that a sufficient evidential foundation has been established to permit testimony on the subject-matter of the statement. The report indicates that there are several sources for the expert opinion other than those that are contested by the Defence. Further, many of the opinions are of a very general nature and none of them rely exclusively on a single source. The Defence may, of course, question the evidential basis of the opinion during the witness's testimony. The Chamber considers cross-examination to be the appropriate mechanism for addressing the concerns of the Defence. The Chamber prefers to deal with the contested issues of reliability when considering the merits of the case, after having heard the totality of the evidence.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 28 September 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[1] *Nahimana et al*., Decision on the Expert Witnesses for the Defence (TC), 24 January 2003 (conditionally authorizing testimony of various expert witnesses on socio-economic and political situation, military organization, influence of the media, and civil defence); *Bagosora et al*., T. 4 September 2002 pp. 6-7 (authorizing testimony on human rights abuses); *Nahimana et al*., T. 20 May 2002, pp. 122-23 (authorizing historian to testify on military matters and the role of the media).

[2] *Bagosora et al*., T. 4 September 2002 p. 6.

Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda 29 September 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Site visit, Rwanda – Prosecutor – precedents – instrumental in discovering the truth or in determining the case – large number of locations proposed – more evidence expected, reduce the need of site visit – motion denied

International instruments cited : Rules of procedure and evidence, Rules 4 and 73

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu*, Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis, 17 February 1998 (ICTR-96-4-T,* Reports 1998*, p. 18) – Trial Chamber I,* The Prosecutor v. Ignace Bagilishema*, Judgement, 7 June 2001 (ICTR-95-1A-T,* Reports 2001*, p. 398) – Trial Chamber II,* The Prosecutor v. Elie Ndayambaje et al.*, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda Under Rules 4 and 73 of the Rules of Procedure and Evidence, 23 September 2004 (ICTR-96-8-T,* Reports 2004*, p. X)*

I.C.T.Y. : President, The Prosecutor v. Kupreskic et al.*, Authorization by the President of an On-Site Visit Pursuant to Rule 4 of the Rules of Procedure and Evidence, 29 September 1998 (IT-95-15); Confidential Order on On-Site Visit, 13 October 1998 (IT-95-15)*

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Prosecution's "Motion for Site Visits in the Republic of Rwanda Under Rules 4 and 73 of the Rules of Procedure and Evidence", filed on 26 June 2003;

CONSIDERING the Joint Defence Response, filed on 15 July 2003;

HEREBY DECIDES the motion.

SUBMISSIONS

1. The Prosecution requests that the Chamber conduct site visits in Rwanda at locations listed in Annex A of the motion, and seek authorization to sit away from the Seat of the Tribunal pursuant to Rule 4 of the Rules. A site visit would enable the

Chamber to fully and properly evaluate witness testimony. It is submitted that such a visit can be authorized where it is in the interests of justice, can be safely and quickly completed, and is supported by all parties.

2. In the joint response, the Defence raises no objections to the motion, but proposes additional sites to be visited in Annexes to the response. The Defence submits that all Counsel should be able to participate in the visits, which should take place as soon as possible.

DELIBERATIONS

3. Rule 4 of the Rules provides that "[a] Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice". In *Prosecutor v. Bagilishema*, the Chamber visited sites in Kibuye Prefecture in Rwanda, which were relevant to the allegations in the case, in order "to better appreciate the evidence to be adduced during the trial". The visit was at the request of the Defence and the Prosecution did not object[1]. In *Akayesu*, the Chamber, after considering the relevant circumstances in that case, decided that an on-site inspection would be informative but not instrumental in discovering the truth or in determining the case[2]. More recently, in *Ndayambaje et al*., the Chamber denied the Prosecution motion for a site visit, holding that even if such visits are ordered, they should take place at the end of the presentation of both the Prosecution and Defence cases[3]. In *Kupreskic et al*., the President of the ICTY authorized an on-site visit at the request of the Chamber, as it was in the interests of justice to obtain a first-hand knowledge of the area, and the events were contained in a small village which could be visited in one day[4].

4. The need for a site visit has to be assessed in view of the particular circumstances of each trial. In *Bagilishema*, the site visit took place before presentation of the evidence. The Chamber in *Ndayambaje et al*. expressed the view that site visits should ideally take place at the close of presentation of the Prosecution and Defence cases. In the present case, the parties have proposed that the Chamber should visit a large number of locations in Rwanda. The Chamber notes that since the lists of sites were submitted, a considerable number of photographs, sketches and maps have been tendered as exhibits. As the trial proceeds, it is expected that more evidence will shed light on the relevant locations. This may further reduce the need for site visits. In view of the logistics and costs involved, a decision to carry out a site visit should preferably be made when the visit will be instrumental in the discovery of the truth

[1] *Bagilishema*, Judgement (TC), 7 June 2001, para. 10.

[2] *Akayesu*, Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis (TC), 17 February 1998, para. 8.

[3] *Ndayambaje et al*., Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda Under Rules 4 and 73 of the Rules of Procedure and Evidence (TC), 23 September 2004, paras. 14-15.

[4] *Kupreskic et al*., Authorization by the President of an On-Site Visit Pursuant to Rule 4 of the Rules of Procedure and Evidence (TC), 29 September 1998; Confidential Order on On-Site Visit (TC), 13 October 1998. The visit was ultimately not carried out due to security concerns.

and determination of the matter before the Chamber[5]. At present, the Chamber is not persuaded that this will be the case. At any rate, the number of locations proposed by the parties is too high.

5. The Chamber does not exclude that it may be feasible, at a later stage, to visit some places in Rwanda that are relevant to the present trial. The parties are at liberty to renew their requests, if required.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 29 September 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on the Prosecution Motion to Recall Witness Nyanjwa 29 September 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora – recall witness – good cause – Prosecutor – supplementary evidence, cumulative – motion denied

International cases cited :

I.C.T.R. : Trial Chamber II, 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-T,* Reports 1998*, p. 1000) – Trial Chamber II,* The Prosecutor v. Juvénal Kajelijeli*, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001 (ICTR-98-44A-T,* Reports 2001*, p. 1664) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana et al*, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected according to the Order of 13 May 2003, 13 May 2003 (ICTR-99-52-T,* Reports 2003*, p. 334) – Trial Chamber I,* 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-T,* Reports 2003*, p. 252) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al*,*

[5] *Akayesu*, Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis (TC), 17 February 1998, para. 8.

Decision on Prosector's Motion for Leave to Vary the Witness List pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-96-7, Reports 2004*, p. X)*

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 oral request to recall Mr. Antipas Nyanjwa as an expert witness, made on 9 September 2004;

CONSIDERING the oral arguments of the Bagosora Defence, made on 9 September 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Prosecution motion presents the issue of whether good cause exists to recall Mr. Antipas Nyanjwa, a handwriting expert, who previously testified before the Chamber on 21 and 22 June 2004. At that time, the Chamber admitted as Prosecution Exhibit 278 the witness' expert report on the authorship of certain disputed documents based on his comparison of known writing samples with other documents allegedly written by the Accused. During cross-examination, the Defence raised questions concerning the size of the expert's sample as well as his use of copies of documents, rather than originals.

2. After his testimony, the Prosecution provided the expert with four additional documents to be used as part of the sample of known handwriting as well as with the originals or better copies of the documents that he had previously reviewed. On 27 July 2004, the Prosecution disclosed a supplementary expert report based on his review which "confirms" and "re-emphasizes" the conclusions made in the initial report[1]. In this disclosure and during the status conference of 13 July 2004, the Prosecution indicated its intention to recall the witness during the week of 6 September 2004.

3. The Bagosora and Ntabakuze Defences filed a motion challenging in part the supplementary report arguing that three of the four new documents used as part of the sample of known handwriting were privileged. The Defence also asserted that that the Prosecution had not sought nor been granted leave to recall the witness. In an oral decision on 10 September 2004, the Chamber ruled that the Prosecution must seek leave to recall Mr. Nyanjwa and that all other issues pertaining to the supplementary report were therefore pre-mature. The Prosecution then made an oral motion to recall the expert, adopting its written submissions filed on 8 September 2004.

[1] Supplementary Expert Report, Registry Numbers 21420, 21421, L 0027335-36

SUBMISSIONS

4. In its written submissions, the Prosecution states that it has no reason to doubt Mr. Nyanjwa's initial assessment, which was based on the use of copies and a somewhat smaller sample of known handwriting, before his testimony and has no reason to doubt that assessment now[2]. Nonetheless, the Prosecution argues that good cause exists to recall the expert because cross-examination has raised questions concerning the sufficiency and quality of the copies of the documents that he reviewed. According to the Prosecution, it did not have an opportunity to address the challenges to the methodology the expert used in the preparation of the first report because they arose *ex improviso* during cross-examination, and it ought to reasonably be permitted to address the arguments by producing new evidence. Though in its possession, the Prosecution notes that it could not show the expert, who was in Kenya, the originals and better copies of the documents prior to his arrival in Arusha for his testimony. In addition, it is argued that the four new documents reviewed by the expert as part of the sample of known handwriting are "fresh evidence", not previously known to the Prosecution, and therefore also could not have been discovered and shown to the witness prior to his testimony.

5. The Bagosora Defence argues that good cause does not exist for recalling Mr. Nyanjwa given that the Prosecution has not adequately demonstrated why the documents, which were in its possession or the Registry's, were not previously shown to the expert.

DELIBERATIONS

6. 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[3]. 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 originally testified[4]. The right to be tried with 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[5]. For exam-

[2] Prosecutor's Written Submissions Regarding Certain Issues Raised by Bagosora and Nabakuze Defence Motions Concerning Prosecution Expert Witness Nyanjwa's Supplementary Expert Report, 8 September 2004, para. 28.

[3] *Kayishema and Ruzindana*, Decision on the Defence Motion for the Re-Examination of Defence Witness DE (TC), 19 August 1998, para. 14.

[4] A similar inquiry is relevant in determining whether a party demonstrates good cause to add witnesses or to call rebuttal evidence. See *Bagosora et al*, Decision on Prosector's Motion for Leave to Vary the Witness List pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, paras. 8-10 (setting forth factors used in determining if there is "good cause" to vary the witness list); *Nahimana et al*, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected according to the Order of 13 May 2003 (TC), 13 May 2003, paras. 41-55 (setting forth relevant legal considerations in determining whether to allow rebuttal evidence).

[5] *Nahimana et al*, Decision of 9 May 2003 on the Prosecutor's Application for Rebuttal Witnesses as Corrected according to the Order of 13 May 2003 (TC), 13 May 2003, paras. 44-45.

ple, the Chamber has intimated in this case that the recall of a witness might be appropriate where a party demonstrates prejudice from an inability to put significant inconsistencies to a witness which arise from previously unavailable Rwandan judicial documents[6].

7. The Chamber does not find that the Prosecution has demonstrated good cause for recalling Mr. Nyanjwa and admitting his supplementary report. The expert's additional evidence appears to be aimed solely at addressing questions posed by the Defence during cross-examination, and not evidence, about the quality and quantity of the documents reviewed by the expert. Both the expert and the Prosecution remain confident in and convinced by the earlier assessment even in the face of these questions[7]. As of yet, no evidence has been tendered to support the contention that Mr. Nyanjwa's original methodology was flawed. Given this, Mr. Nyanjwa's proposed supplementary evidence does not materially or significantly advance any aspect of the Prosecution's case beyond his initial assessment. At this stage of the proceedings, the evidence would therefore be cumulative as the report does not respond to any new defence evidence and simply "confirms" and "re-emphasizes" the expert's previous conclusions[8].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution's motion.

Arusha, 29 September 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[6] *Bagosora et al*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, paras. 7-8. See also *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO (TC), 2 November 2001, para. 12.

[7] See Prosecutor's Written Submissions, para. 28. At trial, Mr. Nyanjwa explained that he could work with either originals or photocopies, if the copies were of good quality. T. 21 June 2004 pp. 11-13. The expert testified that he was provided with a normal sample of documents and that the quality of the copies were good. See, e.g., T. 21 June 2004 pp. 22-23, 48, 56, 57, 63. Based on his analysis of this sample, the expert stated that his findings were one hundred percent conclusive and further noted that there was nothing to criticize in his report. T. 21 June 2004 pp. 23, 74.

[8] Supplementary Expert Report, Registry Numbers 21420, 21421, L 0027335-36.

Decision on Prosecution Request for Deposition of Witness BT 4 October 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Deposition – subpoena – exceptional circumstances – security concerns – protective measures – Prosecutor – importance of the testimony – motion denied

International instruments cited : Rules of procedure and evidence, Rule 71

International cases cited :

I.C.T.R. : Trial Chamber III, The Prosecutor v. Laurent Semanza*, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure, 20 October 2000 (ICTR-97-20-I,* Reports 2000*, p. 2364) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana et al.*, Decision on Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52-I,* Reports 2001*, p. 1202) – Trial Chamber III,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecutor's Motion for Deposition of Witness OW, 5 December 2001 (ICTR-98-41-I,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Eliezer Niyitegeka*, Decision on the Prosecutor's Amended Extremely Urgent Motion for the Deposition of a Detained Witness Pursuant to Rule 71, 4 October 2002 (ICTR-96-14,* Reports 2002*, p. X) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana et al.*, Decision on the Defence Request to Hear the Evidence of Witness Y By Deposition, 10 April 2003 (ICTR-99-52-I,* Reports 2003*, p. 319) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY, 3 October 2003 (ICTR-98-41-T,* Reports 2003*, p. 183) – Trial Chamber II,* The Prosecutor v. Tharcisse Muvunyi et al.*, Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX, 11 November 2003 (ICTR-2000-55-I,* Report 2003*, p. X) – Trial Chamber I,* The Prosecution v. Aloys Simba*, Decision on the Defence's Extremely Urgent Motion for a Deposition, 11 March 2004 (ICTR-2001-76-I,* Reports 2004*, p. X) – Trial Chamber I,* The Prosecutor v. Aloys Simba*, Decision on Extremely Urgent Defence Motion for the Deposition of Alibi Witnesses, 14 June 2004 (ICTR-2001-76-I,* Reports 2004*, p. X)*

T.P.I.Y. : Trial Chamber, The Prosecutor v. Tadić*, Decision on Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link 25 June 1996 (IT-41-1)*

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 to allow Witness BT to give testimony by way of deposition, filed on 9 September 2004;

HAVING CONSIDERED the Responses filed by the Defence for Nsengiyumva on 15 September 2004; by the Defence for Ntabakuze on 16 September 2004; by the Defence for Kabiligi on 17 September 2004; and by the Defence for Bagosora on 20 September 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 25 August 2004, the Chamber granted the Prosecution request for the issuance of a subpoena commanding the appearance of Witness BT before the Chamber to give testimony. In its decision, the Chamber considered the alternative requests by the Prosecution that testimony be given by video-link, or by deposition, to be premature.

2. The Chamber has been advised that a subpoena was served on Witness BT on 7 September 2004.

SUBMISSIONS

3. The Prosecution submits that the conditions prescribed in Rule 71 for ordering a deposition, that there be "exceptional circumstances" and that the deposition be "in the interests of justice", are satisfied. The exceptional circumstance is that, notwithstanding the mandatory nature of the subpoena, the witness continues to refuse to travel to Arusha to testify, citing fears that his testimony might lead to reprisals against his family. A deposition would be in the interests of justice because the witness's testimony is directly relevant to paragraphs in the Indictment of the Accused Bagosora, and of the joint Indictment of the Accused Kabiligi and Ntabakuze. Amongst other things, the witness is expected to testify on an alleged order given by the Accused Bagosora to military officers on the morning of 7 April concerning the execution of a plan.

4. The Prosecution proposes that the deposition take place in Belgium under the direction of a Belgian *juge d'instruction*, The Judge would show the prior witness statement to Witness BT, who would then confirm whether its contents are true and correct. Defence Counsel would be present, who could cross-examine the witness on the content of the statement. There would then be an opportunity for re-direct examination in which the Judge "would put questions to the witness at the request of the Prosecution". The deposition would be conducted in French and video-recorded, to save costs, and then later translated into English. As many Defence Counsel will be travelling home through Europe, holding a deposition in Belgium would not occasion great expense.

5. All four Defence teams oppose the motion. No exceptional circumstance has been established, for example, by an affidavit executed by the witness or other person who may attest to the witness's fear of testifying in Arusha. Even if genuinely held, that fear is hardly uncommon, much less exceptional. The very purpose of witness

protection measures and of the Witness and Victims Support Section ("the WVSS") of the Registry is to assuage such fears. Chambers have previously held that the mere reluctance of a witness to testify, grounded on fears and insecurity, is not an exceptional circumstance justifying a deposition. In any event, the basis of the witness's purported fear, that he or his family might suffer reprisals for his testimony, will not be diminished by holding a deposition rather than direct testimony before the Chamber. The appropriate response to a reluctant witness is to issue a subpoena, as has been done in the present case and, if the witness persists in refusing to testify, request coercive measures or sanctions by the state in which the witness resides.

6. The procedure suggested by the Prosecution is not in the interests of justice. Permitting the examination of the witness by deposition denies the Accused of their right to confront the witnesses against them. The proposed procedure, by which the witness would merely affirm that his written statement is true and correct, followed by cross-examination by the Defence, violates previous decisions of the Chamber which require that direct testimony be given orally unless Rule 92 *bis* applies. In any event, the Prosecution has not established that Belgian law permits cross-examination at a deposition presided over by a Belgian *juge d'instruction*, as proposed. The Prosecution exaggerates the importance of Witness BT's testimony which merely repeats that of Witness Reyntjens. On the other hand, eyewitness testimony which incriminates an Accused is of such importance that it ought to be heard by the Chamber directly, which may then observe the witness's demeanour and pose questions. The Defence further argues that as the preparations for the Defence case are about to begin, many Defence Counsel may need to remain in Arusha for some period after the end of the current session. Holding a deposition in Belgium would, contrary to the Prosecution's submissions, occasion great expense. The proposal to hold the deposition exclusively in French would disadvantage English-speaking Defence counsel and might lead to inaccuracies in the event that the witness wishes to refer to Kinyarwanda words.

DELIBERATIONS

7. Rule 71 provides, in relevant part, that :

> (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.
>
> …
>
> (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 Chamber.

The exceptional nature of depositions is underlined by 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.

The Trial Chamber is vested with a discretion to order a deposition only where there are exceptional circumstances *and* the deposition would be in the interests of justice.

8. The Chamber examines first whether "exceptional circumstances" exist, as required by Rule 71 (A), to justify the taking of a deposition. Past decisions of this Tribunal have recognized that physical infirmity caused by age or ill-health, which makes travel to the Tribunal difficult or impossible, may constitute an exceptional circumstance justifying the taking of a deposition[1]. The Prosecution here claims that the exceptional circumstance is the witness's refusal to testify at the Tribunal, notwithstanding the issuance of a subpoena, because of security fears. The Chamber observes that applications for depositions based exclusively on a witness's security concerns have been consistently denied. In so doing, Chambers have frequently emphasized that the applicant must exhaust all possible methods of reassuring and compelling the prospective witness to testify at the Tribunal, including by seeking special protective measures[2]. Chambers have, for example, granted more robust protective measures for

[1] *Nahimana et al*., Decision on the Defence Request to Hear the Evidence of Witness Y By Deposition (TC), 10 April 2003 ("*Nahimana* Decision"), para. 8 ("the witness is in poor health, as confirmed by a medical certificate. The Chamber accepts that he can manage a short flight but not a long travel to Arusha"); *Bagosora et al*., Decision on Prosecutor's Motion for Deposition of Witness OW (TC), 5 December 2001, para. 12 ("The Chamber accepts that the advanced age, frailty, and poor health of a the witness constitute an exceptional circumstance"); *Simba*, Decision on the Defence's Extremely Urgent Motion for a Deposition (TC), 11 March 2004, para. 7 ("The rapidly deteriorating health of the witness, as attested by Defence Counsel and the witness himself, constitutes, in the present case, an exceptional circumstance justifying the taking of a deposition"); *Muvunyi et al*., Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX (TC), 11 November 2003, para. 10 ("the Chamber considers that Witness QX's age [82 years old] coupled with his critical state of health, constitutes exceptional circumstances within the meaning of Rule 71").

[2] *Semanza*, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure (TC), 20 October 2000, para 27 ("The Tribunal provides protection to witnesses for purposes of having their testimony in court, not by deposition … The [WVSS] exists exactly to assuage the fears of would-be witnesses, and it could bring the subjects of the sought depositions to the Tribunal"); *Simba*, Decision on Extremely Urgent Defence Motion for the Deposition of Alibi Witnesses (TC), 14 June 2004, para. 9 ("One witness has raised security concerns if s/he testifies before the Tribunal, as the proceedings are not closed, and his/her name will be revealed. However, these concerns would be addressed if protective measures were granted … The security concerns raised do not explain why the witnesses could not come to Arusha as protected witnesses, whose identities would not be revealed to the public"); *Nahimana* Decision, para. 8 ("The Chamber notes that Witness Y is very concerned about his safety. In the case of Witness X, who held a similar view, the Chamber instructed the Registry (WVSS) to clarify whether that witness would be willing to testify in Arusha if particularly stringent security measures were adopted. The Chamber would have made a similar decision in relation to Witness Y if his reluctance to testify at the seat of the Tribunal had been based on security concerns only"); *Niyitegeka*, Decision on the Prosecutor's Amended Extremely Urgent Motion for the Deposition of a Detained Witness Pursuant to Rule 71 (TC), 4 October 2002 (*Niyitegeka* Decision), para. 5 ("the Chamber is not convinced that the Prosecution has exhausted all efforts to secure the attendance of the witness").

witnesses who face particularly acute security problems such as, for example, permitting testimony to be given by audio-video transmission from a remote location[3]. Based on the information before it, the Chamber is not of the view that exceptional circumstances exist justifying the taking of a deposition of Witness BT.

9. Even assuming that exceptional circumstances were to exist, the Chamber is not persuaded that a deposition would be in the interests of justice. The content of the witness's testimony is, according to the Prosecution's submissions, highly incriminating and appears to be the only direct evidence of this event. The witness's credibility is, accordingly, of particular significance and should be tested before the Chamber, which can then directly observe the witness's demeanour[4].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 4 October 2004

[Signed] : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Prosecution Request for Testimony of Witness BT via Video-Link 8 October 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Testimony, video-link – exceptional circumstances – physical present is the general rule – ICTY – witness's security – fear objectively justified – interest of justice – witness unwilling to testify, persistent refusal – repeated efforts – subpoena – importance of the testimony – witness's credibility and demeanour – real-time broadcast – video record – compliance with Belgian law – motion granted

International instruments cited : Rules of procedure and evidence, Rules 54, 71, 75, 92 bis *– Rules of procedure and evidence of the ICTY, Rule 71* bis

International cases cited :

[3] *Nahimana et al*., Decision on Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures (TC), 14 September 2001, para. 33; *Bagosora et al*., Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003, para. 10. See generally *Tadić*, Decision on Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence by Video-Link (TC) 25 June 1996.

[4] *Niyitegeka* Decision, para. 5.

I.C.T.R. : Trial Chamber I, 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-I,* Reports 2001*, p. 1202) – Trial Chamber III,* 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-98-41-I,* Reports 2002*, p. X) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY, 3 October 2003 (ICTR-98-41-T,* Reports 2003*, p. 183) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Request for Deposition of Witness BT, 4 October 2004 (ICTR-98-41-I,* Reports 2004*, p. X)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Tadić*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (IT-94-1) – Trial Chamber, T*he Prosecutor v. Delalic et al.*, Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony By Means of Video-link Conference, 28 May 1997 (IT-96-21) – Trial Chamber,* The Prosecutor v. Mrksic et al.*, Decision on Defence Motions for Video-Conference Link, 29 April 1998 (IT-95-13/1) – Appeals Chamber,* The Prosecutor v. Kupreškić et al.*, Decision on Appeal By Dragan Papić Against Ruling to Proceed By Deposition (Separate Opinion of Judge Hunt), 15 July 1999 (IT-95-16) – Trial Chamber,* The Prosecutor v. Kordic and Cerkez*, Order for Video-Conference Link, 24 February 2000 (IT-95-14/2) – Trial Chamber,* The Prosecutor v. Sikirica et al.*, Order for Video-Conference Link, 11 July 2001 (IT-95-8)*

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 "Urgent and Confidential Request to Allow Witness BT to Give Testimony Via Video-link", filed on 1 October 2004;

HAVING CONSIDERED the "Reply" filed by the Defence for Bagosora on 4 October 2004; the "Response", and an "Addendum" thereto, filed by the Defence for Ntabakuze on 4 October 2004; the Responses filed by the Defence for Nsengiyumva and Kabiligi on 5 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 25 August 2004, the Chamber granted the Prosecution request for the issuance of a subpoena commanding the appearance of Witness BT before the Chamber to give testimony. In its decision, the Chamber considered the alternative requests by the Prosecution that testimony be given by video-link, or by deposition, to be premature. The Chamber has been advised that a subpoena was served on Witness BT on 7 September 2004. On 9 September 2004, the Prosecution filed a motion under Rule 71 to take the testimony of the witness by deposition, noting that the witness had refused to comply with the subpoena issued by the Chamber. On 29 September

2004, the Chamber indicated orally that it would deny the motion. In written reasons for that decision issued on 4 October 2004, the Chamber found that the Prosecution had not established, as required by Rule 71 (A), that "exceptional circumstances" existed, nor proven that it would be in the interests of justice to receive evidence by deposition which the Prosecution contended was highly incriminating of the Accused. The Prosecution filed the present motion on 1 October 2004.

SUBMISSIONS

2. The Prosecution relies on its two previous motions concerning Witness BT to justify the taking of testimony by video transmission from Belgium. It argues that Witness BT refuses to travel to Arusha to testify notwithstanding the issuance of the subpoena requiring her attendance. As the Chamber has denied the motion for a deposition, and as Belgian law does not allow for a witness to be compelled to travel beyond Belgian territory, the only means by which the witness's testimony can be heard is by video-link. The Prosecution has submitted, in particular, that Witness BT will testify that she heard words spoken by the Accused Bagosora immediately following a meeting at the *Ecole Superieure Militaire* on the morning of 7 April 1994, to the Accused Ntabakuze and three other officers. It argues that this incident, about which the Chamber has heard hearsay testimony from Expert Witness Filip Reyntjens, is highly incriminating of the Accused.

3. All four Defence teams oppose the motion. Permitting testimony by video-link, merely because the witness does not wish to travel to Arusha, would set a dangerous precedent that undermines the integrity of the Tribunal and would encourage witnesses to choose the venue of their testimony. The Defence notes that many of its witnesses have expressed a similar unwillingness to travel to Arusha, and that any ruling should apply equally to Defence witnesses. The poor image and sound of previous video transmissions to the Chamber is an inadequate substitute for live testimony, and the Chamber has already remarked upon the need for directly observing the demeanour of the witness. The Prosecution has not established that the stringent conditions for permitting such testimony, expressed in previous case law of the Tribunal, exist. In particular, the Prosecution has not shown how audio-video testimony would preserve the witness's anonymity or security, as has been required in previous cases. Mere unwillingness to testify before the Tribunal should not be accepted as a basis for authorizing such testimony, particularly where, as here, the basis of the witness's fears have been neither defined nor substantiated by the Prosecution.

4. According to the Defence, the Prosecution has also failed to substantiate its claim that Belgian law does not allow a witness to be compelled to testify outside of its territory. No effort has been made to prove the law of Belgium, and the claim appears to contradict the Prosecution's submissions requesting the subpoena. On the contrary, the Defence infers from an email sent by a Belgian judge concerning the service of the subpoena on Witness BT that coercive measure are, in fact, available under Belgian law and should be applied. The Defence notes that it is unclear whether the Prosecution wishes to conduct the questioning of the witness itself, or whether it will ask a Belgian *juge d'instruction* to conduct the questioning. The latter proposal does not comply with the Rules and, in any event, the witness should not be permitted to choose the judge presiding over her testimony.

DELIBERATIONS

5. Recourse to video-link for the hearing of testimony was first granted by a Chamber of the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). In *Tadić*, the Chamber authorized this medium of testimony for seven Defence witnesses who refused to travel to the seat of the Tribunal because they feared arrest in The Hague by the Prosecutor of the ICTY[1]. The Chamber recognized that Rule 71 (D), which permitted the holding of a deposition by video-conference, did not apply to real-time electronic transmission of testimony from a remote location to the Chamber. Nevertheless, it authorized the procedure on the basis of Rule 54, which 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."[2] The Chamber indicated that transmission of testimony would be permitted where "the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal."[3] The Chamber nonetheless reiterated the "general rule" that "a witness must be physically present at the seat of the International Tribunal."[4]

6. The ICTY Rules were amended on 15 July 1997 to specifically permit testimony by "video-conference link", and Rule 71 *bis* was subsequently inserted to provide that such testimony may be ordered where it is "in the interests of justice."[5] Criteria which have been applied in assessing whether such testimony is in the interests of justice include : the importance of the testimony; the inability or unwillingness of the witness to attend; and that a good reason has been adduced for the inability or unwillingness to attend[6]. No requirement has been imposed that the witness is unable to attend, for example, because of infirmity.

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[1] *Tadić*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC) ("*Tadić* Decision"), 25 June 1996, para. 19.

[2] *Ibid*., p. 12. See *Delalic et al*., Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony By Means of Video-link Conference (TC), 28 May 1997 (authorizing video testimony under Rule 54).

[3] *Tadić* Decision, para. 19.

[4] *Ibid*., paras. 19, 21.

[5] The first version of the rule permitting electronic transmission of testimony was found in Rule 90 (A), which read in its entirety : "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 or where, in exceptional circumstances and in the interests of justice, a Chamber has authorized the receipt of testimony via video-conference link." Rule 71 *bis*, adopted on 17 November 1999, deleted the requirement of "exceptional circumstances" : "At the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link."

[6] *Sikirica et al*., Order for Video-Conference Link (TC), 11 July 2001 (ordering video testimony of five witnesses on basis of showing that "all five witnesses are unable or unwilling for good reason to come to the International Tribunal); *Mrksic et al*., Decision on Defence Motions for Video-Conference Link (TC), 29 April 1998 (on basis that "testimony of these witnesses is sufficiently important as to make it unfair to proceed without it and that the witnesses are unable or unwilling to for good reason to come to the International Tribunal"); *Kordic and Cerkez*, Order for Video-Conference Link (TC), 24 February 2000 ("the Prosecution has established that the testimony of these witnesses is sufficiently important as to make it unfair to proceed without it and that the witnesses are unable or unwilling for good reason to come to the International Tribunal").

7. The Rules of Procedure and Evidence of the ICTR ("the Rules") do not expressly provide for the taking of testimony by electronic transmission. Nevertheless, in *Nahimana et al*., this Chamber authorized the electronic transmission of testimony, relying on the *Tadić* decision[7]. Although the request was part of a Prosecution motion for protective measures for a witness, the Chamber did not rely on witness protection concerns as the basis for its decision[8]. The Chamber relied, *inter alia*, on *Tadić*, and ordered electronic transmission of the testimony as being "in the interests of justice" :

> "The Chamber is of the opinion that the testimony is sufficiently important, that it will be in the interests of justice to grant the application for a video link solution, and that the Accused will not be prejudiced in the exercise of his right to confront the witness. The crucial question is whether the witness is unable or unwilling to come to the Tribunal."[9]

In applying the "interests of justice" standard, the Chamber adopted the same approach as had been codified in Rule 71 *bis* of the Rules of the ICTY.

8. Video transmission of testimony may also be ordered under Rule 75 of the Rules, which authorizes Chambers to "order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that such measures are consistent with the rights of the accused". In such cases, the applicant must make some showing that giving testimony in that manner is necessary to safeguard the witness's security. The electronic transmission of the testimony of a witness in the present case has been heard after a finding that he was "an extraordinarily vulnerable witness and that testimony from a remote location would assist in preserving his anonymity and security."[10]

9. The Prosecution has not expressly indicated whether it seeks electronic transmission of the witness's testimony as a witness protection measure under Rule 75, or because it would be in the interests of justice under Rule 54. However, the Prosecution has previously argued that it would be in the interests of justice to hear the witness's testimony[11]. Accordingly, the request will be considered in accordance with Rule 54, under the "interests of justice" standard set forth in *Nahimana et al*. and applied before the ICTY.

10. A sufficient evidential foundation has been laid that the witness is unwilling to testify in person at the Tribunal, despite repeated efforts to convince or compel the witness to appear. On 29 September 2004, the Chamber heard representations from the Registry indicating that a subpoena from the Tribunal had been served on

[7] *Nahimana et al*., Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures (TC) ("*Nahimana* Decision"), 14 September 2001.

[8] Paras. 36-37 ("The Chamber considers that it may be possible to adopt sufficient measures to ensure that Witness X can testify here in Arusha … it does not follow clearly from the documentation that [the witness refusal to attend] will be maintained if he is given thorough explanations about the extraordinary measures that will be taken during his stay here").

[9] *Nahimana* Decision, para. 35.

[10] *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; *Bagosora et al*., Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003.

[11] Urgent and Confidential Request for a Subpoena, etc., 19 July 2004, para. 14.

the witness, who nevertheless continued to refuse to travel to Arusha. The Chamber is of the view that, as a practical matter, further measures are not likely to lead to the witness's attendance at the Tribunal.

11. The witness's testimony is undoubtedly of importance to the Prosecution case. Although it is limited in scope, it concerns an utterance by one of the Accused to another Accused which could be probative of several elements of the Prosecution case. The testimony is claimed to be the only direct evidence of the event alleged. The Chamber has already heard testimony from Expert Witness Filip Reyntjens concerning his interpretation of the significance of this alleged event. Further evidence on this matter may assist the Chamber.

12. The importance and limited scope of the testimony, however, also increases the Chamber's need to carefully observe the witness during her testimony. In its previous decision denying a deposition of this witness in lieu of testimony, the Chamber stated that "[t]he witness's credibility is, accordingly, of particular significance and should be tested before the Chamber, which can then directly observe the witness's demeanour."[12] Direct observation of the witness's demeanour is not, however, incompatible with electronic transmission. Experience has shown that electronic transmissions can provide a very clear audio and visual image of the witness to the judges and parties in the courtroom[13]. Representation by the parties at the point of transmission ensures that the conditions of testimony are impartial and fair. The real-time nature of the broadcast facilitates the direct intervention of the judges during the testimony. The quality of the transmission must, however, actually be adequate to permit direct observation of the witness. As an extra safeguard against possible transmission interruptions that might interfere with a complete appreciation of the witness's testimony, the Chamber shall order that the testimony of the witness be video-recorded for subsequent review, if necessary.

13. The Prosecution has represented that the basis for the witness's refusal to come to Arusha is fear of reprisals against her family. Without further information, the Chamber is unable to assess whether this fear is objectively justified. However, the witness's continued refusal to come to Arusha in spite of the service of a subpoena indicates that these fears are genuinely and deeply held. In that sense, they are no

[12] *Bagosora et al*., Decision on Prosecution Request for Deposition of Witness BT (TC), 4 October 2004, para. 9.

[13] *Kupreškić et al*., Decision on Appeal By Dragan Papić Against Ruling to Proceed By Deposition (Separate Opinion of Judge Hunt), 15 July 1999, paras. 29-30 ("It is, of course, of the utmost importance that any tribunal of fact should have the opportunity of seeing the demeanour of the witnesses and of observing the way in which various questions put to them in cross-examination are answered. This is particularly so where the witnesses are vital to the determination of significant factual issues … Such is the geography of the courtrooms used by the Tribunal that the view of the witness and of the witness's demeanour on the television screens provided throughout the courtroom is usually better than that from across the room"). Many national jurisdictions also permit electronic transmission or recording of testimony. See e.g., *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), cert denied, 120 S. Ct. 931 (2000); (informant allowed to testify via two-way closed-circuit television against Genevose family boss, Vincent "The Chin" Gigante); Federal Magistrates Act, 1999, (Australia), s. 67 (permitting testimony before the Federal Magistrates Court or the Federal Magistrate by way of video link or audio link).

less real than the basis for the refusal of the seven witnesses in *Tadić* who feared arrest by the Prosecution of the ICTR.

14. In light of the opportunity that the Chamber will have to observe the witness's demeanour, the nature of the witness's testimony and her persistent refusal to accede to requests to come to the Tribunal, and the unlikelihood that any further measures will convince or compel the witness to appear before the Tribunal, the Chamber finds that it is in the interests of justice to hear the witness via electronic transmission from Belgium.

15. This is no way detracts from the general principle, and the Chamber's strong preference, that most witnesses should be heard in court[14]. Electronic transmission of testimony may, under certain circumstances, be time-consuming and inefficient. The testimony of witnesses heard through electronic media runs the risk of being less weighty than that of in-court testimony if the quality of the transmission impairs the Chamber's assessment of the witness[15].

16. The procedure shall be the same as that followed in respect of Witness BY, who was recently heard by video-link from Belgium. A *juge d'instruction* may be present at the point of transmission during the testimony to conduct certain formalities in compliance with Belgian law. The Chamber will then be in charge of taking the testimony in accordance with the procedure normally followed in a courtroom in Arusha. The Prosecution will conduct the direct examination, followed by cross-examination by the Defence. A prior written statement of the witness could only be entered as an exhibit in lieu of oral testimony if a request under Rule 92 *bis* were granted[16]. No such application has been made.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry, in consultation with the parties, to make all necessary arrangements in respect of the testimony of Witness BT via secure audio-video transmission link, and to video-tape the testimony for possible future reference by the Chamber.

Arusha, 8 October 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[14] Of eighty-three Prosecution witnesses heard so far, this will only be the third to have testified by video-link.

[15] *Tadić* Decision, para. 21.

[16] T. 20 November 2003, p. 15.

Decision on Amicus Curiae Request by the Rwandan Government 13 October 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Amicus curiae – relevant submissions, assistance to the Chamber for the proper determination of the case – restitution, special hearing – provisional measures – right to produce evidence at trial – motion denied

International instruments cited : Statute, art. 15 – Rules of procedure and evidence, Rules 37, 38, 74, 88, 105

International case cited : Trial Chamber I, The Prosecutor v. Alfred Musema*, Decision on an Application by African Concern for Leave to Appear as Amicus Curiae, 17 March 1999 (ICTR-96-13-T,* Reports 1999*, p. 1236)*

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the request by the Rwandan Government to appear as *amicus curiae*, filed on 10 July 1998;

CONSIDERING the "Response to the Request by the Government of Rwanda for Leave to Appear as *Amicus Curiae*", filed by the Bagosora Defence on 18 June 1999; the "Amended Reply to the Government of Rwanda's Request to Appear as *Amicus Curiae*", filed by the Bagosora Defence on 10 August 1999; and the "Prosecutor's Response", filed on 10 May 2000;

HEREBY DECIDES the motion.

SUBMISSIONS

1. The Government of Rwanda requests an appearance before the Chamber in order to seek restitution of property and assets removed by or at the disposal of the Accused. These include public records belonging to the Ministry of Defence, movables, funds and other transferable securities. It also requests provisional measures in relation to assets concealed around the world, such as subpoenas and sequestration of the property. The Government seeks the right to participate in the trial and to produce evidence in order to prove the Accused's culpability.

2. The Bagosora Defence submits that a claim for restitution of property can only be made after a judgement of conviction, according to Rule 105 of the Rules of Procedure and Evidence ("the Rules"). Furthermore, the Rwandan Government has no legal capacity to plead on behalf of individuals. The provisional measures sought are not provided for in the constitutive instruments of the Tribunal and there is no evidence that the Accused misappropriated the property. There cannot be two Prosecutors in the case, and if granted the right to appear as such, the Government would be subject to the same rules of disclosure as the Prosecution.

3. The Prosecution makes no submission on the application and leaves the matter to the Chamber.

DELIBERATIONS

4. Pursuant to Rule 74, the 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 as *amicus curiae* 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[1].

5. With regard to the issue of restitution, the Rules provide a framework within which restitution claims may be granted. If the Chamber finds the Accused guilty of a crime and concludes from the evidence presented that the unlawful taking of property by the Accused was associated with that crime, it shall, pursuant to Rule 88, make a specific finding to that effect in its judgement. In that event, the Chamber shall, pursuant to Rule 105, order the restitution of the property or the proceeds thereof or make such other order as it considers appropriate.

6. As Rule 105 envisions a special hearing on restitution which only takes place after a judgement of conviction that specifically includes findings on the unlawful taking of property, the application is premature at this stage. Moreover, the Indictments do not allege that the Accused unlawfully took property. That being the case, the request does not show how the proposed submissions regarding restitution to victims are relevant to the issues to be decided or how they would assist the proper determination of the case. The general problem of the unlawful taking of property in Rwanda is unrelated to the specific facts at issue in this trial.

7. The two remaining requests for provisional measures and for the right to produce evidence at trial are not provided for in the Rules. Rule 74 envisages that an *amicus curiae* will make submissions on issues relevant to the case. The production of evidence falls within the jurisdiction of the Office of the Prosecutor, as provided for by Article 15 of the Statute and Rules 37 and 38 of the Rules.

[1] *Musema*, Decision on an Application by African Concern for Leave to Appear as Amicus Curiae (TC), 17 March 1999, paras. 2, 13 and 14.

FOR THE ABOVE REASONS, THE CHAMBER
DENIES the application.

Arusha, 13 October 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C) 14 October 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Kabiligi, Ntabakuze – admission of materials – obtain of evidence – suspect's rights – right not to testify against oneself – questioning in presence of counsel, timely information, waiver – right to silence – caution that any statement made may be used against the detainee – custodial interrogation – relevant evidence, probative value, prima facie – original of a document – motion granted in part

International instruments cited : Statute, art. 17 (3), 20 (4) (g) – Rules of procedure and evidence, Rule 42 (A), (B) and (C), 89 (C), 95 – Statute of the International Criminal Court, art. 55 (2)

National instruments cited : Constitution of South Africa (1996), Art. 35 (1) – Constitution of Canada (1982), s. 10 – Fiji Constitution (Amendment) Act 1997, s. 27 – New Zealand Bill of Rights Act (1990), S. 23 (1)

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Gratien Kabiligi, *Decision on the Defence Motion to Lodge Complaint and Open an Investigation into Alleged Acts of Torture Under Rules (40) (C) and 73 (A) of the Rules of Procedure and Evidence, 6 October 1998 (ICTR-97-34-I,* Reports 1998*, p. 754) – Trial Chamber III,* The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Decision on Kabiligi's Motions to Nullify and Declare Evidence Inadmissible, 2 June 2000 (ICTR-97-34-I,* Reports 2000*, p. 1014) – Trial Chamber I,* The Prosecutor v. Théoneste Bagasora*, et. al., Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003 (ICTR-98-41-T,* Reports 2003*, p. 212) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion For the Exclusion of Evidence, 2 September 1997 (IT-96-21) – Appeals Chamber,* The Prosecutor v. Delalic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998 (IT-96-21) – Trial Chamber,* The Prosecutor v. Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts (TC), 1 December 2000 (IT-95-14/2)*

Décision relative à la requête du Procureur intitulée **Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C) of the Rules of Procedure and Evidence** *14 octobre 2004 (ICTR-98-41-T)*

(Original : Anglais)

Chambre de première instance I

Juges : Erik Mose, Président de Chambre ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Kabiligi, Ntabakuze – admission de preuves – obtention de preuve – droits du suspect – droit de ne pas témoigner contre soi-même – interrogatoire en présence d'un conseil, signification en temps utile, renonciation – droit au silence – signification que toute déclaration pourrait être utilisée contre lui – détention provisoire – pertinence de la preuve, valeur probante, indices suffisants – document original – requête accordée en partie

Instruments internationaux cités : Statut, art. 17 (3), 20 (4) (g) – Règlement de procédure et de preuve, art. 42 (A), (B) et (C), 89 (C), 95 – Statut de Rome de la Cour pénale internationale, art. 55 (2)

Instruments nationaux cités : Constitution de l'Afrique du Sud (1996), art. 35 (1) – Constitution du Canada (1982), s. 10 – Constitution de Fiji (Amendement) de 1997, S. 27 – New Zealand Bill of Rights Act (1990), S. 23 (1) et (2)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance II, Le Procureur c. Gratien Kabiligi*, Décision faisant suite à la requête soulevée par la défense aux fins de plainte et d'ouverture d'une enquête sur des actes de torture (art. 40 (C) et 73 (A) du Règlement de procédure et de preuve), 5 octobre 1998 (ICTR-97-34-I,* Recueil 1998*, p. 755) – Chambre de première instance III,* Le Procureur c. Gratien Kabiligi et Aloys Ntabakuze*, Decision on Kabiligi's Motions to Nullify and Declare Evidence Inadmissible, 2 juin 2000 (ICTR-97-34-I,* Recueil 2000*, p. 1014) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts*, Décision relative à l'admissibilité de la déposition du témoin DBQ, 18 novembre 2003 (ICTR-98-41-T,* Recueil 2003*, p. 213) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness MaxweII Nkole, 13 septembre 2004 (ICTR-98-41-T,* Recueil 2004*, p. X)*

T.P.I.Y. : Chambre de première instance, Le Procureur c. Delalic et consorts*, Décision relative à l'exception préjudicielle de l'accusé Zdravko Mucic aux fins de l'irrecevabilité de moyens de preuve, 2 septembre 1997 (IT-96-21) – Chambre d'appel,* Le Procureur c. Delalic*, Arrêt relatif à la requête de l'accusé Zejnil Delalic aux fins d'autorisation d'interjeter appel de la décision de la Chambre de première instance en date du 19 janvier 1998 concernant la recevabilité d'éléments de preuve, 4 mars 1998 (IT-96-21) – Chambre de première instance,* Le Procureur c. Kordic et Cerkez*, Décision*

– Trial Chamber, The Prosecutor v. Brdanin and Talic*, Order on the Standards Governing the Admission of Evidence, 15 February 2002 (IT-99-36)*

E.C.H.R. : Pfeifer and Plankl v. Austria, A 227 1992 (E Ct HR) – Imbriosca v. Switzerland, A 275 1993 (E Ct HR)

National jurisprudence cited : Miranda v. Arizona 384 U.S. 346 (1966) – R v. Evans [1991] 1 SCR 869 – R. v. Cullen 1992 NZLR LEXIS 689 (CA) – R v. Bartle, [1994] 3 S.C.R. 173 – S v. Melani and others 1995 SACLR LEXIS 290 – Dickerson v. United States 530 US 428 (2000) –

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 for the Admission of Certain Materials under Rule 89 (C) of the Rules of Procedure and Evidence", filed on 28 April 2004; and the "Prosecutor's 2nd Motion for the Admission of Certain Documents into Evidence under Rule 89 (C) of the Rules of Procedure and Evidence", filed on 25 May 2004;

CONSIDERING the Response of the Bagosora Defence, filed on 6 May 2004; the Response of the Kabiligi Defence, filed on 7 May 2004; the Prosecution Reply thereto, filed on 18 May 2004; the Second Response of the Kabiligi Defence, filed on 4 June 2004; the Response of the Bagosora Defence, filed on 9 June 2004; the "additional arguments" of the Kabiligi Defence filed on 28 June 2004; the Prosecution "Further Reply", filed on 14 July 2004; the Response of the Kabiligi Defence, filed on 20 July 2004; and the further Response of the Kabiligi Defence, filed on 7 September 2004;

HEREBY DECIDES the motions.

INTRODUCTION

1. The Prosecution seeks to admit the following materials pursuant to Rule 89 (C) of the Rules of Procedure and Evidence ("the Rules") :

(i) a recording and transcript of an interview conducted by ICTR investigators with the Accused Ntabakuze on 19 July 1997 (NTABALO-14, NTABALO-15);

(ii) a recording and transcript of an interview conducted by ICTR investigators with the Accused Kabiligi on 19 July 1997 (KABIGRA-01, KABIGRA-02);

relative à la requête du Procureur concernant les «pièces de Zagreb» et les comptes rendus présidentiels, 1er décembre 2000 (IT-95-14/2) – Chambre de première instance, Le Procureur c. Brdanin et Talic*, Ordonnance relative aux normes régissant l'admission d'éléments de preuve, 15 février 2002 (IT-99-36)*

C.E.D.H. : Pfeifer et Plankl c. Autriche, A 227 1992 (CEDHR) – Imbriosci c. Suisse, A 275 1993 (CEDHR)

Jurisprudence nationale citée : Miranda c. Arizona 384 U.S. 346 (1966) – R c. Evans [1991] 1 SCR 869 – R. c. Cullen 1992 NZLR LEXIS 689 (CA) – R c. Bartle, [1994] 3 SCR. 173 – S c. Melani et consorts 1995 SACLR LEXIS 290 – Dickerson c. États-unis d'Amérique 530 US 428 (2000)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Mose, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête du Procureur intitulée *Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C) of the Rules of Procedure and Evidence* (aux fins d'admission en preuve de certaines pièces en vertu de l'article 89 (C) du Règlement), déposée le 28 avril 2004 et de la requête intitulée *Prosecutor's 2nd Motion for the Admission of Certain Documents into Evidence under Rule 89 (C) of the Rules of Procedure and Evidence,* déposée le 25 mai 2004;

VU la réponse de la défense de Bagosora, déposée le 6 mai 2004; la réponse de la défense de Kabiligi, déposée le 7 mai 2004; la réplique du Procureur, déposée le 18 mai 2004; la duplique de la défense de Kabiligi, déposée le 4 juin 2004; la réplique de la défense de Bagosora, déposée le 9 juin 2004; les conclusions complémentaires de la défense de Kabiligi déposées le 28 juin 2004; la triplique du Procureur déposée le 14 juillet 2004; la réponse de la défense de Kabiligi, déposée le 20 juillet 2004; et la réponse complémentaire de la défense de Kabiligi, déposée le 7 septembre 2004;

STATUE CI-APRÈS sur la requête.

INTRODUCTION

1. Le Procureur demande à la Chambre de première instance d'admettre en preuve, en vertu de l'article 89 (C) du Règlement de procédure et de preuve (le «Règlement»), les pièces suivantes :

(i) L'enregistrement sonore et la transcription de l'interrogatoire de l'accusé Ntabakuze mené le 19 juillet 1997 par les enquêteurs du TPIR (NTABALO-14 et NTABALO- 15);

(ii) L'enregistrement sonore et la transcription de l'interrogatoire de l'accusé Kabiligi effectué le 19 juillet 1997 par les enquêteurs du TPIR (MIGRA-O 1 et MIGRA-02);

(iii) a written authorisation to purchase arms and ammunition, dated 27 July 1993, purportedly signed by Bagosora in his capacity as *Directeur de Cabinet* of the Ministry of Defence (BAGOTHE-38);

(iv) the Agreement between the United Nations and the Government of the Republic of Rwanda on the status of the United Nations Assistance Mission for Rwanda, signed in New York on 5 November 1993 (UNAMIRZ-04); and

(v) documents allegedly signed by the Accused Bagosora regarding the transportation of arms from Seychelles to Zaire (BAGOTHE-25) and a hand-written note by the Accused Bagosora offering to transport General Dallaire to Gitarama (BAGOTHE-26).

SUBMISSIONS

(i) Custodial Interrogation of Ntabakuze and Kabiligi

2. The Prosecution asserts that the Accused Ntabakuze has consented to the admission of his interview by investigators[1]. The Defence for Ntabakuze filed no response to the motion.

3. The interview of the Accused Kabiligi has previously been the subject of defence motions which have been rejected; the Defence should, therefore, be precluded from relying on those same arguments to challenge[2]. In any event, the Accused Kabiligi voluntarily waived his right to counsel and the interview was otherwise conducted in a proper and legal manner. Defence allegations of coercion during the interview are unsubstantiated.

4. The Defence for Kabiligi argues that previous decisions do not preclude raising the alleged involuntariness of the interview, as they concerned remedies other than exclusion or were ruled premature. The interview was oppressive and involuntary and should be excluded pursuant to Rules 89 (C) and 95. The Accused was handcuffed and threatened with return to Rwanda if he did not cooperate, which he perceived to be a death threat. Nor was the Accused informed of the reasons for his arrest, the charges against him, or his rights. The Kabiligi Defence further argues that the Accused did not receive a copy of the tapes and transcripts of the interview in a time-

[1] Prosecution Motion para. 8, citing Letter from Mr. Tremblay to Messrs. Chile Eboe-Osuji and Drew White, Office of the Prosecutor, dated 22 July 2002, filed with the Registry on 13 August 2002, p. 11166 *bis*.

[2] Prosecution Motion paras. 9-10, citing *Kabiligi*, Decision on the Defence Motion to Lodge Complaint and Open Investigations Into Alleged Acts of Torture Under Rule 40 (C) and 73 (A) of the Rules of Procedure and Evidence (TC), 6 October 1998; *Kabiligi*, Decision Rejecting Notice of Appeal (TC), 18 December 1998; *Kabiligi*, Decision Rejecting Notice of Appeal (AC), 18 July 1999.

(iii) Une autorisation écrite d'achat d'armes et de munitions datée du 27 juillet 1993, qui aurait été signée par l'accusé Bagosora en sa qualité de directeur de cabinet au Ministère de la défense (MINADEF) (BAGOTHE-38);

(iv) L'accord entre l'organisation des Nations Unies et le gouvernement de la République rwandaise portant sur le statut de la Mission des Nations Unies pour l'assistance au Rwanda (MINUAR), signé à New York le 5 novembre 1993 (UNAMIRZ-04);

(v) Des documents relatifs au transport d'armes des Seychelles au Zaïre qui auraient été signés par l'accusé Bagosora (BAGOTHE-25), et une note manuscrite de Bagosora offrant de transporter le général Dallaire à Gitararna (BAGOTHE-26).

ARGUMENTS DES PARTIES

i) Interrogatoire de Ntabakuze et de Kabiligi lors de leur détention provisoire

2. Le Procureur affirme que l'accusé Ntabakuze a accepté que son interrogatoire par les enquêteurs soit versé au dossier[1]. La défense de Ntabakuze n'a pas déposé de réponse à la requête du Procureur.

3. L'interrogatoire de l'accusé Kabiligi a déjà fait l'objet de plusieurs requêtes de la défense, qui ont été rejetées. Il ne faudrait donc pas que la défense puisse faire fond sur les mêmes arguments pour en contester l'admission en preuve[2]. Quoiqu'il en soit, Kabiligi a subitement renoncé à son droit à un conseil et l'interrogatoire a été conduit de manière légale et régulière à tous égards. Les allégations de la défense selon lesquelles l'interrogatoire a eu lieu sous la contrainte sont infondées.

4. La défense de Kabiligi fait valoir que les décisions antérieures ne l'empêchent en rien d'affirmer que l'interrogatoire s'est fait sous la contrainte, puisqu'elles répondaient à des requêtes relatives à des mesures autres que l'exclusion ou qu'elles ont été jugées prématurées. L'interrogatoire a eu lieu sous la contrainte et contre le gré de l'accusé; il devrait donc être jugé irrecevable en vertu des articles 89 (C) et 95 du Règlement. L'accusé a été menotté et menacé de refoulement au Rwanda s'il ne coopérait pas, ce qu'il a perçu comme une menace de mort. Il n'a pas été informé des motifs de son arrestation, ni des crimes retenus contre lui, ni de ses droits. De plus, l'accusé n'a pas reçu copie de l'enregistrement et du compte rendu de l'interrogatoire en temps voulu et les enregistrements originaux n'ont pas été placés sous

[1] Requête du Procureur, para. 8, citant une correspondance datée du 22 juillet 2002 entre Me Tremblay et MM. Chile Eboe-Osuji et Drew White du Bureau du Procureur, déposée auprès du Greffe le 13 août 2002, sous la cote RP 11166 *bis*.

[2] Requête du Procureur, paras. 9 et 10, citant la décision faisant suite à la requête soulevée par la défense aux fins de plainte et d'ouverture d'une enquête sur des actes de torture (art. 40 (C) et 73 (A) du Règlement de procédure et de preuve) rendue le 6 octobre 1998 par la Chambre de première instance en l'affaire *Kabiligi*; la décision portant rejet d'acte d'appel, rendue par la Chambre de première instance le 18 décembre 1998 en l'affaire *Kabiligi* et la décision portant rejet d'acte d'appel, rendue par la Chambre d'appel le 18 juillet 1999 en l'affaire *Kabiligi*.

ly manner, and that the original tapes were not sealed in his presence, in violation of Rules 43 (iv) and (v).

(ii)Documents Created Contemporaneous with Events

(a) BAGOTHE-38

5. The Prosecution submits that the Rules and jurisprudence of the Tribunal permit the admission of documents as evidence without identification or other authentication by a witness. The provenance and relevance of the proposed exhibits is either admitted by the Defence, or is self-evident. The documents should, accordingly, be admitted. The Prosecution further contends that the Defence for Bagosora has previously acknowledged the authenticity of BAGOTHE-38, and objects to its admission only because the document, though signed, was not prepared in its entirety by Bagosora[3]. The Prosecution argues that such an objection is relevant to the weight, but not the admissibility, of the document. The document is said to be relevant to the form of the Accused Bagosora's signature on official documents[4].

6. The Bagosora Defence argues that the Prosecution has failed to establish either the relevance or the authenticity of the document referred to as BAGOTHE-38. It admits that the signature at the bottom of the document appears to be that of the Accused, but argues that the Prosecution has failed to establish the origin or chain of custody of the document.

(b) BAGOTHE-25 and BAGOTHE-26

7. The Prosecution submits that BAGOTHE-25 and BAGOTHE-26 are admissible without testimony as neither their relevance nor their provenance is disputed. The Defence for Bagosora previously consented to the admission of the documents[5].

8. The Bagosora Defence indicates that it does not object to the admission of BAGOTHE-25, provided that two other documents disclosed by the Prosecution, BAGOTHE-34 and BELGGVT-2, are also admitted as evidence under Rule 98. The latter documents, an administrative file concerning Bagosora's entries and exits from Seychelles, and a statement from a Belgian judge, are said to provide additional information necessary for understanding BAGOTHE-38.

9. The Bagosora Defence asserts that it has not been shown the original version of document BAGOTHE-26, and argues that there are indications that the document is not authentic. It asks the Chamber to reserve its ruling until the Prosecution has made the original available for inspection, at which time the Defence will make additional submissions.

[3] Prosecution Motion paras. 11-14, citing Letter from Maitre Constant to Messrs. Chile Eboe-Osuji and Drew White, Office of the Prosecutor dated 24 July 2002, filed with the Registry on 29 July 2003, p. 12184.

[4] Prosecution Reply 18 May 2004, para. 7.

[5] Prosecution Second Motion 25 May 2004, paras. 2-3.

scellés en sa présence, ce qui constitue une violation des alinéas (iv) et (v)de l'article 43 du Règlement.

ii) Documents établis à l'époque des faits

a) BAGOTHE-38

5. Le Procureur soutient que le Règlement et la jurisprudence du Tribunal permettent l'admission de documents en preuve sans qu'il soit nécessaire qu'un témoin les identifie ou les authentifie. L'origine et la pertinence des pièces à conviction proposées sont soit acceptées par la défense, soit évidentes. Ces documents devraient par conséquent être admis en preuve. Le Procureur fait valoir en outre que la défense de Bagosora qui avait déjà reconnu l'authenticité de BAGOTHE-38, s'oppose à son admission en preuve uniquement parce que, bien que signé par Bagosora, ce document n'est pas entièrement de sa main[3]. Selon le Procureur, cette objection porte sur la valeur probante de l'élément de preuve en cause et non sur son admissibilité. La signature qui y est apposée est conforme à la signature de l'accusé figurant sur des documents officiels[4].

6. La défense de Bagosora affirme que le Procureur n'a établi ni la pertinence ni l'authenticité du document BAGOTHE-38. Elle reconnaît que la signature apposée au bas du document paraît être celle de l'accusé, mais soutient que le Procureur n'a établi ni l'origine ni la «chaîne de conservation» dudit document.

b) BAGOTHE-25 et BAGOTHE-26

7. L'origine et l'authenticité des documents BAGOTHE-25 et BAGOTIHE-26 n'étant pas remises en cause, ces documents devraient, selon le Procureur, être admis en preuve sans témoignage. La défense de Bagosora avait déjà accepté leur admission en preuve[5].

8. La défense de Bagosora dit qu'elle ne s'opposera pas à l'admission de BAGOTHE-25, si deux autres documents communiqués par le Procureur, à savoir BAGOTHE-34 et BELGGVT-2, sont également admis en preuve en vertu de l'article 98 du Règlement. Ces deux documents, un dossier administratif relatif aux entrées et sorties de Bagosora aux Seychelles et une déclaration d'un juge belge, fourniraient les informations nécessaires pour comprendre BAGOTHE-38.

9. La défense de Bagosora affirme qu'on ne lui a pas montré l'original de BAGOTHE-26 et qu'elle a des raisons de penser que ce document n'est pas authentique. Elle demande à la Chambre de surseoir à statuer jusqu'à ce que le Procureur lui ait présenté le document original pour inspection, après quoi elle présentera des conclusions supplémentaires.

[3] Requête du Procureur, paras. 11 à 14. Correspondance de Me Constant à MM. Chile Eboe-Osuji et Drew White du Bureau du Procureur, datée du 24 juillet 2002 et déposée auprès du Greffe le 29 juillet 2003 (sic) sous la cote RP 12184.

[4] Réplique du Procureur, 18 mai 2004, para. 7.

[5] Deuxième requête du Procureur, 25 mai 2004, paras. 2 et 3.

(c) UNAMIRZ-04

10. The Prosecution notes that all Defence teams have agreed to the admission of the Agreement between the United Nations and the Rwandan Government on the Status of UNAMIR[6]. There were no submissions in opposition to the admission of this document.

DELIBERATIONS

(i) Custodial Interrogation of Kabiligi and Ntabakuze

11. Article 17 (3) of the Statute, "Investigation and Preparation of the Indictment", provides :

> "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."

Article 20 (4) (g) confers on any Accused the right "[n]ot to be compelled to testify against himself or herself or to confess guilt". Rule 42, entitled "Rights of Suspects During Investigation", prescribes that :

> (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.

Rule 42 (B) prescribes the consequences of the absence of counsel, and provides for the possibility of waiver of the right :

> (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.

[6] Prosecution Motion para. 15, fn. 14.

c) UNAMIRZ-04

10. Le Procureur relève que toutes les équipes de défense ont accepté l'admission en preuve de l'accord entre l'organisation des Nations Unies et le gouvernement de la République rwandaise portant sur le statut de la MINUAR[6]. Aucun argument n'a été présenté pour le contester.

DÉLIBÉRATION

i) Interrogatoires de Kabiligi et de Ntabakuze lors de leur détention provisoire

11. L'article 17 (3) du Statut intitulé «Information et établissement de l'acte d'accusation» est ainsi libellé :

> 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.

L'article 20 (4) (g) du Statut confère à toute personne contre laquelle une accusation est portée le droit de ne pas être forcée de témoigner contre elle-même ou de s'avouer coupable»; et l'article 42 du Règlement (Droits du suspect pendant l'enquête) prévoit que :

> 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 I'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.

L'article 42 (B) du Règlement prévoit les conséquences de l'absence d'un conseil et la possibilité de renoncer au droit à l'assistance d'un conseil :

> 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.

[6] Requête du Procureur, para.15, note de bas de page 14.

Rule 40 (C) makes clear that a suspect benefits from the rights enumerated in Rule 42 from the moment of transfer into the custody of the Tribunal. Rule 95 requires the exclusion of evidence "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."

12. The transcript of the custodial interview of the Accused Ntabakuze shows that he unambiguously invoked the right to counsel and refused to answer any questions of substance. However, the Defence for Ntabakuze has made no objection to its admission. On the basis of the absence of objection from the Defence, and noting that the Accused made no statements of substance during the interview, the Chamber finds that no issue arises under Rule 95 and that the statement may be admitted.

13. The admissibility of the Kabiligi statement is, by contrast, contested. As a preliminary matter, the Prosecution contends that the objections raised by the Defence have already been litigated and rejected. This is not the case. A decision dated 6 October 1998 rejected an application for an investigation into allegations of torture, and refused to quash the proceedings against the Accused. Nothing was said about the admissibility of the interview at trial[7]. Another pre-trial decision held that a request for a declaration of inadmissibility was premature as the Prosecution had not yet sought to tender the interview[8]. The issue of its admissibility is now before the Chamber for the first time.

14. The Prosecution claims that the questioning of the Accused Kabiligi was conducted after he had been advised of his rights by the investigators who interviewed him and made a voluntary waiver of his rights in accordance with Rule 42 (B). During the dialogue which is set forth below, the Accused was handed a form, written in French, entitled "Notice of Suspect's Rights" which substantially recapitulates the rights enumerated in Rule 42 (A) and (B). At the bottom of the form is a declaration indicating that the signatory has read and understands the rights enumerated therein; that he is ready to respond to questions; that he does not wish to have counsel at this time; and that no threats or promises have been made against him to procure his consent. At the end of the dialogue, the Accused signed the declaration.

15. The genuineness of that consent must be considered in the context of the entire conversation preceding his signature.

[7] *Kabiligi*, Decision on the Defence Motion to Lodge Complaint and Open an Investigation into Alleged Acts of Torture Under Rules (40) (C) and 73 (A) of the Rules of Procedure and Evidence (TC), 6 October 1998.

[8] *Kabiligi and Ntabakuze*, Decision on Kabiligi's Motions to Nullify and Declare Evidence Inadmissible (TC), 2 June 2000, para. 22 ("The Tribunal decides the admissibility of particular evidence at trial, only after a party gives notice or seeks to introduce the particular item … The Tribunal notes that at this stage of the proceedings it is unknown whether the Prosecutor will seek to introduce any evidence of the questioning at trial. Thus, the Tribunal defers from ruling on the issue of admissibility of the challenged possible evidence")

Il ressort clairement de l'article 40 (C) du Règlement que, dès qu'il est placé sous la garde du Tribunal, le suspect jouit des droits prévus à l'article 42 du Règlement. Aux termes de l'article 95 du Règlement, est irrecevable tout élément 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»

12. Il appert du compte rendu de l'interrogatoire qu'il a subi lors de sa détention provisoire que Ntabakuze a réclamé l'assistance d'un avocat et refusé de répondre à toute question importante. La défense de Ntabakuze ne s'est d'ailleurs pas opposée à ce que cet interrogatoire soit admis en preuve. Comme la défense n'a pas soulevé d'objection et que l'accusé n'a pas fait de déclaration importante pendant l'interrogatoire, la Chambre conclut qu'aucun problème ne se pose relativement à l'article 95 du Règlement et que le compte rendu peut être versé au dossier.

13. En revanche, le conseil de Kabiligi conteste l'admissibilité de la déclaration de son client. A titre préliminaire, le Procureur soutient que les objections soulevées par la défense ont déjà été examinées et rejetées. Or ce n'est pas le cas. Dans une décision rendue le 6 octobre 1998, la Chambre de première instance a refusé qu'une enquête soit ouverte sur les actes de torture dont l'accusé aurait été victime et que la procédure engagée contre lui soit annulée. L'admissibilité en preuve de l'interrogatoire n'a pas été évoquée[7]. Dans une autre décision préalable au procès, la Chambre a conclu que la demande de la défense tendant à ce que ce document soit déclaré irrecevable était prématurée puisque le Procureur n'avait pas encore demandé son admission en preuve[8]. C'est donc la première fois qu'il est demandé à la Chambre de statuer sur l'admissibilité du document en question.

14. Le Procureur affirme que Kabiligi n'a été interrogé qu'après avoir été informé de ses droits par les enquêteurs et qu'il a renoncé à son droit à un conseil conformément à l'article 42 (B) du Règlement. Pendant le dialogue reproduit ci-après, l'accusé a reçu un formulaire en français intitulé «Avis des droits du suspect», qui récapitule les droits énumérés aux paragraphes (A) et (B) de l'article 42 du Règlement. Au bas de ce formulaire figure une «renonciation aux droits» par laquelle le signataire déclare qu'il a lu et compris l'étendue de ses droits, qu'il est disposé à répondre aux questions, qu'il ne désire pas de conseil à ce stade et qu'aucune promesse ni menace ne lui ont été faites pour obtenir son consentement. À la fin de l'entretien, l'accusé a signé la déclaration.

15. L'authenticité du consentement de l'accusé doit être appréciée à la lumière de tout l'entretien qui a eu lieu avant que l'accusé n'appose sa signature sur le formulaire.

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[7] *Le Procureur c. Kabiligi*, décision faisant suite à la requête soulevée par la défense aux fins de plainte et d'ouverture d'une enquête sur des actes de torture (art. 40 (C) et 73 (A) du Règlement de procédure et de preuve) rendue le 6 octobre 1998 par la Chambre de première instance.

[8] *Le Procureur c. Kabiligi et Ntabakuze*, *Decision on Kabiligi's Motions to Nullify and Declare Evidence Inadmissible* (Chambre de première instance), 2 juin 2000, para. 22 («Le Tribunal ne statue sur l'admissibilité d'une pièce donnée que si une partie fait part de son intention de la faire admettre en preuve ... La Chambre fait observer qu'à ce stade de la procédure, l'on ne sait pas si le Procureur prévoit de faire admettre l'interrogatoire de l'accusé en preuve. En conséquence, elle surseoit à statuer sur l'admissibilité de la pièce contestée». [Traduction]

" Investigator : We will now provide you a copy [of the "Notice of Suspect's Rights, which had just been read to the Accused orally] to read, if you wish. Can you tell us what you have decided? Do you understand your rights? Do you have any questions about that?

Kabiligi : Thank you. I do have one question. I am prepared to exercise my rights as soon as I understand the reasons for my arrest and the case brought against me.

Investigator : Can you be more specific? Please clarify what you want?

Kabiligi : I would like to know the reason for my arrest. Am I indicted? By whom, and why? Have I committed any crimes? Where, when and why? And how? That's it. I am prepared as soon as I find out the reasons for my arrest, I will be entitled to request the assistance of counsel provided by the International Tribunal, as I do not have sufficient means to pay for it.

Investigator : So, at this time, you are laying down the condition that we must first inform you of all the charges the Tribunal has against you. Is that what you are requesting?

Kabiligi : Precisely. Before exercising my rights, before requesting the assistance of counsel, I must be informed of the charges against me … At the least the offences I am accused of.

Investigator : Yes. But, of course, that's indeed [?] disclosure is part of the process. In any case, at some point, the Tribunal will have the obligation to disclose in full the case against you. That's part of the standard procedure for your defence procedure. It is obvious that you were not [?]. At some point during your defence, you will be entitled to examine your case file. For the moment, this interview, considered to be the first questioning [?] by Tribunal investigators, what we are requesting is that, if you accept to speak to us. First [?] If you accept to speak to us, we will ask you questions. Should you decide not to speak to us, please tell us what your choice is.

Kabiligi : Personally, I am prepared to talk at this time. But, questioning or preliminary investigation or interview of me, but reserving the right to request the assistance of counsel and exercise the full benefit of the rights that have just been read to me, as soon as I find out the case against me, because I don't know what it is at this time.

Investigator : So, you are saying that before you speak to us, you require that your case file be disclosed to you? That's the condition you seem to be laying down. We are just trying to understand what you are saying. Tell us what you want. Are you saying that you will not talk to us unless your case file is disclosed to you? That's what I understood. You want your case file disclosed to you before we ask you any questions? Is that what you are suggesting? What exactly do you want?

Kabiligi : What I am asking is that at this time, as you explained yesterday, this is a preliminary interview. In case – once I discover the case against me, I

Enquêteur : Nous vous communiquons la copie [de l'« Avis des droits du suspect» qui vient d'être lu à l'accusé] pour lecture si vous le souhaitez. Et vous nous dites maintenant quelle est votre position. Est-ce que vous comprenez l'étendue de vos droits ? Est-ce que vous avez des questions à poser par rapport à ça ?

Kabiligi : Merci. J'ai une question à poser. Je suis prêt d'user de mes droits au moment où j'aurai pris connaissance des motifs de mon arrestation et du dossier qui serait établi à mon endroit.

Enquêteur : Soyez plus explicite. Exprimez clairement ce que vous souhaitez.

Kabiligi : Je souhaite que je prenne connaissance de pourquoi je suis arrêté. Est-ce que je suis accusé ? Par qui et pourquoi ? Est-ce qu'il y a des crimes que j'aurais commis ? Où et quand et pourquoi ? Et comment ? Voilà. Je suis prêt dès que j'aurai pris connaissance des motifs qui m'ont fait arrêter, je serai en droit de demander l'assistance d'un avocat qui me serait fourni par le Tribunal International, n'étant pas en mesure de me payer un avocat moi-même. Merci.

Enquêteur : Donc, présentement vous posez comme préalable qu'on vous notifie tout ce que le Tribunal a comme charges contre vous. C'est ce que vous nous dites ?

Kabiligi : Exactement. Avant d'user de mes droits, avant de faire appel à l'assistance d'un avocat, l'avocat, je dois lui dire les charges qui me sont … Enfin, les fautes qui me sont reprochées.

Enquêteur : Oui. Mais certes, c'est bien [?] la communication fait partie de la procédure. Dans tous les cas, à un moment ou à un autre, le Tribunal sera dans l'obligation de vous communiquer l'intégralité du dossier qu'on a établi. Ça fait partie des mécanismes établis pour votre défense. Il est évident qu'on ne vous a pas pris [?]. À un moment ou à un autre, dans le cadre de votre défense, vous aurez droit à votre dossier. Maintenant, pour cet entretien qui est considéré comme le premier interrogatoire [?] par les enquêteurs du Tribunal. Ce que nous aimerions de vous, si vous acceptez de parler. Il faut d'abord [?] ça. Si vous acceptez de parler, nous allons vous poser certaines questions. Au cas où vous n'êtes pas prêt à parler, vous nous dites quels sont les choix qui sont les vôtres.

Kabiligi : Moi, je suis prêt à parler maintenant. Mais étant une question d'interrogatoire ou bien d'enquête préliminaire, ou bien d'interview à mon égard mais avec le droit de réserve que du moment que j'aurai pris connaissance de mon dossier parce que je n'ai pas de dossier maintenant, je pourrais demander l'assistance d'un avocat et user de tous les droits qui viennent de m'être exposés aussi.

Enquêteur : Donc, vous exigez comme préalable pour parler, la communication de votre dossier. C'est ce que vous semblez poser comme préalable. C'est une question de compréhension. Vous nous dites exactement ce que vous voulez. Ça veut dire que vous ne voulez pas parler tant qu'on ne vous aura pas communiqué votre dossier. C'est tel que je semble vous comprendre. Vous voulez qu'on vous communique votre dossier avant de vous poser quelle question que ce soit ? C'est ce que vous suggérez ? Ou quelle est la démarche que vous attendez ?

Kabiligi : La démarche que j'entends, c'est présentement, comme vous me l'avez expliqué hier, c'est une question d'interview préliminaire. Au cas où ...

will request the assistance of counsel. I am not insisting on having the presence of counsel during this interview, but once I discover the case against me, I must be able to exercise the full extent of the rights that have just been read to me, that I have just taken cognisance of.

Investigator : [?]

Kabiligi : I'm ready to continue.

Investigator : At this time, you are prepared to answer our questions?

Kabiligi : I am prepared to answer your questions. Alone, without the assistance of counsel, as I have not yet read my case file. Once I have read my case file, I will request the assistance of counsel.

Investigator : That implies that you have now waived that right. That means that you have now waived [?]. Momentarily. At least for today. Because should you accept to answer our questions, that means that for the moment, you waive that right. For now.

Kabiligi : But, it doesn't mean I waive it?

Investigator : It is not an absolute waiver. In any event, you are entitled to the assistance of counsel for full answer and defence. This is an international tribunal with all the attendant guarantees.

Kabiligi : All right. I accept.

Investigator : Okay. In that case….

Kabiligi : At this time, for this interview, I am not requesting the assistance of counsel. However, once I have read my case file, I will exercise the full extent of my rights.

Investigator : Now, could you sign the waiver?

Kabiligi : During this interview, I have decided to answer all your questions without the presence of counsel. However, in due course, I may stop the interview and request the assistance of counsel."[9]

16. Article 17 of the Statute and Rule 42 of the Rules state in unconditional terms that a detainee has a right to the immediate assistance of counsel; and, further, that questioning of the suspect "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel". Not all legal systems confer this right on a detainee, but it is deeply and eloquently inscribed in the annals of many national and international legal systems[10]. Along with the right to silence, this

[9] Prosecution Motion, Appendix "KABIGRA-02", pp. K0232817-20.

[10] Constitution of Canada (1982), s. 10 : "Everyone has the right on arrest or detention … (b) to retain and instruct counsel without delay and to be informed of that right"; New Zealand Bill of Rights Act (1990), s. 23 (1) : "Everyone who is arrested or who is detained under any enactment … [s]hall have the right to consult and instruct a lawyer without delay and to be informed of that right"; Constitution of South Africa (1996), Art. 35 (1) : "Everyone who is arrested for allegedly committing an offence has the right (a) to remain silent; (b) to be informed promptly of (i) the right to remain silent; and (ii) the consequences of not remaining silent; (c) not to be

alors j'aurai pris connaissance de mon dossier, je pourrais alors avoir recours à l'assistance d'un avocat. Je n'exige pas qu'il y ait un avocat au cours de cet interview ici mais au jour où j'aurai pris connaissance de mon dossier je devrais pouvoir user de tous mes droits qui viennent de m'être exposés ici, dont je viens de prendre connaissance.

Enquêteur : [?]

Kabiligi : Je suis prêt à continuer.

Enquéteur : Actuellement, vous êtes prêt à répondre à nos questions.

Kabiligi : Je suis prêt à répondre à vos questions. A titre individuel, sans l'assistance d'un avocat puisque je n'ai pas encore lu mon dossier. Dès que j'aurai lu le dossier, je ferai appel à l'avocat.

Enquêteur : Cela suppose que présentement vous renoncez à ce droit. Présentement. Cela suppose que présentement vous renoncez à avoir [?]. Momentanément. Au moins pour aujourd'hui. Parce que si vous acceptez de répondre à nos questions, ça veut dire que vous renoncez momentanément à ce droit. Momentanément.

Kabiligi : Mais ça ne veut pas dire que j'y renonce.

Enquêteur : Ce n'est pas une renonciation définitive. Dans tous les cas, il est prévu que vous aurez un avocat pour que votre défense soit assurée avec le plus d'efficacité possible. Nous sommes un tribunal international, avec toutes les garanties que cela suppose.

Kabiligi : Bon, d'accord. Je suis d'accord.

Enquêteur : OK. Dans ce cas-ci ...

KabiIigi : Présentement, au cours de cette interview, je ne fais pas appel à l'assistance d'un avocat. Mais au jour où j'aurai lu mon dossier, j'utiliserai tous mes droits.

Enquéteur : Là vous me signez la présente décharge ?

Kabiligi : Au cours de cette interview, je me décide à répondre à toutes vos questions sans la présence d'un avocat. Mais au moment opportun, je pourrais arrêter l'entrevue et requérir les services d'un avocat[9].

16. Selon l'article 17 du Statut et l'article 42 du Règlement, le droit d'un détenu d'être assisté immédiatement d'un conseil est inconditionnel, et 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». Si ce droit n'est pas reconnu au détenu par tous les systèmes juridiques, il est toutefois bien établi et clairement inscrit dans les annales de nombreux systèmes juridiques nationaux et internationaux[10]. À l'instar

[9] Requête du Procureur, annexe «KABIGRA-02», p. KOO5O914 à KOO5O916.

[10] Constitution du Canada (1982), s. 10 : «Chacun a le droit, en cas d'arrestation ou de détention : ... b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit»; New Zealand Bill of Rights Act (1990), S. 23 (1) : «Chacun a le droit, en cas d'arrestation ou de détention en vertu de telle ou telle loi, d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit»; [Traduction]

Constitution de l'Afrique du Sud (1996), art. 35 (1) : ((Toute personne arrêtée parce qu(il y a des raisons de croire qu'elle a commis une infraction a le droit (a) de garder 1e silence; (b) d'être

right is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.

17. The importance of the right to counsel, and the precariousness of its exercise by a suspect in detention, is reflected in the stringent requirement in Rule 42 (B) that a suspect has "*voluntarily waived* his right to counsel" before a custodial interrogation can take place. The heavy burden of the words "voluntarily waived" were interpreted by a Chamber of the ICTY in *Delalic* :

> "The burden of proof of voluntariness or absence of oppressive conduct in obtaining a statement is on the Prosecution. Since these are essential elements of proof fundamental to the admissibility of a statement, the Trial Chamber is of the opinion that the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt."[11]

National courts in which the right to counsel is recognized have elaborated that a waiver cannot be voluntary unless a detainee knows of the right to which he is entitled[12]. To be so informed, the suspect must be informed that the right includes the

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compelled to make any confession or admission that could be used in evidence against that person"; Art. 35 (2) : "Everyone who is detained … has the right … (b) to choose, and to consult with, a legal practitioner and to be informed of this right"; Fiji Constitution (Amendment) Act 1997, s. 27 : "Every person who is arrested or detained has the right : (c) to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly …"; Statute of the International Criminal Court, Art. 55 (2) : "Where there are grounds to believe that a person has committed a crime … that person shall also have the following rights of which he or she shall be informed prior to being questioned : … (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel"; *Miranda v. Arizona* 384 U.S. 346 (1966) ("*Miranda*"); *Dickerson v. United States* 530 US 428 (2000) (reaffirming that the rules announced in Miranda were constitutional rules). See also *Imbriosca v. Switzerland*, A 275 1993 (E Ct HR), para. 36 (finding that Article 6 of the European Convention of Human Rights, including the right to the assistance of counsel, applies in principle to preliminary investigations).

[11] *Prosecutor v. Delalic et al*., Decision on Zdravko Mucic's Motion For the Exclusion of Evidence (TC), 2 September 1997 ("*Delalic* Exclusion Decision") , para. 42.

[12] *Miranda* p. 475 (right to counsel must be "knowingly and intelligently waived"); *R. v. Cullen* 1992 NZLR LEXIS 689 (CA) ("*Cullen*") p. 10 ("[t]he purpose of making the suspect aware of his rights is so that he may make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are"); *R v. Evans* [1991] 1 SCR 869

du droit de garder le silence, ce droit est fondé sur le fait qu'une personne détenue aux fins d'interrogatoire par les autorités est généralement effrayée, mal informée et vulnérable, que la peur et l'ignorance peuvent amener un innocent à faire de faux aveux et que la vulnérabilité du suspect peut donner lieu à des irrégularités à l'encontre de l'innocent comme du coupable, surtout lorsque le suspect est détenu au secret ou mis à l'isolement.

17. L'importance du droit à l'assistance d'un conseil et la difficulté avec laquelle un suspect en détention provisoire peut l'exercer expliquent le caractère strict de l'article 42 (B) du Règlement, qui exige que le suspect ait «renoncé à son droit à l'assistance d'un conseil» avant que l'interrogatoire n'ait lieu. L'importance du terme «renoncé» a été soulignée par une Chambre de première instance du TPIY dans l'affaire *Delalic* :

> «La charge de la preuve du caractère volontaire de la déclaration et de l'absence de pressions en vue de son obtention incombent à l'accusation. Puisqu'il s'agit là d'éléments de preuve essentiels pour juger de la recevabilité d'une déclaration, la Chambre de première instance estime qu'il est nécessaire d'appliquer les critères les plus stricts de recevabilité correspondant à l'allégation. Ainsi, l'accusation qui affirme que l'accusé/le suspect fait des déclarations volontairement et qu'il n'a été soumis à aucune pression, est tenue d'en faire la preuve de manière convaincante et au-delà de tout doute raisonnable»[11].

Les juridictions nationales qui reconnaissent le droit à l'assistance d'un conseil ont établi que la renonciation ne saurait être considérée comme volontaire que si l'accusé est informé de la nature de ce droit[12]. Il faut pour cela que le suspect soit informé

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informée sans délai (i) qu'elle a 1e droit de garder 1e silence; et (ii) des conséquences encourues si elle choisit de ne pas garder le silence; (c) de ne pas être obligée de faire une confession ou une déclaration qui pourrait servir de preuve contre elle»; art. 35 (2) : a Tout détenu ... a le droit ... (b) d'avoir recours à l'assistance d'un avocat et d'être informé de ce droit»;

Constitution de Fiji (Amendement) de 1997, S. 27 : «Chacun a le droit, en cas d'arrestation ou de détention, (c) de s'entretenir avec l'avocat de son choix en privé dans son lieu de détention, d'être informé de ce droit sans délai ...» [Traduction];

Statut de Rome de la Cour pénale internationale, art. 55 (2) : «Lorsqu'il y a des motifs de croire qu'une personne a commis un crime ..., cette personne a de plus les droits suivants, dont elle est informée avant d'être interrogée : ... (b) Garder le silence, sans que ce silence soit pris en considération pour la détermination de sa culpabilité ou de son innocence; (c) Être assistée par le défenseur de son choix ou, si elle n'en a pas, par un défenseur commis d'office chaque fois que les intérêts de la justice l'exigent, sans avoir dans ce cas à verser de rémunération si elle n'en a pas les moyens; et (d) Être interrogée en présence de son conseil, à moins qu'elle n'ait renoncé volontairement à son droit d'être assistée d'un conseil»;

Miranda c. Arizona 384 U.S. 346 (1966) (ci-après «Miranda»); *Dickerson c. États-unis d'Amérique* 530 US 428 (2000) (confiant le caractère constitutionnel des règles énoncées dans «Miranda». Voir également *Imbriosci c. Suisse*, A 275 1993 (CEDHR), para. 36 (d'où il ressort que l'article 6 de la Convention européenne des droits de l'homme, notamment le droit à l'assistance d'un conseil, s'applique en principe aux enquêtes préliminaires). [Traduction].

[11] *Le Procureur c. Delalic et consorts*, Décision relative à l'exception préjudicielle de l'accusé Zdravko Mucic aux fins de l'irrecevabilité de moyens de preuve, 2 septembre 1997 (ci-après la «décision *Delalic*»), para. 42.

[12] *Miranda*, p. 475 (la renonciation au droit à l'assistance d'un conseil doit être «volontaire» et «en connaissance de cause»; *R. c . Cullen* 1992 NZLR LEXIS 689 (CA) («*Cullen*»), p. 10

right to the prompt assistance of counsel, prior to and during any questioning. Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective[13]. These rights, and the practical mechanisms for their exercise, must be communicated in a manner that is reasonably understandable to the detainee, and not "simply by some incantation which a detainee may not understand."[14] Generally, a suspect may be taken to comprehend what a reasonable person would understand; but where there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights[15].

18. Once the detainee has been fully apprised of his right to the assistance of counsel, he or she is in a position to voluntarily waive the right. The waiver must be shown "convincingly and beyond reasonable doubt". It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken[16].

("*Evans*"), p. 891 ("[A] person who does not understand his or her right cannot be expected to assert it").

[13] *Miranda* p. 479 ("[The detainee] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be sued against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot an attorney one will be appointed for him prior to any questioning if he so desires."); *R v. Bartle*, [1994] 3 S.C.R. 173 ("*Bartle*"), p. 191 ("[A] person who is "detained" within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty …. a detainee is entitled as of right to seek such legal advice 'without delay' and upon request").

[14] *Cullen* p. 10 ("[t]the fundamental rights conferred or confirmed by the New Zealand Bill of Rights Act 1990 are not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making the suspect aware of his rights is so that he make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are"); *S v. Melani and others* 1995 SACLR LEXIS 290 pp. 47-48 (Sup. Ct., Eastern Cape) ("[i]n order to give effect to an accused's right in terms of section 25 (1) (c) he or she must be informed of his or her right to consult in manner that it can reasonably be supposed that he or she has understood the content of that right").

[15] *Evans* pp. 890-91 ("In most cases, one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further … But where, as here, there is a positive indication that the accused does no understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding … It is true that [the police] informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it").

[16] *Delalic* Exclusion Decision, para. 42. See *Pfeifer and Plankl v. Austria*, A 227 1992 (E Ct HR), para. 37 ("the waiver of a right guaranteed by the Convention – insofar as it is permissible – must be established in an unequivocal manner"); *Bartle* para. 39 (must be "clear and unequivocal that the person is waiving the procedural safeguard"); *Miranda* p. 475 ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver").

de son droit à se faire immédiatement assister d'un conseil avant et pendant l'interrogatoire. Le fait de laisser entendre à l'accusé que ce droit est conditionnel ou que l'intervention du conseil peut être reportée jusqu'à la fin de l'interrogatoire suffit à invalider la renonciation[13]. Ce droit et les mécanismes pratiques permettant de l'exercer doivent être communiqués de telle manière que le détenu puisse les comprendre et non «simplement être lus comme une litanie que le détenu peut ne pas comprendre»[14]. On part généralement du principe qu'un suspect peut comprendre ce qui est à la portée de toute personne douée de raison; mais s'il y a des raisons de croire que le suspect ne saisit pas de quoi il retourne, tout doit être mis en oeuvre pour qu'il comprenne effectivement en quoi consistent ses droits[15].

18. Une fois que le détenu est parfaitement informé de son droit à l'assistance d'un conseil, il lui est dès lors loisible de renoncer audit droit. La renonciation volontaire doit être «convaincante et au-delà du doute raisonnable». Elle doit être délibérée et sans équivoque et clairement circonscrite à l'interrogatoire lors duquel la déclaration en question est recueillie[16].

(«le suspect est informé de ses droits pour qu'il puisse le cas échéant les exercer, ce qu'il ne saurait faire de toute évidence s'il n'en connaît pas la teneur») [Traduction]; *R c. Evans* [1991] 1 SCR 869 («*Evans*»), p. 891 («Une personne qui ne comprend pas son droit n'est pas en mesure de l'exercer»).

[13] *Miranda*, p. 479 («Avant d'être interrogé, [le détenu] doit être averti qu'il a le droit de garder le silence, que chacune de ses déclarations pourra être utilisée comme moyen de preuve contre lui, et qu'il a droit à l'assistance d'un conseil ou, s'il est indigent, d'un conseil commis d'office à titre gratuit») [Traduction]; *R c. Bartle*, [1994] 3 SCR. 173 («*Bartle*»), p. 191 («[Une] personne 'détenue' au sens de l'art. 10 de la Charte a immédiatement besoin de conseils juridiques, afin de protéger son droit de ne pas s'incriminer et d'obtenir une aide pour recouvrer sa liberté :.. L'alinéa 10 (b) habilite la personne détenue à recourir de plein droit à l'assistance d'un avocat 'sans délai' et sur demande»).

[14] *Cullen*, p. 10 («Pour informer un détenu des droits fondamentaux garantis ou confirmés par le New Zealand Bill of Rights Act de 1990, les policiers ne peuvent se contenter de réciter rituellement la mise en garde relative à ce droit que le détenu peut ne pas comprendre. Le suspect est informé de ses droits afin qu'il puisse décider de les exercer et il ne peut manifestement pas le faire s'il ne comprend pas en quoi consistent lesdits droits.»); *S c. Melani et consorts* 1995 SACLR LEXIS 290 pp. 47 et 48 (Cour d'appel, Eastern Cape) («Pour qu'un accusé puisse exercer ses droits au sens de l'article 25 (1) (c), il doit être informé de son droit à l'assistance d'un conseil de manière telle que l'on puisse raisonnablement penser qu'il a compris en quoi consiste ce droit») [Traduction].

[15] *Evans*, p. 891 («Dans la plupart des cas, il est possible de conclure, d'après les circonstances, que l'accusé comprend ce qui lui est dit. Dans ces cas, les policiers ne sont pas tenus de faire plus ... Mais lorsque, comme en l'espèce, il y a des signes concrets que l'accusé ne comprend pas son droit à l'assistance d'un avocat, les policiers ne peuvent se contenter de la récitation rituelle de la mise en garde relative à ce droit de l'accusé; ils doivent prendre des mesures pour faciliter cette compréhension. ... Il est vrai qu'ils ont informé l'appelant de son droit à l'assistance d'un avocat. Cependant, ils ne lui ont pas expliqué ce droit quand il a mentionné qu'il ne le comprenait pas.»).

[16] Décision *Delalic* sur l'irrecevabilité, para. 42. Voir *Pfeifer et Plankl c. Autriche*, A 227 1992 (CEDHR), para. 37 («la renonciation à un droit garanti par la Convention - pour autant qu'elle soit licite - doit se trouver établie de manière non équivoque»); *Bartle*, para. 39 (il faut qu'«il soit bien clair que la personne renonce au moyen de procédure conçu pour sa protection»);

19. Relying on these principles, the Chamber is of the view that the Prosecution has not discharged its burden of showing that the Accused Kabiligi voluntarily waived his right to the assistance of counsel, as required by Rule 42 (B). At the beginning of his interview with the investigators, the Accused demonstrated that he did not understand that he had an immediate right to the assistance of counsel. He asked repeatedly to be informed of the charges against him, and seems to have believed that "as soon as I find out the reasons for my arrest, I will be entitled to request the assistance of counsel", and that "before exercising my rights, before requesting the assistance of counsel, I must be informed of the charges against me". Rather than correcting the Accused's misperception that his right to counsel was conditional upon being informed of the case against him, the investigators responded that "standard procedure" is that disclosure would happen later. The Accused then attempted to reserve the right to request the assistance of counsel "as soon as I find out the case against me, because I don't know what it is at this time". This again should have demonstrated to the investigators that the Accused was still confused, and probably did not understand that he had the right to assistance of counsel immediately. Nothing in the remainder of the interview indicates that the Accused's misunderstanding was ever corrected, and at no time did the investigators advise the Accused that he had an immediate right to the assistance of counsel during questioning. Under these circumstances, the Prosecution has not proven that there was a waiver of the right to counsel, as required by Rule 42 (B).

20. The Chamber is further of the view that the Accused actually did invoke the right to counsel at the beginning of his interview. The Accused states three times that as soon as he is informed of the case against him, he would then "exercise" the right of, or "be entitled" to, the assistance of counsel. He also purports to "exercise the full benefit of the rights that have just been read to me, as soon as I find out the case against me". The investigators should have recognized that this was a confused attempt to invoke the right to counsel, and ceased their questioning immediately. Rule 42 (B) expressly states that questioning "shall not proceed" in the absence of a voluntary waiver. It was improper for the investigators to have explained that "standard procedure" was that disclosure occurred at a later time, thereby possibly implying that the right to counsel was also only available at a later time. The Accused was under the impression that the interview was "preliminary", but the investigators proceeded to ask important questions of substance. The questioning of the Accused after his attempted invocation of the right to counsel, including the apparent waiver of that right, violated Rule 42 (B).

21. The right to counsel during a custodial interrogation is closely intertwined with the exercise of the right to silence; the right to be cautioned that any statement made may be used against the detainee in evidence at trial; and the right in Article 20 (4) (g) of the Statute "[n]ot to be compelled to testify against himself or herself or to confess guilt". Without at least the opportunity to choose whether to consult with counsel, there is a possibility that an accused will answer the questions of investigators in ignorance of the other rights to which he or she is entitled. For this reason,

19. Se fondant sur ces principes, la Chambre de première instance est d'avis que le Procureur n'est pas parvenu à démontrer que l'accusé Kabiligi a volontairement renoncé à son droit à l'assistance d'un conseil comme prévu par l'article 42 (B) du Règlement. Au début de son interrogatoire par les enquêteurs, l'accusé a montré qu'il ne comprenait pas qu'il avait droit sans délai à l'assistance d'un conseil. Il a demandé à plusieurs reprises à être informé des crimes qui lui étaient reprochés et a semblé croire que «dès qu'[il] aurai[t] pris connaissance des motifs qui [l']ont fait arrêter, [il] serai[t] en droit de demander l'assistance d'un avocat» et qu'«avant d'user de [s]es droits, avant de faire appel à l'assistance d'un avocat, [on] [devait] lui dire […] les fautes qui [lui étaient] reprochées». Au lieu de corriger l'erreur de l'accusé qui pensait n'avoir droit à l'assistance d'un avocat qu'après avoir été informé de ce qui lui était reproché, les enquêteurs ont répondu que «la communication fai[sai]t partie de la procédure» et que son dossier lui serait communiqué par la suite. L'accusé a alors tenté de se réserver le droit de demander par la suite l'assistance d'un avocat le moment venu («du moment que j'aurai pris connaissance de mon dossier parce que je n'ai pas de dossier maintenant»). Cela aurait dû faire comprendre aux enquêteurs que l'accusé était quelque peu désemparé et ne comprenait probablement pas qu'il avait droit sans délai à l'assistance d'un conseil. Rien dans la suite de l'interrogatoire ne donne à penser que la méprise de l'accusé a été corrigée, et les enquêteurs n'ont jamais averti l'accusé qu'il avait immédiatement droit à l'assistance d'un conseil pendant l'interrogatoire. Étant donné ce qui précède, le Procureur n'a pas établi que l'accusé avait volontairement renoncé au droit à l'assistance d'un conseil comme le prévoit l'article 42 (B) du Règlement.

20. La Chambre estime également que l'accusé a évoqué le droit à l'assistance d'un conseil au début de l'interrogatoire. En effet, il a déclaré à trois reprises qu'il serait prêt à «user de [s]es droits» ou qu'il «serait en droit» de demander l'assistance d'un avocat dès qu'il aurait pris connaissance des motifs de son arrestation. Il a également dit : «au jour où j'aurai pris connaissance de mon dossier, je devrais pouvoir user de tous mes droits qui viennent de m'être exposés ici, dont je viens de prendre connaissance.» Les enquêteurs auraient dû se rendre compte que l'accusé essayait ainsi confusément d'invoquer le droit à l'assistance d'un conseil et mettre immédiatement fin à l'interrogatoire. L'article 42 (B) du Règlement prévoit expressément que l'interrogatoire «ne peut avoir lieu» si le suspect n'a pas renoncé à ce droit. Il était incorrect de la part des enquêteurs d'expliquer que «la communication fait partie de la procédure» et que son dossier lui serait communiqué plus tard, laissant ainsi probablement entendre à l'accusé qu'il ne pouvait exercer son droit à l'assistance d'un conseil que plus tard. L'accusé pensait que l'interrogatoire était «préliminaire», mais les enquêteurs lui ont posé d'importantes questions de fond. Le fait d'interroger l'accusé après qu'il eut essayé d'invoquer son droit à l'assistance d'un conseil, y compris sa renonciation apparente à ce droit, constituait une violation de l'article 42 (B) du Règlement.

21. Le droit d'un suspect à l'assistance d'un conseil au cours d'un interrogatoire mené pendant la détention provisoire est étroitement lié au droit de garder le silence; au droit d'être averti que toute déclaration qu'il ferait pourrait être utilisée contre lui au procès; et au droit prescrit par l'article 20 (4) (g) du Statut de ne pas être forcé de témoigner contre lui-même ou de s'avouer coupable.» Si même la possibilité de choisir de se faire assister d'un conseil ne lui est pas donnée, il est probable que l'accusé répondra aux questions des enquêteurs parce qu'il ignore ses autres droits.

the consequence of non-waiver of the right is expressly set forth in the Rule 42 (B) : questioning "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel". As stated by the ICTY Chamber in *Delalic*, it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being "antithetical to, and would seriously damage, the integrity of the proceedings."[17] In any event, no circumstances have been raised by the Prosecution to suggest that exclusion is not the appropriate response to the violation of the right. The interview of the Accused Kabiligi is excluded.

(ii) Documents Created Contemporaneous with Events

(a) BAGOTHE-38

22. Rule 89 (C) provides the Chamber with the discretion to admit any relevant evidence which it deems to have probative value. Conversely, this rule imposes an obligation to refuse evidence which is not relevant or does not have probative value[18]. At the admissibility stage, the moving party need only make a *prima facie* showing that the document is relevant and has probative value[19]. This Chamber recently discussed in detail the conditions for admission of documentary evidence :

> "In offering a document for admission as evidence, the moving party must as an initial matter explain what the document is. The moving party must further provide indications that the document is authentic – that is, that the document is actually what the moving party purports it to be. There are no technical rules or preconditions for authentication of a document, but there must be "sufficient indicia of reliability" to justify its admission. Indicia of reliability which have justified admission of documents in the jurisprudence of the *ad hoc* Tribunals include : the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting[20]. Authenticity and reliability are overlapping concepts : the fact that the

[17] Delalic Exclusion Decision, para. 43.

[18] *Bagasora, et. al*., Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 8.

[19] *Bagosora et al*., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 7; *Musema*, Judgement, TC, paras. 35-38.

[20] *Delalic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para. 18; *Kordic and Cerkez*, Decision on Prosecutor's Submissions Concerning 'Zagreb Exhibits' and Presidential Transcripts (TC), 1 December 2000, paras. 43-44; *Brdanin and Talic*, Order on the Standards Governing the Admission of Evidence (TC), 15 February 2002, para. 20.

C'est pourquoi la conséquence de la renonciation à ce droit est expressément prévue à l'article 42 (B) du Règlement en ces termes : «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.» Comme l'a déclaré la Chambre de première instance du TPIY dans l'affaire *Delalic*, il paraît difficile qu'une déclaration recueillie en infraction au droit fondamental à l'assistance d'un avocat satisfasse les dispositions de l'article 95 et ne soit pas frappée d'exclusion du fait que son admission «irait à l'encontre d'une bonne administration de la justice et y porterait gravement atteinte»[17]. En tout état de cause, le Procureur n'ayant pas présenté d'arguments tendant à démontrer que la violation de ce droit ne doit pas entraîner l'inadmissibilité, l'interrogatoire de Kabiligi est déclaré inadmissible en preuve.

ii) Documents établis à l'époque des faits

a) BAGOTHE-38

22. L'article 89 (C) du Règlement permet à la Chambre d'admettre souverainement tout élément de preuve pertinent dont elle estime qu'il a valeur probante. Inversement, il lui impose de rejeter tout élément de preuve qui est non pertinent ou n'a pas valeur probante[18]. Au stade de l'admissibilité des preuves, la partie requérante doit simplement établir l'existence d'indices suffisants pour conclure que le document est pertinent et a valeur probante[19]. La présente Chambre a examiné récemment en détail les normes d'admission des éléments de preuve documentaires et conclu ce qui suit :

> «En demandant l'admission en preuve d'un document, la partie requérante doit commencer par expliquer la nature dudit document. Elle doit également montrer que le document est authentique – c'est-à-dire qu'il correspond à la description qu'elle en donne. Il n'existe pas de règles techniques ou des conditions préalables pour authentifier un document, mais il faut qu'il présente des «indices de fiabilité suffisants» pour en justifier l'admission. Les indices de fiabilité qui ont justifié l'admission de documents dans la jurisprudence des tribunaux spéciaux sont notamment les suivants : le lieu de saisie du document accompagné du témoignage relatant la chaîne de conservation du document depuis le moment de sa saisie, la corroboration du contenu du document par d'autres éléments de preuve, la nature même du document, à savoir, les signatures et les cachets apposés sur lui ou même la forme de l'écriture de son auteur[20]. L'authenticité et la fiabilité

[17] Décision *Delalic* sur l'irrecevabilité, para. 43.

[18] *Bagosora et consorts*, Décision relative à l'admissibilité de la déposition du témoin DBQ, 18 novembre 2003, § 8.

[19] *Bagosora et consorts*, *Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness MaxweII Nkole (TC)*, 13 septembre 2004, para. 7 ;jugement *Musema*, paras. 35 à 38.

[20] *Delalic*, Arrêt relatif à la requête de l'accusé Zejnil Delalic aux fins d'autorisation d'interjeter appel de la décision de la Chambre de première instance en date du 19 janvier 1998 concernant la recevabilité d'éléments de preuve, 4 mars 1998, para. 18 ; *Kordic et Cerkez*, Décision relative à la requête du Procureur concernant les «pièces de Zagreb» et les comptes rendus présidentiels, 1er décembre 2000, paras. 43 et 44 ; *Brdanin et Talic*, Ordonnance relative aux normes régissant l'admission d'éléments de preuve, 15 février 2002, § 20.

> document is what it purports to be enhances the likely truth of the contents thereof. On the other hand, if the document is not what the moving party purports it to be, the contents of the document cannot be considered reliable, or as having probative value[21]."

23. The Prosecution asserts that the written authorisation to purchase arms and ammunition, dated 27 July 1993, purportedly signed by Bagosora in his official capacity as *Directeur de Cabinet* of the Ministry of Defence (BAGOTHE-38), is relevant to the manner in which Bagosora signed authorisations, given that the Defence for Bagosora challenged this in its cross-examination of Prosecution Witness KJ. The Chamber notes that the Defence has not conceded the authenticity of the document and only admits that the signature appears to be that of Bagosora. The document is relevant and will be admitted. Its authenticity and evidentiary weight will be assessed in the context of all available evidence.

(b)BAGOTHE-25 and BAGOTHE-26

24. The Defence for Bagosora agrees to the admission of BAGOTHE-25 on condition that two other documents produced by the Prosecution, BAGOTHE-34 and BELGGVT-2, also be admitted into evidence to provide additional context. This is not a valid objection to the admission of the document. There is no need to condition the admission of one document upon the introduction of a second document which may provide additional information on a matter discussed in the first. The Defence may itself introduce any relevant and admissible evidence at the time of its choosing. Accordingly, BAGOTHE-25 is admissible.

25. The Defence for Bagosora asks the Chamber to refrain from any decision on the admissibility of BAGOTHE-26 until such time as an original of the document is produced for inspection by the Prosecution. The Prosecution has not indicated whether it is in possession of an original of the document. While an original of a document is not a precondition for admissibility, the Chamber would expect that, when available, an original of a document should be provided for inspection to assist the parties in assessing the authenticity of the document. Without further clarification concerning the availability of an original of the document, the Chamber declines to admit the document at the present stage.

(c) UNAMIRZ-04

26. The Defence made no objection to the admission of the agreement between the United Nations and Rwanda on the status of UNAMIR forces in Rwanda in 1994. The Chamber considers the document admissible.

FOR THE ABOVE REASONS, THE CHAMBER

[21] *Bagosora et al*., Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 8.

> sont des notions qui se recouvrent partiellement : le fait pour le document d'être effectivement ce qu'il est censé être milite en faveur de la véracité de son contenu. Si toutefois le document n'est pas tel que la partie requérante le présente, le contenu du document ne saurait être considéré comme fiable ou comme ayant valeur probante.»[21]

23. Le Procureur affirme que l'autorisation écrite d'achat d'armes et de munitions, datée du 27 juillet 1993, qui aurait été signée par Bagosora en sa qualité de directeur de Cabinet au Ministère de la défense (BAGOTHE-38) est conforme à la manière dont Bagosora signait les autorisations, même si la défense de Bagosora l'a contesté lors du contre-interrogatoire du témoin à charge KJ. La Chambre relève que la défense n'a pas reconnu l'authenticité de ce document, se contentant de déclarer que la signature qui y est apposée semble être celle de Bagosora. Ce document est pertinent et est admis en preuve. Son authenticité et la valeur probante à lui accorder seront déterminées compte tenu de tous les éléments de preuve disponibles.

b) BAGOTHE-25 et BAGOTHE-26

24. La défense de Bagosora accepte l'admission de BAGOTHE-25 à condition que deux autres documents produits par le Procureur, à savoir BAGOTHE-34 et BELG-GVT-2, soient également admis en preuve pour apporter des informations supplémentaires permettant de mieux le comprendre. Il ne s'agit pas là d'une objection valable à l'admission d'un document. Il n'est pas nécessaire d'assujettir l'admission d'un document à l'introduction d'une autre pièce susceptible de fournir des informations supplémentaires sur une question examinée dans le premier document. La défense peut à tout moment introduire un élément de preuve pertinent et admissible. En conséquence, BAGOTHE-25 est admis en preuve.

25. La défense de Bagosora demande à la Chambre de surseoir à se prononcer sur l'admissibilité de BAGOTHE-26 jusqu'à ce que le Procureur produise l'original de ce document pour inspection. Celui-ci n'a pas indiqué s'il est ou non en possession dudit original. L'original d'un document n'est pas une condition préalable à son admissibilité en preuve, mais, au cas où il est disponible, la Chambre s'attend à ce que l'original d'un document soit fourni pour inspection de manière à permettre aux parties d'en évaluer l'authenticité. Enfin, elle conclut qu'en l'absence de toute information relative à la disponibilité de l'original en question, elle surseoit à statuer sur son admissibilité à ce stade de la procédure.

(c) UNAMIRZ-04

26. La défense n'a fait aucune objection à l'admission en preuve de l'accord entre les Nations Unies et la République rwandaise sur le statut de la MINUAR signé au Rwanda en 1994. La Chambre considère que ce document est admissible.

PAR CES MOTIFS, le Tribunal

[21] *Bagosora et consorts*, *Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole* (TC), 13 septembre 2004, para. 8.

GRANTS the Prosecution motions to admit into evidence the records of interviews of the Accused Ntabakuze, identified as NTABALO-14 and -15; the written authorisation to purchase arms (BAGOTHE-38); the documents relating to transport of arms (BAGOTHE-25); the Agreement between the United Nations and Rwanda on the Status of UNAMIR (UNAMIRZ-04);

DIRECTS the Registry to mark each of the admitted documents as a Prosecution exhibit; and

DENIES the Prosecution motion in respect of KABIGRA-01 and -02 and BAGOTHE-26.

Arusha, 14 October 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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FAIT DROIT à la requête du Procureur en admission en preuve des enregistrements des interrogatoires de l'accusé Ntabakuze (NTABALO-14 et 15); de l'autorisation écrite d'achat d'armes (BAGOTHE-38); des documents relatifs au transport d'armes (BAGOTHE-25); et de l'accord entre les Nations Unies et le Gouvernement du Rwanda sur le statut de la MINUAR (UNAMIRZ-04);

DEMANDE au Greffe d'enregistrer chacun des documents admis et de les verser au dossier comme pièces à conviction du Procureur;

REJETTE la requête du Procureur en ce qui concerne les documents KABIGRA-O1 et -02 et BAGOTHE-26.

Arusha, le 14 octobre 2004

[Signé] : Erik Mose; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on the Defence Motion to Unseal the Identity of Witness XAM 15 October 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora, Ntabakuze – protected witnesses – removal of the protection – identity – exceptional circumstances – no prejudice – motion denied

International cases cited :

I.C.T.R. : Trial Chamber III, The Prosecutor v. Théoneste Bagosora et al.*, Decision on the Prosecution Motion for the Harmonisation and Modification of Protective Measures for Witnesses, 29 November 2001 (ICTR-98-41-I,* Reports 2001*, p. 1082) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Reconsideration of order to Reduce Witness List and on Motion for Contempt for Violation of that Order, 1 March 2004 (ICTR-98-41-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecutor's 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)", 15 June 2004 (ICTR-98-41-I,* Reports 2004*, p. X)*

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 and Ntabakuze Confidential Motion to Have the Trial Chamber Unseal the Identity of Prosecution Witness XAM", filed on 4 October 2004;

CONSIDERING the Prosecution's response, filed on 5 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 29 November 2001, the Chamber issued a witness protection order for all Prosecution witnesses, including Witness XAM[1]. The witness testified on 29 September 2004. During cross-examination, the Defence raised questions concerning the witness's need for protection, and he expressed a continued desire to remain protected[2].

[1] *Bagosora et al*., Decision on the Prosecution Motion for the Harmonisation and Modification of Protective Measures for Witnesses (TC), 29 November 2001.

[2] T. 29 September 2004 pp. 8-9.

SUBMISSIONS

2. The Defence motion seeks to remove the witness protection measures previously granted to Witness XAM. The witness should have testified openly given his position and the fact that no evidence suggested that he had a subjective or objective fear of testifying openly without a pseudonym. The Defence also argues that protection measures should cease when they are no longer applicable. Consequently, the Chamber should have questioned the witness *a priori* to determine whether there was any basis for allowing him to testify with a pseudonym or in closed session.

3. The Prosecution argues that the Defence's motion lacks foundation in either the Rules or Tribunal jurisprudence.

DELIBERATIONS

4. Unsealing the identity of Witness XAM would require the Chamber to review and reverse its initial grant of protection. Only exceptional circumstances would justify such a review, for instance, a finding that the grant of protection was an error in law or an abuse of discretion, or that new circumstances called into question the basis for the initial decision[3]. The Defence cites no exceptional circumstances that warrant reversing of the Chamber's initial grant of protection.

5. Witness XAM's identity was fully disclosed to the Defence well before his testimony. He gave almost the entirety of his testimony in an open session. Based on the existing protection order, however, Witness XAM was allowed to testify with a pseudonym and to provide identifying information in a brief closed session to protect his identity from public disclosure. It was clear that he wanted to testify under pseudonym. The Defence has not alleged, nor can the Chamber identify, any prejudice flowing from the use of these minimal protective measures during Witness XAM's testimony.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the joint Defence motion.

Arusha, 15 October 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[3] *Bagosora et al*., Decision on Prosecutor's 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), 15 June (2004), paras. 7-9, citing *Bagosora et al*., Decision on Reconsideration of order to Reduce Witness List and on Motion for Contempt for Violation of that Order (TC), 1 March 2004, para. 11.

Decision on Prosecution Request for Extension of Time to Respond to Expected Defence Motions 21 October 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judge : Erik Møse

Bagosora – motion for acquittal – extension of time – consolidated response – translation – Prosecution – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73 (A) and (E), 98 bis

International cases cited :

I.C.T.R. : Trial Chamber, The Proscutor v. Ferdinand Nahimana et al., *Reasons for Oral Decision of 17 September 2002 on the Motion for Acquittal, 25 September 2002 (ICTR-96-11,* Reports 2002*, p. X) – Appeals Chamber,* The Prosecutor v. X Bizimingu*, Decision on the Application to Appeal Against the Provisional Release Decision of Trial Chamber II of 4 November 2002, 13 December 2002 (*Reports 2002*, p. X) – Appeals Chamber,* The Prosecutor v. Elie Ndayambaje*, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002, 10 January 2003 (ICTR-98-42-A,* Reports 2003*, p. 2260) – Trial Chamber III,* The Prosecutor v. François Karera*, Decision on the Prosecutor's Extremely Urgent Motion for Extension of Time to File a Response to a Defence Motion, 26 February 2003 (ICTR-2001-74-I,* Reports 2003*, p. 2378)*

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

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 the Prosecution "Request" to extend the time-limit to respond to expected Defence motions for acquittal under Rules 73 and 98 *bis*, filed on 19 October 2004;

HEREBY DECIDES the motion.

1. On 18 October 2004, the Defence for Bagosora filed a motion under Rule 98 *bis* for acquittal on the basis that the Prosecution has presented insufficient evidence to sustain a conviction on various counts of the Indictment. The Prosecution indicates that it expects the other Defence teams to also file motions for acquittal, and requests that the five day time-limit for responding to motions, set out in Rule 73 (E), start to run only from the date of filing of the last such Defence motion, or from the expiration of the time limit under Rule 98 *bis*, whichever is sooner. It argues that as the four co-defendants are charged with conspiracy, any response must take account of

the submissions of all four Defence teams. Furthermore, the Prosecution intends to respond to all four Defence motions with a single response, minimizing duplication of argument.

2. The Chamber grants the relief requested. A consolidated Prosecution response to Rule 98 *bis* motions has been the practice in the past, and would encourage a more efficient presentation of argument in this case[1].

3. The Prosecution also argues that this extension is justified because it "must arrange for translation" of Defence motions from French into English. The Chamber recalls, however, that, as an organ of the Tribunal, the Prosecution is expected to be able to function in both of its working languages. The absence of a translation from one of the working languages to the other does not justify an extension of the time-limit for the Prosecution[2].

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion to extend the deadline for the Prosecution to respond to any motions for acquittal under Rule 98 *bis* until five days after the last defendant files his motion, or until five days after the expiration of the time limit prescribed by Rule 98 *bis*, whichever is earlier.

Arusha, 21 October 2004

[Signed] : Erik Møse

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Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane 22 October 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

[Signed] : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora – subpoena – relevant information – no other means – motion granted

International instruments cited : Rules of procedure and evidence, Rule 54

[1] *Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motion for Acquittal (TC), 25 September 2002.

[2] *Bizimingu*, Decision on the Application to Appeal Against the Provisional Release Decision of Trial Chamber II of 4 November 2002 (AC), 13 December 2002, p. 3; *Ndayambaje*, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002 (AC), 10 January 2003, p. 4; *Karera*, Decision on the Prosecutor's Extremely Urgent Motion for Extension of Time to File a Response to a Defence Motion (TC), 26 February 2003, p. 2.

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-I,* Reports 2004*, p. X)*

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 *Ex Parte* "Requête de la défense de Bagosora aux fins de délivrance d'une citation à comparaître", filed on 1 October 2004;

HEREBY DECIDES the motion.

SUBMISSIONS

1. The Bagosora Defence requests the Chamber to issue a subpoena under Rule 54 of the Rules of Evidence and Procedure ("the Rules"), compelling Mr Mamadou Kane to meet with the Defence. Mr Kane was the Political Adviser to the Special Representative of the Secretary-General in Rwanda and was present in Rwanda from December 1993 to May 1994. The Defence asserts that Mr Kane has information relating to, and wants to discuss with him, the negotiations on the Arusha Accords, the 1994 ceasefire, planning of the massacres in 1994, his knowledge of the Accused Bagosora, political assassinations and his observations on incitement of the population and the difficulty in controlling the military. The Defence has tried unsuccessfully to meet with Mr Kane many times since 1999; Mr Kane has recently expressed a refusal to meet with the Defence.

DELIBERATIONS

2. Rule 54 of the Rules provides that "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". In a previous decision, the Chamber held that :

> "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. However, the Defence must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful. Additionally, the Defence must have a reasonable belief that the prospective witness can materially assist in the preparation of its case. Indeed, subpoenas should not be issued lightly."[1]

[1] *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.

3. Mr Kane's position at the time in Rwanda indicates that he had the opportunity to observe the events at issue and may have information relevant to the case. The Bagosora Defence is asking for Mr Kane's personal observations, which could not be obtained by other means. In addition, the Bagosora Defence has tried unsuccessfully to meet with Mr Kane since 1999. The Chamber also notes that the United Nations has indicated that it has no objections to the Defence interviewing Mr Kane. The requirements for a subpoena have therefore been met.

4. The Bagosora Defence has not specified a particular time and venue for its proposed meeting with Mr Kane. As he works for the United Nations in Ethiopia, the Chamber requests the Registry to communicate the subpoena to the relevant UN authorities in Ethiopia, after which the Bagosora Defence will consult with Mr Kane to fix an appropriate time and venue for the meeting.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registrar to prepare a subpoena in accordance with this decision, addressed to Mr Mamadou Kane, and to communicate it, with a copy of the present decision, to the UN authorities in Ethiopia.

Arusha, 22 October 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute 22 October 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora – cooperation of States, France – transfer of prospective witnesses – not specifically mentioned in the Statute – relevant information to the case – motion granted

International instruments cited : Statute, art. 18 (2), 28 – Rules of procedure and evidence, Rule 54

International cases 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-T,* Reports 2004*, p. X) – 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-T,* Reports 2004*, p. X) – 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-T,* Reports 2004*, p. X) – 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-T,* Reports 2004*, p. X)*

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 "Requête de la défense de Bagosora aux fins de coopération de la République Française", filed on 11 October 2004;

HEREBY DECIDES the motion.

1. The Bagosora Defence requests the Chamber, under Article 28 of the Statute, to order the French authorities to permit the Bagosora Defence to meet with Mr Marlaud and Colonel Maurin.

2. Article 28 (1) of the Statute imposes an obligation on States to "cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". Article 28 (2) enumerates types of requests and orders which may be issued by a Trial Cham-

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)

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora – coopération des Etats, France – transfert de témoins potentiels – non expressément mentionné dans le Statut – information pertinente – requête accordée

Instruments internationaux cités : Statut, art. 18 (2), 28 – Règlement de procédure et de preuve, art. 54

Jurisprudence internationale citée :

Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts*, «Request for the Government of Rwanda for Cooperation and Assistance pursuant to Article 28 of the Statute», 10 mars 2004 (ICTR-98-41-T,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procureur c. Théoneste Bagosora et al.*, «Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana», 25 mai 2004 (ICTR-98-41-T,* Recueil 2004*, p. X) – 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-T,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procueur c. Théoneste Bagosora et consorts*, «Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute», 31 août 2004 (ICTR-98-41-T,* Recueil 2004*, p. X)*

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 d'une requête intitulée Requête de la défense de Bagosora aux fins de coopération de la République française, déposée le 11 octobre 2004,

STATUE ainsi qu'il suit :

1. En vertu de l'article 28 du Statut, l'équipe de défense de Bagosora prie la Chambre d'inviter les autorités françaises à lui permettre de s'entretenir avec M. Marlaud et le colonel Maurin.

2. Aux termes de l'article 28 (1) du Statut, les États sont tenus de «collabore[r] avec le Tribunal international pour le Rwanda à ta recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire». L'article 28 (2) énumère les types de demandes et d'ordonnances pouvant émaner d'une

ber. Although the transfer of prospective witnesses is not specifically mentioned, the Chamber's power is not limited to requests and orders listed in the provision and may include any order whose purpose is to assist the Tribunal in its mandate. Article 18 (2) empowers a Chamber to "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 a trial". Rule 54 of the Rules of Procedure and Evidence specifies that a Judge or 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". On the basis of these powers, the Chamber is competent to issue an order to a State to request cooperation in the facilitation of a meeting between the Defence and a person in that State[1].

3. As with other applications for an Article 28 request, the applicant 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[2]. Further, the applicant should identify the nature of the assistance requested with particularity[3].

4. Based on the submissions of the Defence, the Chamber finds that the conditions for an Article 28 request are met. Both Mr Marlaud and Colonel Maurin were present in Rwanda in April 1994 and may have information relevant to the proceedings. Moreover, the French authorities have indicated to the Registry that a meeting between the Bagosora Defence and Mr Marlaud and Colonel Maurin would be facilitated if the Tribunal makes a formal request to that effect.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

DIRECTS the Registrar to transmit the present decision to the Republic of France, and to report back on its implementation;

RESPECTFULLY REQUESTS the Republic of France, under Article 28 of the Tribunal's Statute, to facilitate the meeting of the Bagosora Defence with Mr Marlaud and Colonel Maurin.

Arusha, 22 October 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[1] *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.

[2] *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.

[3] *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. 4.

Chambre de première instance. Le transfert de témoins potentiels n'y est pas expressément mentionné, mais loin de se limiter aux demandes et ordonnances visées dans cette disposition, le pouvoir de la Chambre peut s'étendre à toute ordonnance ayant pour but d'aider le Tribunal à s'acquitter de son mandat. L'article 18 (2) habilite la Chambre à décerner «les ordonnances et mandats d'arrêt, de dépôt, d'amener ou de remise et toutes ordonnances nécessaires pour la conduite du procès». L'article 54 du Règlement de procédure et de preuve précise qu'«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 ta conduite du procès». Compte tenu de ces prérogatives, la Chambre est compétente pour inviter un État à lui apporter sa coopération en ménageant une entrevue entre la défense et une personne vivant dans ledit État[1].

3. Comme pour les autres requêtes tendant à faire solliciter la coopération des États en vertu de l'article 28 du Statut, le requérant doit préciser la nature des éléments de preuve recherchés, leur importance dans le cadre du procès et les initiatives prises pour les obtenir[2]. De plus, il doit indiquer avec précision la nature de l'assistance sollicitée[3].

4. À la lumière des arguments présentés par la défense, la Chambre est d'avis que les conditions sont remplies pour former une demande en vertu de l'article 28 du Statut. Monsieur Marlaud et le colonel Maurin se trouvaient au Rwanda en avril 1994 et pourraient avoir des informations présentant un intérêt dans le cadre du procès. Qui plus est, les autorités françaises ont fait savoir au Greffe qu'elles ménageraient une entrevue entre l'équipe de défense de Bagosora et M. Marlaud et le colonel Maurin si le Tribunal en faisait officiellement la demande.

PAR CES MOTIFS, LE TRIBUNAL

FAIT DROIT à la requête;

ORDONNE au Greffier de transmettre le présent acte à la République française et de le tenir informé de la suite qui lui sera réservée;

PRIE la République française, en vertu de l'article 28 du Statut du Tribunal, de ménager l'entrevue que l'équipe de défense de Bagosora voudrait avoir avec M. Marlaud et le colonel Maurin.

Arusha, le 22 octobre 2004

[Signé] : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

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[1] Affaire *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 (Chambre de première instance), 23 juin 2004, par. 4.

[2] Affaire *Bagosora et consorts*, «Request for the Government of Rwanda for Cooperation and Assistance pursuant to Article 28 of the Statute» (Chambre de première instance), 10 mars 2004, par. 4; «Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana» (Chambre de première instance), 25 mai 2004, par. 6.

[3] 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), 31 août 2004, par. 4.

Decision on the Joint Defence Motion for an Update of the Prosecution's Pre-Trial Brief 2 November 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Trial brief, new witnesses, update – sufficient notice to the Accused of the content of the witness's testimony – closing brief can serve the update purpose – judicial economy – motion denied

International instruments cited : Statute, art. 20 (4) (a) – Rules of procedure and evidence, Rule 73 bis *(B) (iv) (c)*

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al.*, Decision on Defence Motions of Nsengiyumva, Kabiligi and Ntabakuze Challenging the Prosecutors Pre-Trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002 (ICTR-98-41-T,* Reports 2002*, p. X)*

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 an Update of the Pre-Trial Brief Revision Pursuant to the Trial Chamber Decision of May 2002", filed on 24 September 2004;

CONSIDERING the Prosecution's response, filed on 1 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 23 May 2002, the Chamber ordered the Prosecution to amend its Pre-trial Brief to identify the points in the Indictments to which each of its witnesses would testify[1]. The Prosecution filed its revised brief on 7 June 2002. The Chamber later granted two Prosecution requests to vary the list of witnesses, adding witnesses including Witness AAA, ABQ, AFJ, Nkole, Nowrojee, XBG, XBH, and XBM.

[1] *Bagosora et al.*, Decision on Defence Motions of Nsengiyumva, Kabiligi and Ntabakuze Challenging the Prosecutors Pre-Trial Brief and on the Prosecutor's Counter-Motion (TC), 23 May 2002.

SUBMISSIONS

2. The Defence requests the Prosecution to update its Pre-trial Brief by specifying the points in the Indictment to which Witness AAA, ABQ, AFJ, Nkole, Nowrojee, XBG, XBH, and XBM have testified. According to the Defence, the Chamber's decision of 23 May 2002 applies to the added witnesses. By failing to specify which points in the Indictment the added witnesses are addressing, the Prosecution is depriving the Accused of his right to be informed of the nature and cause of the charges against them under Article 20 (4) (a). The motion also argues that amending the Pre-trial Brief will promote judicial economy by narrowing the scope of evidence, in a way that is necessary for the Defence, if it should file motions for acquittal at the close of the Prosecution's case.

3. The Prosecution argues that it has complied with the Chamber's prior order with respect to the added witnesses in its requests to vary the prosecution witness list. Secondly, the motion is moot because the Defence failed to raise this matter prior to cross-examining the witnesses at issue. The Prosecution further observes that the Defence does not need a revised Pre-trial Brief to file its motions for acquittal as it will have heard the evidence of the added witnesses and knows the factual charges in the Indictments.

DELIBERATIONS

4. Under Rule 73 *bis* (B) (iv) (c), the Chamber may order the Prosecutor to identify "the points in the indictment on which each witness will testify". In its decision of 23 May 2002, the Chamber objected to the fact that the Prosecution's Pre-trial Brief merely referred to the counts of the Indictments, which did not give sufficient notice to the Accused of the content of the witness's testimony. The Chamber directed the Prosecution to indicate to which "events, circumstances, or paragraphs" in the Indictments the witnesses would be testifying[2].

5. In its motions to vary the witness list, the Prosecution has sufficiently detailed the content of the testimony in compliance with the requirements of Rule 73 *bis* and the Chamber's previous order[3]. The Chamber also observes that the purpose of the Pre-trial Brief is to notify the Accused and their Counsel of the nature of the testimony witnesses will give so that they can prepare for the examination. With regard to evidence that was actually presented, the closing brief will serve the purpose for which the Defence seeks the update. The Rules provide for this type of summation at the close of all the evidence, not the close of the Prosecution's case. It would not promote the interests of judicial economy to require the Prosecution to amend the Pre-trial Brief at this late date.

[2] *Ibid*., in particular para. 12.

[3] Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence 13 June 2003, paras. 7-10; Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence 24 March 2004, paras. 8-55.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the joint Defence motion.

Arusha, 2 November 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Ex Parte *Motion*
10 November 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judge : Erik Møse

Bagosora – video-conference testimony – ex parte motion, confidential – inter partes motion – protected witness – motion inadmissible

International instruments cited : Rules of procedure and evidence, Rule 73 (A) and (E)

International case cited :

I.C.T.R. : The Prosecutor v. Théoneste Bagosora et al., Prosecution Motion for Special Protective Measures for Witnesses A and BY, 5 September 2003 (ICTR-98-41)

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

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 the "Confidential *Ex-Parte* Motion to have Defence Witness O-08 Testify by Video Conferencing Pursuant to Rule 71 and 54 R.P.E", filed by the Defence for Bagosora on 14 October 2004;

HEREBY DECIDES the motion.

1. The Defence for Bagosora justifies the filing of its motion confidentially and *ex parte* on the basis that the witness for whom it requests video-conference testimony has not yet indicated whether he wishes to testify publicly. References to the witness's name and position are scattered throughout the motion.

2. As a general rule, motions must be filed *inter partes*. Rule 73 (E) contemplates the filing of motions *inter partes*, giving a "responding party" five days from the receipt of the motion to reply. Previous motions in the present case requesting testimony of a protected witness by video-conference have been filed *inter partes*, with

protected witness information filed in an *ex parte* annex[1]. The moving party has not explained why such a procedure could not have been followed in the present motion, or given any other justification for deviating from the principle of *inter partes* submissions.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the motion to be inadmissible.

Arusha, 10 November 2004

[Signed] : Erik Møse

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Decision on Testimony by Video-Conference 20 December 2004 (ICTR-98-41-T)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Bagosora – video-link testimony – exceptional circumstances – poor health – written statement, alternative – interest of justice – ICTY – importance of the testimony, inability or unwillingness of the witness to attend, good reason – motion granted

International instruments cited : Rules of procedure and evidence, Rules 54, 71 (A) and 90 (A)

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théodore Bagosora et al., *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41-T,* Reports 2004, *p. X)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Krnojelac, *Order for Testimony via Video-Conference Link, 15 January 2001 (IT-97-25) – Trial Chamber,* The Prosecutor v. Milosevic, *Order on Prosecution Motion for the Testimony of Nojko Marinovic via Video-Conference Link, 19 February 2003 (IT-02-54) – Trial Chamber,* The Prosecutor v. Brdanin, *Order for Testimony via Video-Conference Link Pursuant to Rule 71* bis, *9 September 2003 (IT-99-36)*

[1] E.g. *Bagosora et al*., Prosecution Motion for Special Protective Measures for Witnesses A and BY, 5 September 2003.

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 "Confidential Motion to Have Defence Witness Major Donald MacNeil Testify by Video Conferencing", filed by the Defence for Bagosora on 17 November 2004;

CONSIDERING the Prosecution Response, filed on 26 November 2004;

HEREBY DECIDES the motion.

1. The Defence for Bagosora requests that the testimony of one of its witnesses, Major Donald MacNeil of the Canadian Armed Forces, be heard by video-link with a Canadian military facility in Toronto, Canada. A letter from a Canadian military doctor, appended as Annex 2 of the motion, indicates that Major MacNeil's health is fragile because of a recent limb amputation and that travel is not recommended. The Defence enumerates the topics on which it wishes to elicit testimony of Major MacNeil, who was part of the UNAMIR mission in Rwanda in 1994. In particular, it seeks to introduce evidence concerning his involvement in the transfer of refugees effected through UNAMIR in 1994; his perception of events during his mission to Rwanda; the visit to Rwanda by Bernard Kouchner concerning the transfer of orphans, about which General Dallaire has testified for the Prosecution; his attendance at a meeting between representatives of UNAMIR's Humanitarian Assistance Group and Rwandan government officials, including a military officer, on 16 May 1994; his attendance at a meeting with *Interahamwe*; and his knowledge of a meeting between Colonel Yaache and Colonel Bagosora on 17 May 1994 concerning the transfer of orphans.

2. Relying on Rules 71 (A) and 54 of the Rules of Procedure and Evidence, the Defence asserts that hearing the testimony by video-conference is in the interests of justice in light of his knowledge of events and his desire to testify. His medical condition justifies hearing the testimony in this manner, and is said to be an exceptional circumstance. The Defence wishes that the testimony be heard during the first trial session in 2005, scheduled to commence on 12 January 2004.

3. The Prosecution suggests that, depending on the content of the witness's testimony, it might be willing to admit the witness's evidence by written statement. Testimony by video-link would, accordingly, be unnecessary because a less costly alternative for the admission of the evidence would be available.

4. Video-testimony has been granted on several occasions during the present case. The standard for authorizing testimony by video-conference was discussed extensively by this Chamber in its *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link*[1]. Video-conference testimony should be ordered where it is in the interests of justice, as that standard has been elaborated in ICTR and ICTY jurisprudence. In particular, the Chamber will consider the importance of the testimony; the inability or unwillingness of the witness to attend; and whether a good reason has been adduced for the inability or unwillingness to attend. This in no way detracts

[1] *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004.

from the general principle, articulated in Rule 90 (A), that "witnesses shall, in principle, be heard directly by the Chambers".

5. The Defence has established that the witness is, for medical reasons, unable to travel to Arusha to give his testimony. This is undoubtedly a sufficient reason[2]. The Defence has also established with particularity the nature of the testimony to be adduced and its importance.

6. The Prosecution suggests that it might agree to the admission of the witness's testimony by written procedure, depending on its precise content, and that this would be a more efficient method of introducing the evidence. The present decision does not preclude the Defence from making an application under the Rules to introduce the evidence as a written statement, should it wish to do so. In general, however, it is for the party presenting a witness to determine whether to make such an application.

7. Accordingly, the Chamber authorizes Defence witness Major Donald MacNeil to give testimony by way of video-conference from the Canadian Forces College, Toronto, or such other suitable location as may be designated by the Registry in consultation with the Defence. The witness's counsel may be present during the testimony, which shall be taken in accordance with the Rules and procedures applicable at the Tribunal.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry, in consultation with the parties, to make all necessary arrangements in respect of the testimony of Major Donald MacNeil via video-conference, and to videotape the testimony for possible future reference by the Chamber.

Arusha, 20 December 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[2] *Brdanin*, Order for Testimony via Video-Conference Link Pursuant to Rule 71 *bis* (TC), 9 September 2003 (ordering video testimony based on the "poor state of the Witness' health and his extreme difficulty in coping with the emotional stress caused by giving evidence"); *Milosevic*, Order on Prosecution Motion for the Testimony of Nojko Marinovic via Video-Conference Link (TC), 19 February 2003 (ordering video testimony due to the "current state of health of the witness" stating that "it is not possible for the Witness to travel to the seat of the International Tribunal and that it would be appropriate for his testimony to be given by way of a video-conference link"); *Krnojelac*, Order for Testimony via Video-Conference Link (TC), 15 January 2001 (ordering video testimony because "the medical condition specified in the Motion precludes witness FWS-49 from appearing before the Tribunal, which in the circumstances shows good cause).

Decision on Motion Concerning Alleged Witness Intimidation 28 December 2004 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Ntabakuze – intimidation of prospective witnesses – Government of Rwanda – Witnesses and Victims Support Section – fair trial – protection of witnesses – cooperation of States – cross-examination – burden of proof – motion denied

International instruments cited : Statute, art. 19 (1), 20 (4) (E), 21, 28 – Rules of procedure and evidence, Rule 75

International case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses, 15 March 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

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 "Motion for Dismissal", filed by the Defence for Ntabakuze on 27 September 2004;

CONSIDERING the Registrar's Submission, filed on 13 October 2004; and the Prosecution Response, filed on 20 October 2004;

HEREBY DECIDES the motion.

SUBMISSIONS

1. The Defence for Ntabakuze asserts that military authorities in Rwanda have engaged in acts of intimidation of prospective witnesses, and of its Legal Assistant. As a result, the prospective witnesses have either declared that they no longer wish to co-operate with the Defence, or they can no longer be contacted. The Legal Assistant fears for his own security and is unwilling to return to Rwanda to conduct further investigations. The Defence claims that it has brought the incidents of intimidation to the attention of both the Registry and Rwandan authorities without any reasonable prospect of a satisfactory remedy. The Tribunal's Witnesses and Victims Support Section (WVSS) has allegedly indicated that its mandate extends only to officially designated Defence witnesses, not prospective witnesses. Further, WVSS discloses the identity of protected witnesses to the Rwandan authorities to secure travel documents. In present circumstances, the disclosure of such information will endanger, not safeguard, their security. The Defence took their complaints to a Rwandan official who

denied knowledge of the incidents in question, and asked for further particulars concerning the persons allegedly targeted. The Defence declined to reveal those particulars, and no further action was taken.

2.These events are said to have impaired the right of the Accused to a fair trial, in particular, the right enshrined in Article 20 (4) (e) of the Statute to obtain the attendance of witnesses on his behalf, on the same conditions as Prosecution witnesses. The Defence argues that, under the circumstances, it would be a "sham" to continue proceedings against the Accused and that all the charges against him should be dismissed.

3. The Registry confirms that the mandate of the WVSS extends only to confirmed witnesses, not prospective witnesses. Disclosure of a witness's identity to the State in which they reside is essential for both their protection and their ability to travel to Arusha as a witness. Defence teams in previous cases have succeeded in conducting investigations in Rwanda without significant hindrance, and the Government of Rwanda has in the past co-operated well in documenting, moving, and transferring Defence witnesses to Arusha.

4. The Prosecution argues that the Defence has made no submissions on the appropriateness of the remedy proposed. The Defence bears the burden of showing that there is no remedy short of dismissal that would be appropriate, and has offered no alternative relief. Accordingly, the motion in its present form should be dismissed.

DELIBERATIONS

5. According to Articles 19 (1) and 20 of the Statute, the Accused has the right to a fair and expeditious trial. The proceedings shall be conducted in accordance with the Rules, with full respect for the rights of the Accused and due regard for the protection of victims and witnesses. Article 20 (4) lists certain minimum guarantees which form part of the principle of fair trial. According to Article 20 (4) (e), the Accused is entitled to cross-examine witnesses who have testified against him and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as witnesses against him.

6. The Tribunal has adopted provisions for the protection of witnesses, pursuant to Article 21 of the Statute. Rule 75 enumerates the measures that may be ordered by a Chamber to protect the privacy and security of victims and witnesses. WVSS is charged with enforcing these orders, upon notification by a party of the identity of its protected witnesses. In the present case, the Defence submits that prospective witnesses were interrogated and intimidated by Rwandan officials. The Chamber observes that these prospective witnesses were not subject to the witness protection order of 15 March 2004 either at the time of the alleged intimidation, or as of the date of the filing of the present motion[1]. This does not diminish the significance of the alleged intimidation, but the situation was not one in which the WVSS was mandated to provide direct protection to Defence witnesses.

[1] *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004.

7. Pursuant to Article 28 of the Statute, all states are obliged to cooperation with the Tribunal. Non-cooperation, or active obstruction, could adversely affect the fairness of a trial. Threats or intimidation of confirmed or prospective witnesses by state officials would, if proven, be a serious violation of the duty of cooperation.

8. The Defence bears the burden of establishing that the alleged intimidation occurred. The evidence thereof is contained in an affidavit sworn by the Legal Assistant[2]. He describes a telephone conversation on or soon after 17 May 2004 in which a "source and witness" explained that he had been questioned by the Rwandan Military Prosecution Department about his cooperation with the Defence. The witness reportedly said that he was asked about the Defence Legal Assistant, who is Rwandan, including the whereabouts of any of his relatives. The witness believed that his phone was under surveillance and, fearing for his security, asked the Legal Assistant not to contact him again. About ten days later, the Legal Assistant visited Kigali and avers that he was unable to meet with the informer or with any other witnesses "for their security reasons", although he gives no details of his efforts to contact other witnesses, or cite any further reports of intimidation of prospective witnesses[3]. With the assistance of Registry officials, the Legal Assistant brought the allegations of intimidation to the attention of an official of the Rwandan Military Prosecution Department. That official asked the name of the person who was allegedly summoned; the Legal Assistant declined to disclose the identity of a potential witness, and the interview apparently reached an impasse on that point[4]. After his return to Arusha, the Legal Assistant "learn[ed]" that the witness in question was summoned and asked questions about his co-operation with the Defence on two further occasions. He also "learned" that another prospective witness had been summoned to the Military Prosecution Department and that a third had been taken there and beaten.

9. The Chamber is unable, based on the evidence presented, to find on the balance of probabilities that the Rwandan authorities have intimidated Defence witnesses. The evidence provided is vague and indirect. With the exception of the telephone conversation on 17 May 2004, the affiant does not reveal the source of the allegations of intimidation. Even in that telephone conversation, the witness "did not go into details and I could not ask him any more questions regarding his security situation in Rwanda."[5] Apparently no further efforts were made to contact the witness, directly or indirectly, to determine his security situation or the nature of the alleged threats against him.

10. In any event, the remedy sought by the Defence, dismissal of all charges against the Accused, has not been shown to be appropriate. There is little indication of the content of the expected testimony of the witnesses who were allegedly intimidated, or the specific charges to which they may relate. The Chamber is, in effect, being invited to dismiss charges in the Indictment without any showing that the testimony of the prospective witnesses relates to those charges.

[2] Annex 1 to the Motion ("Annex 1").
[3] *Ibid.*, para. 17.
[4] *Ibid.*, para. 19-24.
[5] *Ibid.*, para. 12.

11. Consequently, the Chamber denies the motion, but expects the WVSS to continue to follow the situation closely, and to report any credible evidence of intimidation of prospective witnesses, whether appearing for the Defence or Prosecution. Such allegations are of grave concern to the Chamber and it is important that the WVSS document the allegations, assist the parties in addressing the appropriate authorities, and, where feasible, investigate allegations of intimidation of actual or prospective witnesses[6].

FOR THE ABOVE REASONS

THE CHAMBER DENIES THE MOTION.

Arusha, 28 December 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[6] In the present case, officials of the WVSS were instrumental in assisting the Defence in addressing their complaints to Rwandan officials. *Ibid*. para. 20. Such efforts are commended.

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)

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[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)

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[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.

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.

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)

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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.

- 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)

- 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)

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-A)

(Original : not specified)

Appeals Chamber

Judge : Inés Weinberg de Roca

Ngeze, Barayagwiza, Nahimana – notice of appeal, appellants' briefs, deadline – delay – good cause – joined case – motion granted

International instrument cited : Rules of procedure and evidence, Rule 116

I, Inés Mónica Weinberg de Roca, 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 Assigning Judges and Designating the Pre-Appeal Judge" filed on 19 December 2003, which designated me to serve as Pre-Appeal Judge in this case;

NOTING the "Judgement and Sentence" rendered in the English language by Trial Chamber I in this case on 3 December 2003 ("Judgement");

NOTING that in the "Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs" of 19 December 2003 the Pre-Appeal Judge ordered the Appellants Barayagwiza and Nahimana to file their Notices of Appeal no later than thirty days from the communication of the Judgement in the French language and to file their Appellants' Briefs no later than seventy-five days from the communication of the Judgement in the French language, and required Appellant Ngeze to file his Notice of Appeal no later than 9 February 2004;

BEING SEISED OF Appellant Ngeze's "Motion seeking a further extension of time for filing the notice of appeal", filed on 5 February 2004, in which the he requests that the deadline for filing his Notice of Appeal be delayed until after service of the French translation of the Judgement, as is the case for the Appellants Nahimana and Barayagwiza;

CONSIDERING that paragraph 18 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings of 16 September 2002 provides 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 the Pre-Appeal Judge is of the opinion that no prejudice would be caused to the other party";

Décision relative à la requête de Ngeze aux fins d'un nouveau report du délai de dépôt de ses acte et mémoire d'appel 6 février 2004 (ICTR-99-52-A)

(Original : Anglais)

Chambre d'appel

Juge : Inés Weinberg de Roca, juge de la mise en état en appel

Ngeze, Barayagwiza, Nahimana – dépôt de l'acte d'appel, mémoire d'appel, délai – report – motif valable – jonction d'instances – requête accordée

Instrument international cité : Règlement de procédure et de preuve, art. 116

NOUS, Inés Mónica Weinberg de Roca, 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'États voisins entre le 1er janvier et le 31 décembre 1994 (le «Tribunal international»);

VU l'ordonnance du Président portant désignation des juges et du juge de la mise en état en appel déposée le 19 décembre 2003 et en vertu de laquelle nous avons été désignée juge de la mise en état en appel dans la présente affaire;

VU le *Judgement and Sentence* rendu en anglais dans la présente affaire par la Chambre de première instance I le 3 décembre 2003 (le «jugement»);

NOTANT que dans la décision intitulée *Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs* qu'elle a rendue 19 décembre 2003, le juge de la mise en état en appel a ordonné que les appelants Barayagwiza et Nahimana déposent leurs actes d'appel dans un délai de trente jours à compter de la communication du jugement en français et leurs mémoires d'appel dans un délai de soixante-quinze jours à compter de la communication du jugement en français, et a demandé que l'appelant Ngeze dépose son acte d'appel le 9 février 2004 au plus tard;

VU la requête de l'appelant Ngeze intitulée *Motion seeking a further extension of time for filing the notice of appeal*, déposée le 5 février 2004, dans laquelle il demande le report du délai de dépôt de son acte d'appel à une date ultérieure, après que le texte français du jugement lui aura été signifié, ainsi qu'il a été accordé aux appelants Nahimana et Barayagwiza;

CONSIDÉRANT qu'aux termes du paragraphe 18 de la directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal du 16 septembre 2002 «il peut être statué sur toute requête aux fins de prorogation de délai, dans le respect de la pratique existante, sans qu'il soit donné à la partie adverse la possibilité d'y répondre si […] le juge de la mise en état en appel, estime que cela ne portera nullement préjudice à la partie adverse»;

NOTING that Rule 116 of the Rules of Procedure and Evidence ("Rules") provides that

> "(A) The Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause.
>
> (B) Where 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";

CONSIDERING that, in the circumstances of this joined case, good cause has been shown to extend the deadline for the filing of the Notice of Appeal of the Appellant Ngeze to the same dates as for his co-Appellants and that no prejudice will be caused to the other parties;

FOR THE FOREGOING REASONS,

ORDER the Appellant Ngeze to file his Notice of Appeal no later than thirty days from the communication of the Judgement in the French language and to file his Appellant's Brief no later than seventy-five days from the communication of the Judgement in the French language;

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

Dated this 6th day of February 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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NOTANT que l'article 116 du Règlement de procédure et de preuve (le «Règlement») porte 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»;

CONSIDÉRANT que, dans les circonstances de la présente jonction d'instances, des motifs valables justifient le report du délai de dépôt de l'acte d'appel de l'appelant Ngeze à la même date que celle fixée pour ses co-appelants et qu'il n'en résultera aucun préjudice pour les autres parties;

PAR CES MOTIFS,

ORDONNONS que l'appelant Ngeze dépose son acte d'appel au plus tard dans les trente jours suivant la communication du jugement en français et son mémoire d'appel dans un délai de soixante-quinze jours à compter de la communication du jugement en français.

Fait en français et en anglais, le texte anglais faisant foi.

Fait le 6 février 2004, à La Haye (Pays-Bas).

[Signé] : Inés Mónica Weinberg de Roca

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Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order 2 March 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inès Monica Weinberg de Roca, Pre-Appeal Judge

Ngeze, Barayagwiza, Nahimana – schedule, scheduling order, clarification – exceptional circumstances – notice of appeal, appellant's brief – extension of time – annulment of Judgement – good cause – motion granted

International instruments cited : Rules of procedure and evidence, Rules 108, 111

I, Inés Mónica Weinberg de Roca, 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 "Judgement and Sentence" rendered in the English language by Trial Chamber I in this case on 3 December 2003 ("Judgement");

BEING SEISED OF the "Motion for Clarification of the Schedule" filed on 13 February 2004 by counsel on behalf of Appellant Ngeze ("Motion"), which requests a clarification of the schedule for filing the appellant's brief;

CONSIDERING that although motions for clarification will be granted only in exceptional circumstances, a clarification of the briefing schedule for all three appellants may facilitate the efficient administration of justice;

NOTING the "Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and briefs" of 19 December 2003 ("First Decision"), which (i) ordered the Appellants Barayagwiza and Nahimana to file their Notices of Appeal no later than thirty days from the communication of the Judgement in the French language and to file their Appellants' Briefs no later than seventy-five days from the communication of the Judgement in the French language; and (ii) which granted the relief sought in the motion filed by counsel on behalf of Ngeze, and ordered the Appellant Ngeze to file his Notice of Appeal no later than 9 February 2004 and to file his Appellant's Brief no later than seventy-five days thereafter in accordance with Rule 109;

NOTING the subsequent "Decision on Ngeze's Motion for an Additional Extension of Time to File his Notice of Appeal and Brief" of 6 February 2004 ("Second Decision"), which granted the further extension requested by the Appellant Ngeze personally, and ordered the Appellant Ngeze to file his Notice of Appeal no later than thirty days from the communication of the Judgement in the French language and to file

his Appellant's Brief no later than seventy-five days from the communication of the Judgement in the French language;

NOTING that on 7 February 2004, Counsel for Ngeze filed a Notice of Appeal in accordance with the First Decision;

NOTING FURTHER the "Notification de la demande d'annulation du jugement rendu le 3 décembre 2003 par la Chambre I dans l'affaire '*Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze*, ICTR-99-52-T'" filed personally by Appellant Barayagwiza on 3 February 2004 ("Barayagwiza Motion for Annulment"), in which Appellant Barayagwiza seeks the annulment of the Judgement;

NOTING FURTHER the "Prosecution Response to Barayagwiza Motion for Annulment of Judgement Rendered on 3 December 2003" filed on 26 February 2004, in which the Prosecution argues that the Motion for Annulment should be dismissed because the Appeals Chamber is without jurisdiction to deal the issues raised therein by way of interlocutory motion on appeal and to order that the issues be re-framed in Notice of Appeal pursuant Rule 108 of the Rules;

CONSIDERING that Rules 108 and 111 of the Rules of Procedure and Evidence ("Rules"), the Practice Direction on Formal Requirements for Appeals from Judgement of 16 September 2002, and the Practice Direction on the Length of Briefs and Motions on Appeal of 16 September 2002 contemplate that a party will file a single Notice of Appeal and a single Appellant's Brief within the page and time limits prescribed therein;

CONSIDERING that the Second Decision granted a further extension from the time limit for filing the single Notice of Appeal and the single Appellant's Brief of Appellant Ngeze;

CONSIDERING that although the Ngeze Notice of Appeal was filed before the time limit set in the Second Decision, the Appellant Ngeze may seek to vary the grounds of appeal by showing good cause pursuant to Rule 108 of the Rules, and that good cause has been shown by the apparent failure of communication between the Appellant Ngeze and counsel regarding the requests for extensions and the filing of the Notice of Appeal;

CONSIDERING FURTHER that the Barayagwiza Motion for Annulment challenges the legal and procedural basis of the Judgement and will therefore be treated as the Appellant's Notice of Appeal pursuant to Rule 108 of the Rules;

CONSIDERING that the Appellant Barayagwiza may seek to vary his grounds of appeal by showing good cause pursuant to Rule 108 of the Rules and that good cause has been demonstrated by the fact Appellant Barayagwiza filed his Motion for Annulment without knowing that it would be considered as a Notice of Appeal;

HEREBY ORDERS

1. Each Appellant to file his single Notice of Appeal no later than thirty days from the communication of the Judgement in the French language;

2. Each Appellant to file his single Appellant's Brief no later than seventy-five days from the communication of the Judgement in the French language;

3. That the Appellants' Ngeze and Barayagwiza may, if they so wish, amend the Notices of Appeal (including the Motion for Annulment) filed before 2 March 2004 at any time prior to the deadline for filing the Notice of Appeal set out in paragraph 1 above.

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

Dated this 2nd day of March 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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Decision on Ngeze's Motion for an Extension of Page Limits for Appeals Brief 2 March 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Monica Weinberg de Roca, Pre-Appeal Judge

Ngeze – appeal brief – extension of page limits – exceptional circumstances – motion denied

International instrument cited : Practice Direction on the Length of Briefs and Motions Appeal dated 16 September 2002, paragraphs l (a) and 5

I, Ipès Monica Weinberg de Roca, 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;

BEING SEISED OF the "Motion for Extension of Page Limits" filed on 9 February 2004 by counsel on behalf of Appellant Ngeze ("Motion"), which requests permission to file an appeal brief of no more than two-hundred pages and no more than sixty thousand words *inter alia* on the basis of : (1) the length of the notice of appeal; (2) the number of issues to be appealed; (3) the necessity for thorough citations; and (4) the landmark issues raised in the appeal;

CONSIDERING "Prosecution Response to Appellant's Motion for Extension of Page Limits" filed on 18 February 2004 in which the Prosecution argues that the Appellant has failed to show any exceptional circumstances justifying the requested relief and that an extension of pages would result in "excessively cumbersome proceedings" especially if the other Appellants were to be granted similar latitude;

CONSIDERING the "Response to the Prosecution Response to Appellant's Motion for Extension of Page Limits" filed on 19 February 2004, which stresses *inter alia* the novel and important issues raised in the appeal and the conservative nature of the request;

NOTING that paragraph l (a) of the Practice Direction on the Length of Briefs and Motions Appeal dated 16 September 2002 ("Practice Direction") provides that "the brief of art appellant appeal from a final, judgement of a Trial Chamber will not exceed 100 pages or 30,000 words, whichever is greater" and that paragraph 5 of the Practice Direction requires a party seeking an extension of the page limit to "provide an explanation of the exceptional circumstances that necessitate the oversized filing";

CONSIDERING that the effectiveness of appeal briefs does not depend on their length but on the clarity and persuasiveness of the presented arguments;

FINDING that the Appellant has not demonstrated that there are exceptional circumstances in this case that warrant an extension of the page limits prescribed in the Practice Direction;

HEREBY DISMISSES the Motion.

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

Dated this 2 March 2004, at The Hague, The Netherlands.

[Signed] : Inès Monica Weinberg de Roca

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Decision on Barayagwiza's Motion for Determination of Time Limits 5 March 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Barayagwiza – appellant's brief – notice of appeal – deadline – extension of time – additional evidence – motion denied

International instruments cited : Rules of procedure and evidence, Rules 115 (A) and 116 – Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings of 16 September 2002, paragraph 18

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING the "Judgement and Sentence" rendered in the English language by Trial Chamber I on 3 December 2003 ("Judgement");

BEING SEIZED OF the "Détermination du *dies a quo* pour le calcul des délais d'appel dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, ICTR-99-52-A'" filed by Appellant Barayagwiza personally on 1 March 2004 ("Motion"), in which Appellant Barayagwiza seeks a declaration that the seventy-five days granted for the filing of his Appellant's Brief will run from the date after the filing of his Notice of Appeal and that the date for filing additional evidence will run from the date of the communication of the French translation of the Judgement;

CONSIDERING that paragraph 18 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings of 16 September 2002 provides that an extension of time may be disposed of without giving the other party the opportunity to respond to the motion;

NOTING the "Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and briefs" of 19 December 2003 and the "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order" of 2 March 2004, which ordered each Appellant to file his single Notice of Appeal no later than thirty days from the communication of the Judgement in the French language and to file his single Appellant's Brief no later than seventy-five days from the communication of the Judgement in the French language;

[1] "Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge" 19 December 2003.

Décision relative à la requête de Barayagwiza aux fins de détermination du **dies a quo** *pour le calcul des délais d'appel 5 mars 2004 (ICTR-99-52-A)*

(Original : Anglais)

Chambre d'appel

Juge : Inés Weinberg de Roca, juge de la mise en état en appel

Barayagwiza – acte d'appel – mémoire d'appel – délai de dépôt – prorogation de délai – moyens de preuve supplémentaires – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 115 (A) et 116 – Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal du 16 septembre 2002, paragraphe 18

NOUS**,** Inés Mónica Weinberg de Roca, juge de la mise en état en appel dans la présente affaire[1]*,

VU le *Judgement and Sentence* prononcé en anglais le 3 décembre 2003 par la Chambre de première instance I (le «jugement»);

VU la «Détermination du *dies a quo* pour le calcul des délais d'appel dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze», ICTR-99-52-A déposée le 1er mars 2004 par l'appelant Barayagwiza en personne (la «requête»), dans laquelle l'appelant Barayagwiza nous demande de déclarer que le délai de soixante-quinze jours prévu pour le dépôt de son mémoire de l'appelant commence à courir à compter du lendemain de la date de dépôt de son acte d'appel et que le délai de dépôt de moyens de preuve supplémentaires commence à courir à compter de la date de réception en langue française du jugement;

CONSIDÉRANT qu'aux termes du paragraphe 18 de la «Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal» du 16 septembre 2002, il peut être statué sur toute requête aux fins de prorogation de délai, sans qu'il soit donné à la partie adverse la possibilité d'y répondre;

VU la décision intitulée *Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs* du 19 décembre 2003 et la décision intitulée *Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order* du 2 mars 2004, qui ordonnent à chaque appelant de déposer son acte d'appel au plus tard dans les trente jours de la communication en langue française du jugement et de déposer son mémoire de l'appelant au plus tard dans les soixante-quinze jours de la communication en langue française du jugement;

[1] [* note omise par le Tribunal]

FINDING that Appellant Barayagwiza has not demonstrated good cause as required by Rule 116 of the Rules for any further extension of the time limit for the filing of his Appellant's Brief;

FINDING that the time limit for filing motions to present additional evidence before the Appeals Chamber expired seventy-five days after the date of the Judgement pursuant to Rule 115 (A) of the Rules;

CONSIDERING that no good cause has been shown for further delay in relation to any particular motion to present additional evidence;

FOR THE FOREGOING REASONS,

DISMISS the Motion.

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

Dated this 5 March 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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CONSTATANT que l'appelant Barayagwiza n'a point invoqué de motifs valables ainsi que l'exige l'article 116 du Règlement pour justifier tout nouveau report du délai de dépôt de son mémoire de l'appelant;

CONSTATANT qu'aux termes de l'article 115 (A) du Règlement, le délai de dépôt de requêtes aux fins de présentation devant la Chambre d'appel de moyens de preuve supplémentaires est venu à expiration soixante-quinze jours après la date du jugement;

CONSIDÉRANT qu'aucun motif valable n'a été invoqué pour justifier un nouveau report de délai relativement à toute requête donnée aux fins de présentation de moyens de preuve supplémentaires;

PAR CES MOTIFS,

REJETTE la Requête.

Fait en français et en anglais, le texte anglais faisant foi.

Fait le 5 mars 2004, à La Haye (Pays-Bas).

[Signé] : Inés Mónica Weinberg de Roca

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Order to Registrar
9 March 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Registrar – French translation – joint appeal – improper delay

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING the "Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs" of 19 December 2003 ("Decision"), which noted that the Registry had advised that the French translation of the Judgement would be available by 9 April 2004, but which emphasized that in the circumstances of a joint appeal involving defence teams of different linguistic compositions it is necessary to expedite the translation in order to ensure fair and expeditious proceedings, and which therefore directed the Registrar to expedite the translation of the Judgement and to serve it on the three Appellants and their Counsel in the French language no later than 1 March 2004;

NOTING that the Registrar failed to serve the Judgement on the three Appellants within the time limit set in the Decision;

NOTING that the Registrar failed to notify the Pre-Appeal Judge or the parties of any problems encountered in complying with the time limit of 1 March 2004 and failed to plead any good cause for an extension of the deadline prior to the expiry of the time limit;

FINDING, therefore, that the Registrar is currently in breach of the Decision;

HEREBY

ORDER the Registrar to file a report to the Pre-Appeal Judge, no later than 12 March 2004, indicating the reasons for the improper delay in serving the French translation;

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

Dated this 9 March 2004, 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.

Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits his Appellant's Brief 11 March 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Inés Monica Weinberg de Roca, Pre-Appeal Judge

Ngeze – reconsideration – extension of page limits – exceptional circumstances – motion denied

International instruments cited : Practice Direction on the Length of Briefs and Motions on Appeal dated 16 September 2002, paragraphs 1 (a) and 5 – Practice Direction of the Length of Briefs and Motion on Appeal dated 8 March 2004, Rule 5

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case,

BEING SEISED OF the "Prisoner Hassan Ngeze Motion for Requesting (sic) to Revise the Recent Decision on Ngeze (sic) Motion for Extension of Pages Limits Under Exceptional Circumstances, Pursuant to Rules (5) of the Practice Direction of the Length of Briefs and Motion on Appeal" dated 8 March 2004 and filed by the Appellant Ngeze on 9 March 2004 ("Motion"), in which the Appellant Ngeze seeks to justify an extension of the page limit for his Appellant's Brief to 200 pages on the grounds that he will be filing a "supplementary Notice of Appeal" and a "supplementary Appeal Brief";

NOTING that paragraph 1 (a) of the Practice Direction on the Length of Briefs and Motions on Appeal dated 16 September 2002 ("Practice Direction") provides that "the brief of an appellant on appeal from a final judgement of a Trial Chamber will not exceed 100 pages or 30,000 words, whichever is greater" and that paragraph 5 of the Practice Direction requires a party seeking an extension of the page limit to "provide an explanation of the exceptional circumstances that necessitate the oversized filing";

RECALLING the "Decision on Ngeze's Motion for an Extension of Page Limits for Appeals Brief" of 2 March 2004, in which the Pre-Appeal Judge denied Counsel for Ngeze's request for an identical extension of the page limits for the Appellant's Brief;

RECALLING the "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order" of 2 March 2004, in which the Pre-Appeal Judge held that each Appellant is only entitled to a single Notice of Appeal and a single Appellant's Brief;

FINDING that the Appellant Ngeze has not shown exceptional circumstances that necessitate the requested oversized filing and that, having considered the Appellant's arguments, there is no reason to reconsider these previous decisions;

DISMISS the Motion in its entirety;

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

Dated this 11th day of March 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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Decision ton the Jerome Bicamumpaka and Prosper Mugiraneza urgent Motion for Disclosure of Closed Session Testimony and Exhibits for Witness LAG 15 March 2004 (ICTR-99-52-T)

(Original : English)

Trial Chamber I

Judge : Erik Møse

Bicamumpaka, Mugiraneza – closed session testimony, exhibits under seal, disclosure – witness protection, any party or person is bound by the witness protection orders – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana et al., *Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003 (ICTR-99-52-T,* Reports 2003, *p. 371) – Trial chamber,* The Prosecutor v. Eliézer Niyitegeka, *Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 June 2003 (ICTR-96-14) – Trial Chamber II,* The Prosecutor v. Juvénal Kajelijeli, *Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 7 October 2003 (ICTR-98-44A-T,* Reports 2003, *p. 1730) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF, 11 November 2003 (ICTR-98-41-T,* Reports 2003, *p. 209) – Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka, *Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-14,* Reports 2004, *p. X) – Trial Chamber,* The Prosecutor v. Ntakirutimana, *Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-10; ICTR-96-17,* Reports 2004, *p. X) – Trial Chamber,* The Prosecutor v. Alfred Musema, *Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al., 18 February 2004 (ICTR-96-13,* Recueil 2004, *p. X)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

Décision relative à la requête urgente de Jérôme Bicamumpaka et Prosper Mugiraneza en communication de la disposition faite à huis clospar le témoin LAG et des pièces à conviction relatives à ce témoin 15 mars 2004 (ICTR-99-52-T)

(Original : Anglais)

Chambre de première instance I

Juge : Erik Mose

Bicamumpaka, Mugiraneza – déposition à huit clos, pièces à conviction sous scellés, communication – protection des témoins, engagement par la partie qui se voit transmettre les pièces de respecter les mesures de protection – requête accorée

Instrument international cité : Règlement de procédure et de preuve, art. 73

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Ferdinand Nahimana et consorts*, Decision on Joseph Nzirorera's Motion for Disclosure Closed Session Testimony and Exhibits Received under Seal, 5 juin 2003 (ICTR-99-52-T,* Recueil 2003*, p. 371) – Chambre de première instance,* Le Procureur c. Eliézer Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 juin 2003 (ICTR-96-14) – Chambre de première instance II,* Le Procureur c. Juvénal Kajelijeli*, Décision relative à la requête de Nzirorera en communication de dépositions faites à huis clos et de pièces à conviction déposées sous scellés, 7 octobre 2003 (ICTR-98-44A-T,* Recueil 2003*, p. 1731) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts*, Decision on Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF, 11 novembre 2003 (ICTR-98-41-T,* Recueil 2003*, p. 209) – Chambre de première instance,* Le Procureur c. Eliézer Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al., 17 février 2004 (ICTR-96-14,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procureur c. Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al., 17 février 2004 (ICTR-96-10; ICTR-96-17,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procureur c. Alfred Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al., 18 février 2004 (ICTR-96-13,* Recueil 2004*, p. X)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIEGEANT en la Chambre de première instance I, composée du juge Erik Mose, désigné en vertu de l'article 73 du Règlement de procédure et de preuve du Tribunal (le «Règlement»),

BEING SEIZED of the "Jérôme Bicamumpaka and Prosper Mugiraneza Urgent Motion for Disclosure of Closed Session Testimony and Exhibits for Witness LAG", filed on 8 March 2004;

CONSIDERING the "Prosecutor's Response", filed on 10 March 2004;

HEREBY DECIDES the motion.

SUBMISSIONS

1. The Defence for the Accused, Jérôme Bicamumpaka and Prosper Mugiraneza, in the case of *Prosecutor v. Bizimungu et al*., being heard before Trial Chamber II, request disclosure of transcripts of closed session testimony and access to exhibits under seal of a protected witness, Witness LAG, who appeared at the trial of *Prosecutor v. Nahimana et al*. The Defence submit that they need the material in order to effectively cross-examine that witness when he appears as Prosecution Witness GTA in the trial of *Bizimungu et al*. The Defence also request access to the judicial records of Witness LAG obtained by the Prosecution in *Nahimana et al*.

2. The Prosecution has no objections to the motion save to urge the compliance of Defence with the protective measures ordered in respect of its Prosecution witnesses in *Nahimana et al*., including Witness LAG. However, the Prosecution notes that the Accused, Bicamumpaka and Mugiraneza, were not mentioned by Witness LAG in closed session or sealed exhibits. Regarding the judicial records, the Prosecution submits that these were never obtained from the Rwandan Government.

DELIBERATIONS

3. The Defence's references, in the motion, to another pseudonym, AHI, are erroneous, as Witnesses LAG and AHI were two different witnesses who appeared in the trial of *Nahimana et al*. It is Witness LAG who testified on 30 August and 3 and 4 September 2001, and whose judicial records were requested by the Defence in *Nahimana et al*.

4. The motion was filed on 8 March 2004 and the response was filed on 10 March 2004. In between the filing of these documents, the witness testified, on 9 and 10 March 2004, as Prosecution Witness GTA in *Bizimungu et al*. Although the Defence submit that the transcripts and exhibits are sought for cross-examination purposes, neither Counsel for the two Accused made reference to this motion during his testimony, and both proceeded to cross-examine the witness without requesting the transcripts or exhibits. The Defence have informed the Chamber orally that nonetheless they maintain their request. It is noted that the Defence did not, in the motion,

SAISI de la requête urgente de Jérôme Bicamumpaka et Prosper Mugiraneza en communication de la déposition faite à huis dos par le témoin LAG et des pièces à conviction relatives à ce témoin; intitulée *Jérôme Bicamumpaka and Prosper Mugiraneza Urgent Motion for Disclosure of Closed Session Testimony and Exhibits for Witness LAG* et déposée le 8 mars 2004,

VU la réponse du Procureur déposée le 10 mars 2004,

STATUE A PRESENT sur la requête.

CONCLUSIONS DES PARTIES

1. La défense de Jérôme Bicamumpaka et Prosper Mugiraneza en l'affaire *Le Procureur c. Bizimungu et consorts* devant la Chambre de première instance II demande que lui soient communiqués les comptes rendus de la déposition d'un témoin protégé recueillie à huis clos et les pièces à conviction sous scellés relatives à ce témoin. Il s'agit en l'occurrence du témoin LAG entendu dans l'affaire *Le Procureur c. Nahimana et consorts*. Les conseils de la défense font valoir que les pièces demandées leur sont : nécessaires pour mener à bien le contre-interrogatoire de ce témoin dans le cadre de sa comparution à charge, sous le pseudonyme «GTA», au procès de *Bizimungu et consorts*. Les conseils sollicitent également l'accès au dossier judiciaire du témoin, obtenu par le Procureur dans l'affaire *Nahimana et consorts*.

2. Le Procureur ne s'oppose pas à la requête, sauf à insister sur la nécessité pour la défense de se conformer aux mesures de protection des témoins à charge, notamment du témoin LAG, prescrites dans l'affaire *Nahimana et consorts*. Le Procureur note cependant que les accusés Bicamumpaka et Mugiraneza ne sont mentionnés ni dans la déposition faite à huis clos par le témoin LAG, ni dans les pièces à conviction sous scellés relatives à ce témoin. Quant au dossier judiciaire, le Procureur déclare ne pas l'avoir obtenu auprès du gouvernement rwandais.

DÉLIBÉRATION

3 La défense fait erreur, dans sa requête, en associant également le témoin en question au pseudonyme «AHI». Les témoins LAG et AHI sont deux témoins différents cités dans l'affaire *Nahimana et consorts*; c'est le témoin LAG qui a comparu le 30 août et les 3 et 4 septembre 2001 et dont le dossier judiciaire a été demandé par la défense dans l'affaire *Nahimana et consorts*.

4. La requête a été déposée le 8 mars 2004 et la réponse le 10 mars 2004. Le témoin a fait sa déposition dans l'affaire *Bizimungu et consorts*, en tant que témoin à charge GTA, dans l'intervalle séparant le dépôt de ces deux écritures, soit les 9 et 10 mars 2004. La défense fait valoir que les comptes rendus et les pièces à conviction sont demandés aux fins du contre-interrogatoire de ce témoin. Or, ni l'un ni l'autre des conseils des deux accusés concernés n'a mentionné la présente requête lors de la déposition du témoin GTA, et tous deux ont contre-interrogé celui-ci sans avoir demandé les comptes rendus ou les pièces en question. Ils ont informé la Chambre oralement qu'ils maintenaient malgré tout leur demande. La Chambre note que la

state their willingness to be bound by the protective measures order in *Nahimana et al*.

5. The relief requested requires modification of the *Nahimana* witness protection orders dated 23 November 1999 and 2 July 2001, to permit disclosure of the confidential material. The Trial Chamber has ongoing authority to review and modify its own decisions where appropriate. The Chamber notes that the Prosecution does not object and considers that the material requested is relevant to raising credibility issues in respect of the witness[1]. Although the Defence have not stated that they agree to be bound by the terms of the witness protection orders, the Chamber decides that any Defence team which expressly undertakes in writing filed with the Registry, on behalf of itself and the Accused represented, to be bound by the *Nahimana* witness protection orders, shall be given the protected material of Witness LAG.

6. The timing of that disclosure is to be determined by the Trial Chamber seized of the case. Upon receipt of the written undertaking described above, the Chamber authorizes the Registry to transmit the closed session transcripts of Witness LAG's testimony, and the sealed exhibits tendered during his testimony, to Trial Chamber II, for release to the Defence as it deems appropriate.

FOR THE ABOVE REASONS, THE CHAMBER

DECIDES that the transcripts of the closed session trial testimony of Witness LAG in *Nahimana et al*., and exhibits filed under seal therewith, shall be made available to any Defence team in the case of *Bizimungu et al.* which undertakes in writing filed with the Registry, on behalf of itself and the Accused represented, to be bound by the witness protection orders of 23 November 1999 and 2 July 2001;

ORDERS that any person or party in receipt of such closed session testimony and exhibits filed under seal therewith shall be bound *mutatis mutandis* by the witness protection orders of 23 November 1999 and 2 July 2001;

[1] *Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 7 October 2003; *Bagosora et al*., Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al. (TC), 18 February 2004.

défense n'a pas indiqué dans sa requête qu'elle entendait s'astreindre aux mesures de protection de témoins prescrites dans l'affaire *Nahimana et consorts*.

5. La communication des pièces confidentielles demandées par la défense suppose que soient modifiées les décisions du 23 novembre 1999 et 2 juillet 2001 portant protection de témoins dans l'affaire *Nahimana et consorts*. La Chambre de première instance reste habilitée à réexaminer et à modifier, le cas échéant, ses propres décisions. La Chambre relève que le Procureur ne s'oppose pas à la demande de la défense et qu'il estime les pièces demandées pertinentes aux questions relatives à la crédibilité du témoin[1]. Bien que la défense n'ait pas indiqué qu'elle acceptait d'être liée par les décisions susmentionnées, la Chambre décide que toute équipe de défense qui s'engage expressément, en son nom et celui de l'accusé qu'elle représente, par un écrit déposé auprès du Greffe, à se conformer aux mesures de protection de témoins prescrites dans l'affaire *Nahimana et consorts*, pourra se voir remettre les pièces confidentielles relatives au témoin LAG.

6 Il appartient à la Chambre de première instance saisie de l'affaire de décider du moment de cette communication. Une fois qu'elle aura reçu l'engagement écrit susvisé, la Chambre autorisera le Greffe a transmettre à la Chambre de première instance II les comptes rendus de la déposition faite à huis clos par le témoin LAG et les pièces à conviction sous scellés produites lors de ladite déposition, à charge pour la Chambre de première instance II de les transmettre à la défense comme elle le juge oppotun.

PAR CES MOTIFS, LA CHAMBRE

DECIDE que les comptes rendus de la déposition faite à huis clos par le témoin LAG dans l'affaire *Nahimana et consorts*, de même que les pièces à conviction déposées sous scellés relativement à cette déposition, seront mis à la disposition de toute équipe de défense dans l'affaire *Bizimungu et consorts* qui s'engage, en son nom et en celui de l'accusé qu'elle représente, par un écrit déposé auprès du Greffe, à se conformer aux mesures de protection de témoins prescrites par les décisions des 23 novembre 1999 et 2 juillet 2001;

ORDONNE que toute personne ou partie qui entre en possession de ladite déposition recueillie à huis clos et des pièces à conviction sous scellés y relatives soit liée *mutatis mutandis* par les décisions portant protection de témoins rendues les 23 novembre 1999 et 2 juillet 2001;

[1] *Nahimana et consorts*, *Decision on Joseph Nzirorera's Motion for Disclosure Closed Session Testimony and Exhibits Received under Seal* (Chambre de première instance), 5 juin 2003; *Niyitegeka*, *Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ* (Chambre de première instance), 23 juin 2003; *Kajelijeli*, Décision relative à la requête de Nzirorera en communication de dépositions faites à huis clos et de pièces à conviction déposées sous secllés (Chambre de premiere instance), 7 octobre 2003; *Bagosora et consorts*, *Decision on Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF* (Chambre de premiere instance), 11 novembre 2003; *Niyitegeka*, *Decision on Release of Closed Session Transcript of Witness K J for Use in the Trial of* Bagosora et al. (Chambre de premiere instance), 17 février 2004 *Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of *Bagosora et al.* (Chambre de première instance), 17 février 2004 *Musema*, *Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of* Bagosora et al. (Chambre de premiere instance), 18 février 2004.

ORDERS the Registry to carry out the terms of this Decision, and to otherwise continue to enforce the terms of the witness protection orders of 23 November 1999 and 2 July 2001.

Arusha, 15 March 2004

[Signed] : Erik Møse

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INVITE le Greffe à mettre en œuvre le dispositif de la présente décision et à continuer de veiller, par ailleurs, au respect des mesures de protection de témoins prescrites les 23 novembre 1999 et 2 juillet 2001.

Arusha, le 15 mars 2004

[Signé] : Erik Mose

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Decision on Disclosure of Closed Session Testimony and Sealed Exhibits of Witness X 22 March 2004 (ICTR-99-52-T)

(Original : English)

Trial Chamber I

Judge : Erik Møse

Closed session testimony, exhibits under seal, disclosure – witness protection – authority of the Trial Chamber to review and modify its own decisions – the party to whom the material is disclosed is bound by the witness protection orders

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana et al., *Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003 (ICTR-99-52-T,* Reports 2003*, p. 371) – Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 June 2003 (ICTR-96-14) – Trial Chamber II,* The Prosecutor v. Juvénal Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 7 October 2003 (ICTR-98-44A-T,* Reports 2003*, p. 1730) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF, 11 November 2003 (ICTR-98-41-T,* Reports 2003*, p. 209) – Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-14,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-10; ICTR-96-17,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Alfred Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al., 18 February 2004 (ICTR-96-13,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF the "Prosecutor's Motion Seeking an Order for the "Disclosure of Sealed Excerpts (Closed Session) Transcripts and Exhibits Received Under Seal for Prosecution Witness X", filed on 17 March 2004;

HEREBY DECIDES the motion.

1. The Prosecution in the case of *Prosecutor v. Bagosora et al*. requests disclosure of transcripts of closed session testimony of protected Witness X who appeared at the trial of *Prosecutor v. Nahimana et al*. The references in the motion to Trial Chamber II are erroneous as both are Trial Chamber I cases. Witness X is scheduled to testify

as a Prosecution witness in the trial of *Bagosora et al*. The Prosecution seeks the disclosure of the material to the Defence, so as to facilitate the process of disclosure and expedite the appearance of the witness. The Defence in both *Bagosora* and *Nahimana* have not responded to the motion, which has been brought by the Prosecution in respect of one of its own witnesses, and for the benefit of the Defence in *Bagosora et al*.

2. The relief requested requires modification of the *Nahimana* witness protection decision of 14 September 2001, relating to Witness X, in order to permit disclosure of the information to the Defence. The Trial Chamber has ongoing authority to review and modify its own decisions where appropriate. The Defence has a legitimate need for the protected material, which may be relevant to the witness's credibility. The Chamber follows past decisions in finding that the protected material requested may be disclosed, provided that the party to whom it is to be disclosed agrees to be bound by the terms of the witness protection decision[1]. Any Defence team in *Bagosora et al*. which expressly undertakes in writing filed with the Registry, on behalf of itself and the Accused represented, to be bound by the *Nahimana* witness protection order shall be given the protected material of Witness X.

3. Upon receipt of the written undertaking described above, the Chamber authorizes the Registry to transmit the closed session transcripts of Witness X's testimony, and any exhibits filed under seal therewith, to the Defence in *Bagosora et al*.

FOR THE ABOVE REASONS, THE CHAMBER

DECIDES that the transcripts of the closed session trial testimony of Witness X in *Nahimana et al*., and exhibits filed under seal therewith, shall be made available to any Defence team in the case of *Bagosora et al.* which undertakes in writing filed with the Registry, on behalf of itself and the Accused represented, to be bound by the witness protection decision of 14 September 2001;

ORDERS that any person or party in receipt of such closed session testimony and exhibits filed under seal therewith shall be bound *mutatis mutandis* by the witness protection decision of 14 September 2001;

ORDERS the Registry to carry out the terms of this Decision, and otherwise to continue to enforce the terms of the witness protection decision of 14 September 2001.

Arusha, 22 March 2004

[Signed] : Erik Møse

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[1] *Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 7 October 2003; *Bagosora et al*., Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al. (TC), 18 February 2004.

Order Concerning Multiple Notices of Appeal 3 May 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

Notice of appeal, multiple – motion for annulment

International instrument cited : Rules of procedure and evidence, Rule 108

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case,

RECALLING the "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order" of 2 March 2004 in which the Pre-Appeal Judge held :

(1) That each Appellant is only entitled to a single Notice of Appeal and a single Appellant's Brief;

(2) That the "Notification de la demande d'annulation du jugement" filed 3 February 2004 by Appellant Jean-Bosco Barayagwiza ("Motion for Annulment" and "Appellant", respectively), would be treated as the Appellant's Notice of Appeal pursuant to Rule 108 of the Rules of Procedure and Evidence ("Rules");

(3) That the Appellant may amend his Motion for Annulment no later than thirty days from the communication of the Judgement in the French language;

HAVING RECEIVED the "Notice d'appel" filed 22 April 2004 by Counsel Caldarera, assigned counsel to the Appellant, and the "Acte d'appel modifié" filed 27 April 2004 by the Appellant personally, both of which purport to replace the Motion for Annulment;

FINDING that the Appellant, who is represented by Counsel Caldarera, is only entitled to a single Notice of Appeal and that therefore the Appellant must clearly indicate to the Appeals Chamber which document he intends to rely on as his Notice of Appeal pursuant to Rule 108 of the Rules;

Ordonnance relative aux actes d'appel multiples 3 mai 2004 (ICTR-99-52-A)

(Original : Anglais)

Juge de mise en Etat

Juge : Weinberg de Roca

Acte d'appel, multiples – demande d'annulation de jugement

Instruments internationaux cités : Règlement de procédure et de preuve, art. 108

NOUS, Inés Mónica Weinberg de Roca, juge de la mise en état en appel dans la présente affaire[1],

RAPPELANT la *Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order* du 2 mars 2004 dans laquelle la juge de la mise en état en appel avait décidé que :

1) Chaque appelant n'a droit de présenter qu'un seul acte d'appel et un seul mémoire d'appelant;

2) La notification de la demande d'annulation du jugement[2], déposée le 3 février 2004 par l'appelant Jean-Bosco Barayagwiza (la «demande d'annulation» et «l'appelant», respectivement), serait considérée comme étant l'acte d'appel de l'appelant aux fins de l'article 108 du Règlement de procédure et de preuve (le «Règlement»);

3) L'appelant peut, dans les trente jours suivant la communication de la version française du jugement, modifier sa demande d'annulation[3];

AYANT RECU la notice d'appel déposée le 22 avril 2004 par M[e] Caldarera, le conseil commis d'office à la défense de l'appelant, et l'acte d'appel modifié déposé le 27 avril 2004 par l'appelant lui-même, toutes deux écritures censées remplacer la demande d'annulation;

DÉCLARANT que l'appelant, qui est représenté par M[e] Caldarera, n'a droit qu'à un seul acte d'appel et que, dès lors, il doit indiquer clairement à la Chambre d'appel le document qu'il considère être son acte d'appel et sur lequel il entend s'appuyer aux fins de l'article 108 du Règlement;

[1] *Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge*, 19 December 2003.

[2] *Notification de la demande d'annulation du Jugement rendu le 3 décembre 2003 par la Chambre I dans l'affaire 'Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze*, ICTR-99-52-T', 3 février 2004.

[3] La version française du jugement a été communiquée à l'appelant le 7 avril 2004.

HEREBY

ORDER the Appellant to indicate to the Appeals Chamber, not later than 10 May 2004, which document he intends to rely on as his Notice of Appeal;

DECLARE that if no notification is received by 10 May 2004, then the Motion for Annulment dated 3 February 2004 shall be the Notice of Appeal pursuant to Rule 108 of the Rules.

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

Dated this 3rd day of May 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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PAR LA PRÉSENTE :

ORDONNONS à l'appelant d'indiquer à la Chambre d'appel, au plus tard le 10 mai 2004, le document qu'il considère être son acte d'appel et sur lequel il entend s'appuyer comme tel ;

DÉCLARONS que si à l'échéance du 10 mai 2004 la notification n'est pas reçue, la demande d'annulation datée du 3 février 2004 sera considérée comme étant l'acte d'appel aux fins de l'article 108 du Règlement.

FAIT en français et en anglais, le texte anglais faisant foi.

FAIT à La Haye (Pays-Bas), le 3 mai 2004

[Signé] : Inés Mónica Weinberg de Roca

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Order Concerning Ngeze's Motion 5 May 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

Ngeze – new evidence – appellant's brief, extension of time – wording unclear and ambiguous – motion denied

International instruments cited : Rules of procedure and evidence, Rule 115 – Practice Direction on Formal Requirement for Appeals from Judgement dated 16 September 2002, paragraphs 7, 9, 10 and 19

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

HAVING RECEIVED a document entitled "Appellant Hassan Ngeze urgent letter to the Appeal Chamber requesting the rescheduling time of appeal brief, until I get a new counsel, under exception circumstances and good reason" filed 4 May 2004 ("Motion") by Appellant Hassan Ngeze ("Appellant") personally, in which he requests the admission of new evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules") and an extension of time for filing his Appellant's Brief;

FINDING that the Motion does not conform to the Practice Direction on Formal Requirement for Appeals from Judgement dated 16 September 2002 ("Practice Direction") and, in particular, fails to comply with the requirements of paragraph 7 of the Practice Direction relating to the filing of additional evidence on appeal and paragraphs 9 and 10 of the Practice Direction relating to general requirements for all filings;

FINDING, moreover, that the wording of the Motion is unclear and ambiguous and that the relief requested in the Motion should properly be addressed by way of two separate motions, one requesting the admission of additional evidence and the other requesting an extension of time for filing his Appellant's Brief;

HEREBY, pursuant to paragraph 19 of the Practice Direction,

REJECT the Motion as currently filed without prejudice to the Appellant's right to re-file in accordance with the Rules and the Practice Direction.

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

Dated this 5th day of May 2004, 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.

Order Concerning Ngeze's Amended Notice of Appeal 5 May 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

Ngeze – notice of appeal – appellant's brief – single document – evidence

International instruments cited : Rules of procedure and evidence, Rules 108, 115 – Practice Direction on Formal Requirement for Appeals from Judgement dated 16 September 2002

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case,

RECALLING the "Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order" of 2 March 2004 in which the Pre-Appeal Judge held :

(1) That each Appellant is only entitled to a single Notice of Appeal and a single Appellant's Brief;

(2) That, because good cause had been shown, Appellant Ngeze ("Appellant") could amend the Notice of Appeal filed by his counsel on 9 February 2004 at any time prior to thirty days from the communication of the Judgement in the French language;

HAVING RECEIVED a package of documents filed by the Appellant on 30 April 2004, which includes :

(A) A document entitled "Prisoner Hassan Ngeze 1st amendment of appeal notice pursuant to Rule 108 of the Rules of Procedure and Evidence";

(B) A copy of the "Defence Notice of Appeal" dated 9 February 2004;

(C) A copy of correspondence from the Appellant to the Registrar of the International Tribunal requesting transmission of the Appellant's condolences to the Rwandan authorities;

(D) A copy of an internet article entitled "Kagamé : 'Pourquoi la France n'examine pas ses propres responsabilités'" dated 16 March 2004;

(E) A video cassette of the Belgian Minister of Foreign Affairs dated 26 April 2004;

FINDING that by filing his Notice of Appeal in two separate documents (Documents A and B) the Appellant has failed to clearly indicate which single Notice of Appeal he intends to rely on as his Notice of Appeal pursuant to Rule 108 of the Rules of Procedure and Evidence ("Rules");

FINDING, moreover, that Document A fails to adhere to the requirements set out in the Practice Direction on Formal Requirement for Appeals from Judgement dated 16 September 2002 ("Practice Direction");

FINDING that Documents C and D and video cassette E are not in evidence in this case and will not be considered for admission by the Appeals Chamber unless

submitted as additional evidence on appeal pursuant to Rule 115 of the Rules and the Practice Direction;

HEREBY

ORDER the Appellant to indicate to the Appeals Chamber, not later than 12 May 2004, which single document he intends to rely on as his Notice of Appeal;

ORDER that if the Appellant wishes to combine the arguments contained in Documents A and B, then this combined Notice of Appeal must be filed not later than 12 May 2004 and must be presented as a single document which complies with the Rules and the Practice Direction;

ORDER that if the Appellant elects to rely on Document A as his Notice of Appeal, then it must be re-filed in strict compliance with the Rules and Practice Direction not later than 12 May 2004;

DECLARE that if no notification or re-filing is received by 12 May 2004, then the Notice of Appeal filed on 9 February 2004 shall be the Notice of Appeal pursuant to Rule 108 of the Rules.

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

Dated this 5th day of May 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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Decision on Disclosure of Transcripts and Exhibits of Witness EB 6 May 2004 (ICTR-99-52-T)

(Original : Not specified)

Trial Chamber I

Judge : Erik Møse

Nsengiyumva – closed session testimony – sealed exhibits – open session testimony, public – disclosure – authority of the Trial chamber to review and modify its own decisions – the party to whom material is disclosed is bound by the witness protection orders – request granted

International instruments cited : Rules of procedure and evidence, art. 73

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana et al., *Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003 (ICTR-99-52-T,* Reports 2003*, p. 371) – Trial*

chamber, The Prosecutor v. Eliézer Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 June 2003 (ICTR-96-14) – Trial Chamber II,* The Prosecutor v. Juvénal Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 7 October 2003 (ICTR-98-44A-T,* Reports 2003*, p. 1730) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF, 11 November 2003 (ICTR-98-41-T,* Reports 2003*, p. 209) – Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-14,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-10; ICTR-96-17,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Alfred Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al., 18 February 2004 (ICTR-96-13,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF the "Motion by the Defence for Nsengiyumva for Closed Session Transcripts, Open Session Transcripts and Exhibits Tendered During the Testimony of Prosecution Witness EB", filed on 6 April 2004;

HEREBY DECIDES the motion.

1. The Defence for Nsengiyumva in the case of *Prosecutor v. Bagosora et al*. requests disclosure of transcripts of open and closed session testimony and exhibits tendered during the testimony of protected Witness EB who appeared at the trial of *Prosecutor v. Nahimana et al*. Open session transcripts and exhibits not under seal are public documents which the Defence is able to obtain without court order. Therefore, the Chamber will only address the part of the request relating to closed session transcripts and sealed exhibits. The Defence seeks the disclosure of the material to discredit Witness OQ who testified in *Bagosora*. The Defence for Nsengiyumva agrees to abide by the protective measures orders applicable to Witness EB.

2. The relief requested requires modification of the *Nahimana* witness protection orders of 23 November 1999 and 2 July 2001, in order to permit disclosure of the requested material to the Defence. The Trial Chamber has ongoing authority to review and modify its own decisions where appropriate. The Defence has a legitimate need for the protected material, which may be relevant to Witness OQ's credibility. The Chamber follows past decisions in finding that the protected material requested may be disclosed, provided that the party to whom it is to be disclosed agrees to be bound by the terms of the witness protection order[1].

[1] *Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003;

3. Upon receipt of the written undertaking described above, the Chamber authorizes the Registry to transmit the closed session transcripts of Witness EB's testimony, and any exhibits filed under seal therewith, to the Defence for Nsengiyumva in *Bagosora et al*.

FOR THE ABOVE REASONS, THE CHAMBER

DECIDES that the transcripts of the closed session trial testimony of Witness EB in *Nahimana et al*., and exhibits filed under seal therewith, shall be made available to the Defence for Nsengiyumva in the case of *Bagosora et al.* which will file a written undertaking with the Registry, on behalf of itself and the Accused Nsengiyumva, to be bound by the witness protection orders of 23 November 1999 and 2 July 2001;

ORDERS that any person or party in receipt of such closed session testimony and exhibits filed under seal therewith shall be bound *mutatis mutandis* by the witness protection orders of 23 November 1999 and 2 July 2001;

ORDERS the Registry to carry out the terms of this Decision, and otherwise to continue to enforce the terms of the witness protection orders of 23 November 1999 and 2 July 2001.

Arusha, 6 May 2004

[Signed] : Erik Møse

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Decision on Jean Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance 19 May 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

Kajelijeli, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 7 October 2003; *Bagosora et al*., Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al. (TC), 17 February 2004; *Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al. (TC), 18 February 2004.

Barayagwiza – legal assistance – illegal appointment of a counsel – withdrawal of counsel – fairness and efficiency of the proceedings – dependant request – motion denied

International instruments cited : Tribunal's Directive on Assignment of Defence Counsel, Article 19 (A) and (E)

International cases cited :

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Vidoje Blagojević*, Public and redacted reasons for decision on appeal by Vidoje Blagojević to replace his defence team, 7 November 2003 (IT-02-60-AR73.4)*

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 "Very Urgent Motion to Appeal Refusal of Request for Legal Assistance" filed by Jean-Bosco Barayagwiza ("Appellant") on 24 March 2004 ("Motion"), in which the Appellant seeks *inter alia* (i) assignment of counsel and a defence team to assist the Appellant with the preparation of his appeal; and (ii) access to special facilities in order to prepare his appeal;

NOTING "*La réponse du Greffe au recours très urgent contre le refus d'assistance juridique déposé par l'accusé Jean Bosco Barayagwiza*" filed 8 April 2004, in which the Registrar argues *inter alia* that the Appellant has already been granted all of the necessary facilities required to prepare his case, including assigned counsel, and that another counsel cannot be assigned prior to the withdrawal of the current counsel;

NOTING the Appellant's "*Réplique à la réponse du Greffier concernant mon «Recours très urgent contre le refus d'assistance juridique datée du 24 mars 2004»*", filed on 16 April 2004;

NOTING the correspondence from the Appellant to the Registrar of 10 February 2004, 19 February 2004, 1 March 2004, 4 March 2004, and 16 March 2004 and the responses of the Registrar of 12 February 2004 and 17 March 2004;

CONSIDERING that the Appellant has not made an unambiguous formal request to the Registrar for the withdrawal of counsel Barletta Caldarera pursuant to Article 19 (A) of the Tribunal's Directive on Assignment of Defence Counsel ("Directive"), and that in his letter to the Appellant of 12 February 2004, the Registrar did not treat the Appellant's requests as arising under Article 19 (A) of the Directive;

CONSIDERING, however, that the Appellant has argued that the appointment of counsel Barletta Caldarera was against his wishes and illegal, has made repeated requests for legal assistance on appeal, has submitted his own Notice of Appeal replacing that filed by counsel Barletta Caldarera, has impugned the appointment of counsel and the quality of representation in his Notice of Appeal, and has consistently refused to work with counsel Barletta Caldarera on his appeal;

FINDING that, in the circumstances of this case, and in the interest of ensuring that proceedings on appeal advance in an efficient manner, the Appellant's conduct and submissions must be construed as a request for withdrawal of counsel pursuant to Article 19 (A) of the Directive, without prejudice to the Appellant's position that the appointment of counsel was illegal, and that such request requires a decision by the Registrar whether to withdraw and replace assigned counsel;

CONSIDERING that any decision by the Registrar to deny a request for withdrawal of assigned counsel may be reviewed by the President pursuant to Article 19 (E) of the Directive and not the Appeals Chamber;

FINDING that, in order to preserve the fairness and efficiency of the proceedings, it is necessary to stay the proceedings against Appellant Barayagwiza until a final decision has been reached on his request to withdraw assigned counsel Barletta Caldarera[1];

CONSIDERING that the Appellant's request for additional resources is subsidiary to, and dependent upon the outcome of, his request for withdrawal of counsel;

FOR THE FOREGOING REASONS,

1. HEREBY DISMISSES the Motion;

2. REMITS the request for withdrawal of assigned counsel Barletta Caldarera to the Registrar for a decision pursuant to Article 19 (A) of the Directive; and

3. STAYS the proceedings in relation to Appellant Barayagwiza until a final decision has been made concerning the Appellant's request to withdraw counsel Barletta Caldarera.

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

Dated this 19th day of May 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge

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Order Concerning Filings by Hassan Ngeze 24 May 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

[1] *Prosecutor v. Vidoje Blagojević*, ICTY Case No. IT-02-60-AR73.4, "Public and redacted reasons for decision on appeal by Vidoje Blagojević to replace his defence team", 7 November 2003, para. 7.

Ngeze – report, disclosure – unclear and ambiguous wording – notice of appeal, accordance with the Rules – counsel, representation

International instruments cited : Rules of procedure and evidence, Rule 108 – Practice Direction on Formal Requirement for Appeals from Judgement dated 16 September 2002

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza*, Order of the Presiding Judge Assigning Judges and Designating the Re-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134) – Appeals Chamber,* The Prosecutor v. Hassan Ngeze*, Order concerning Ngeze's amended notice of appeal, 5 May 2004 (ICTR-99-52-A,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Hassan Ngeze*, Decision on Ngeze's Motion for clarification of the Schedule and scheduling order, 2 March 2004 (ICTR-99-52-A,* Reports 2004*, p. X)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Miroslav Kvocka et al.*, Order on Zorn Zigic's motion to strike out portions of Prosecutor's response, 13 March 2003 (IT-98-3011-A) – Trial Chamber,* The Prosecutor v. Vojislav Seselj*, Decision on Motion for Disqualification, 10 June 2003 (IT-03-67-PT)*

I, Inés Monica Weinberg de Roca, Pre-Appeal Judge in this case[1],

1. COPIES OF CORRESPONDANCE

HAVING RECEIVED the following documents from Appellant Hassan Ngeze ("Appellant") :

1. Letter to Registrar Dieng dated 11 February 2004;
2. Letter to Mr. Preira dated 17 February 2004;
3. Letter to Counsel Floyd and Ms. Leblanc dated 23 Febmary 2004;
4. Letter to Counsel Floyd dated 1 March 2004, with attachments;
5. Letter to Mr. Fometé dated 4 March 2004, with attachments;
6. Letter to President Mose dated 12 March 2004, with attachments;
7. Letter to Ms. Talon dated 16 March 2004;
8. Letter to Counsel Floyd, undated, filed 19 March 2004, with attachments;
9. Letter to Mr. Preira dated 15 April2004, with attachment;
10. Letter to Counsel Floyd dated 20 April 2004, with attachments;
11. Letter to Mr. Preira dated 20 April2004;
12. Letter to Ms. Talon dated 27 April 2004;
13. Letter to Registrar Dieng dated 27 April 2004;

[1] "Order of the Presiding Judge Assigning Judges and Designating the Re-Appeal Judge" 19 December 2003.

14. Confidential letter to Ms. Talon dated 4 May 2004;

15. Confidential letter to Mr. Preira dated 5 May 2004, with attachments;

16. Confidential letter to Mr. Preira dated 6 May 2004;

17. Letter to Mr. Preira and Ms. Talon dated 10 May 2004, with attachment;

18. Letter to Ms. Talon dated 10 May 2004;

19. Letter to Counsel Floyd, Co-counsel Chadha, and Ms. Leblanc dated 13 May 2004, with attachments;

NOTING that although the Appellant has sent copies of the abovementioned documents to the Appeals Chamber, the Appeals Chamber is not seised of the matters raised therein;

FINDING that the practice of copying all correspondence to the Appeals Chamber, regardless of its relevance to any matter currently under appeal, is unnecessary and unduly complicates the proceedings;

2. Motions

HAVING RECEIVED a document entitled "The Appellant motion to compel the Registrar to disclose the report made by Jean Pele Fometé, with the UNDF report cited in *Media* Judgement paragraph 84 page 23, for the purpose of my appeal notice and brief" filed confidentially on 6 May 2004 by the Appellant personally ("Motion for Disclosure");

FINDING that the Motion for Disclosure does not conform to the Practice Direction on Formal Requirement for Appeals from Judgement dated 16 September 2002 ("Practice Direction") and that the wording of the Motion for Disclosure is unclear and ambiguous;

HAVING RECEIVED "Appellant Hassan extremely urgent memorandum requesting the Appeal Chamber to disregard and reject in totality what Counsel John Floyd Filed on 10th May 2004 which he called "Ngeze Counsel memorandum regarding the notice of appeal" filed 12 May 2004 by the Appellant personally ("Motion to Disregard");

FINDING that the Motion to Disregard does not conform to the Practice Direction and that the wording of the Motion to Disregard is unclear and ambiguous;

3. Notice of Appeal

HAVING RECEIVED "The Appellant Hassan Ngeze clarification of what will be his Notice of Appeal as per appeal order concerning Ngeze's amendment Notice of Appeal of May 5th 2004, Document (A) and (B) to be considered as a single notice of appeal" filed 10 May 2004, in which the Appellant seeks to re-file "Prisoner Hassan Ngeze 1st amendment of appeal notice pursuant to Rule 108 of the Rules of Procedure and Evidence" and the "Defence Notice of Appeal" dated 9 February 2004 together as his Notice of Appeal;

FINDING that the Appellant has. failed to re-file his Notice of Appeal in accordance with the Rules, Practice Direction, and Pre-Appeal decisions[2] and that, therefore, the Notice of Appeal filed on 9 February 2004 shall be the Notice of Appeal pursuant to Rule 108 of the Rules;

4. Future Filings

NOTING that the Appellant has been assigned Counsel Floyd and Co-counsel Chadha to represent him on appeal;

CONSDERING the repeated unnecessary filings of the Appellant, the duplication of filings from both the Appellant and his Counsel, the filing of contradictory motions on related matters by the Appellant and his Counsel, and the Appellant's repeated failure to adhere to the Rules and Practice Direction;

FINDS that all further submissions which the Appellant wishes to make to the Appeals Chamber should be made on his behalf by one of his Counsel, except for submissions relating uniquely to his representation by assigned Counsel, which should be filed with the Appeals Chamber only after the Appellant has sought relief from the Registrar and then review by the President[3].

ORDER the Registrar to serve this Order on the Appellant together with complete copies of all of the documents listed in section 1 above and the two motions listed in section 2 above;

REJECT the Motion for Disclosure and the Motion to Disregard as currently filed, without prejudice to the Appellant's right to re-file through Counsel in accordance with the Rules and the Practice Direction;

ORDER that the Notice of Appeal led by Counsel on 9 February 2004 should be the Notice of Appeal pursuant to Rule 108 of the Rules;

ORDER that Appellant Hassan Ngeze shall make all further submissions relating to his appeal through his Counsel;

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

Dated this 24th day of May 2004,

At The Hague, The Netherlands.

[Signed] : Inés Monica Weinberg de Roca

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[2] "Order concerning Ngeze's amended notice of appeal", 5 May 2004; "Decision on Ngeze's Motion for clarification of the Schedule and scheduling order", 2 Mach 2004.

[3] See, e.g. *Prosecutor v. Mirosiav Kvocka et al*., ICTY case n° IT-98-3011-A, Order on Zorn Zigic's motion to strike out portions of Prosecutor's response, 13 March 2003, p. 2; *Prosecutor v. Vojislav Seselj*, ICTY Case n° IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003, para 5.

Order Concerning Hassan Ngeze's Request to Join Co-Appellant's Motion 24 May 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

Ngeze, Barayagwiza – additional evidence – Bruguière Report – independent motion – motion dismissed

International instruments cited : Rules of procedure and evidence, Rule 115

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Hassan Ngeze*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134) – Appeals 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-A,* Reports 2004*, p. X)*

I, Inés Monica Weinberg de Roca, Pre-Appeal Judge in this case[1],

HAVING RECEIVED "Ngeze Defence's notice in support of the motion for aditional (sic) evidence tiled by defence counsel Caldaera" filed 12 May 2004 ("Motion to Adopt"), in which Counsel Floyd seeks to "adopt and conform" a.motion seeking to adduce additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rule 115") filed by Counsel Barletta-Caldarera[2], assigned counsel of Appellant Jean-Bosco Barayagwiza;

CONSlDERWG that the proceedings concerning Appellant Jean-Bosco Barayagwiza have been temporarily stayed until a final decision has been made concerning his request to withdraw assigned counsel[3];

CONSIDERING, moreover, that Counsel Barletta-Caldarera did not submit the Bruguière Report, a witness statement of Judge Bruguière, or any of the other documentation that he sought to have admitted as additional evidence on appeal to the Appeals Chamber for consideration pursuant to Rule 115;

[1] "Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge", 19 December 2003.

[2] *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.

[3] Decision on Jean-Bosco Barayagwiza's motion appealing refusal of request for legal assistance, 19 May 2004.

FINDING therefore that if Appellant Ngeze wishes to file a motion seeking to admit the Bruguière Report and/or related material as additional evidence on appeal, that Counsel for Ngeze should file an independent motion, accompanied by the additional evidence sought to be admitted;

HEREBY

DISMISS the Motion to Conform, without préjudice to the Appellant's right to refile this request as an independent motion pursuant to Rule 115.

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

Dated this 24th day of May 2004,

At The Hague, The Netherlands.

[Signed] : Inés Monica Weinberg de Roca

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Decision Denying Further Extension of Time 25 May 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inès Monica Weinberg de Roca, Pre-Appeal Judge

Ngeze, Nahimana – additional evidence, extension of time – notice of appeal, appellant's brief – good cause, dependent of the circumstances of the case – Appeals Chamber – Motion dismissed

International instruments cited : Statute, Art. 20 (4) (b) – Rules of procedure and evidence, Rules 108 bis (B), 111, 115 and 116 – Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings of 16 September 2002, paragraph 18

International cases cited : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza*, Order of the Presiding Judge Assigning Judges and Designating the Pre-AppeaI Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134) – Appeals Chamber,* The Prosecutor v. Jean de Dieu Karnuhanda*, Decision on Motion for Extension of Time for Filing of Notice of Appeal and Appellant' s Brief Pursuant to Rules 108, 111, 115 and 116 of the Rules of Procedure and Evidence, 8 March 2004 (ICTR-99-54A-A,* Reports 2004*, p. X)*

I, Inès Monica Weinberg de Roca, Pre-Appeal Judge in this case[1],

BEING SEISED OF the "Requête de la défense aux fins de report du délai de dépôt du mémoire de l'appelant et du délai de dépôt de la requête aux fins de présentation de moyens de preuve supplémentaires" filed 14 May 2004 and re-filed 18 May 2004 ("Nahimana's Motion"), in which Appellant Ferdinand Nahimana ("Appellant Nahimana") seeka a furtherand extension of file in which to file his Appellant's Brief and motion to present additionnal evidence and submits that good cause time has been shown on the basis of the extension of time granted to another appellant in a different case pending before the Appeals Chamber[2], Article 20 (4) (b) of the Statutet of the Tribunal and Rules 108 *bis* (B), and Rule 116 of the Rules of Procedure and Evidence ("Rules");

BEING SEISED OF "Ngeze Defence's Motion in support to the Nahimana's Motion dated 14 May 2004 requesting an extension of time to file the appeal brief and the motion to present additional evidence (pursuant to rules 111,115 and 116 of the Rules of procedure and Evidence", filed 21 May 2004 ("Ngeze's Counsel's Motion"), in which Counsel for Appellant Hassan Ngeze ("Appellant Ngeze") argues that if an extension of time is granted to Appellant Nahimana, then itwould be in the interest of justice to grant Appellant Ngeze the same extension of time;

HAVING ALSO RECEIVED a document entitled "Appellant Hassan Ngeze Motion to support counsel Bijou Dural Motion "*requête de la défense aux fins de report du délai de dépôt du mémoire de l'appelant et du delay (sic) de dépôt de la requête aux fins de présentation de moyens de preuve supplémentaires* filed 14th May 2004", filed 20 May 2004 ("Ngeze's Motion");

FINDING that Ngeze's Motion, which duplicates Ngeze's Counsel Motion, is unclear and fails to conform to the Practice Direction on Formal Requirement for Appeals from Judgement dated 16 September 2002;

CONSIDERING that paragraph 18 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings of 16 September 2002 provides that an extension of time may be disposed of without giving the other party the opportunity to respond to the motion;

NOTING the "Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and briefs" of 19 December 2003 ("19 December 2003 Decision") and the decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order" of 2 March 2004, which ordered each Appellant to file his Notice of Appeal no later than thirty days from the communication of the Judgement in the French language and to file his Appellant's Brief no later than seventy-five days from the communication of the Judgement in the French language;

CONSIDERING that the 19 December 2003 Decision took the linguistic skills of the lead counsel and Appellant Nahimana into account in granting an extension of

[1] "Order of the Presiding Judge Assigning Judges and Designating the Pre-AppeaI Judge", 19 December 2003.

[2] *Jean de Dieu Karnuhanda*, Case N° ICTR-99-54A-A, Decision on Motion for Extension of Time for Filing of Notice of Appeal and Appellant' s Brief Pursuant to Rules 108, 111, 115 and 116 of the Rules of Procedure and Evidence, 8 March 2004.

time for filing the Notice of Appeal and Appellant's Brief, but noted that preparatory work could begin even without the translation;

CONSIDERING that good cause depends on the circumstances of the case and cannot be demonstrated merely by showing that an extension of time was granted in a different case;

CONSIDERING, moreover, that, since the 19 December 2003 Decision, Anglophone co-counsel, Ms. Diana Ellis, has been assigned to represent Appellant Nahimana;

FINDING that Appellant Nahimana has not demonstrated good cause as required by Rule 116 of the Rules for a further extension of the time limit for the filing of his Appellant's Brief;

FINDING that the time for filing motions to present additional evidence before the Appeals Chamber expired seventy-five days after the date of the Judgement pursuant to Rule 115 (A) of the Rules and that Appellant Nahimana failed to request an extension of time prior to the expiration of this time limit;

FINDING that no good cause has been shown for further delay in relation to any particular motion to present additional evidence;

FINDING that since Ngeze's Counsel's Motion is premised on the success of Nahimana's motion, his request for an extension of time is also denied;

FOR THE FOREGOING REASONS,

DISMISS Nahimana's Motion;

DISMISS Ngeze's Counsel's Motion; and

DISMISS Ngeze's Motion.

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

Dated this 25th day of May 2004, at The Hague, The Netherlands.

[Signed] : Inès Monica Weinberg de Roca

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Decision on Disclosure of Transcripts and Exhibits of Witness X 3 June 2004 (ICTR-99-52-T)

(Original : English)

Trial Chamber I

Judges : Judge Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

Closed session testimony – exhibits under seal – disclosure – witness protection orders – amendement to the Rules enter into force immediately – party bound mutatis mutandis by the terms of the witness protection order in the first proceedings – no authorisation longer requested – motion denied

International instruments cited : Rules of procedure and evidence, Rules 6, 66 (A) (ii), 75

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003 (ICTR-99-52-T,* Reports 2004*, p. 371) – Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 June 2003 (ICTR-96-14) – Trial Chamber II,* The Prosecutor v. Juvénal Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 7 October 2003 (ICTR-98-44A-T,* Reports 2003*, p. 1730) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF, 11 November 2003 (ICTR-99-41-T,* Reports 2003*, p. 209) – Trial Chamber,* The Prosecutor v. Eliézer Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-14,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al., 17 February 2004 (ICTR-96-10; ICTR-96-17,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Alfred Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of Bagosora et al., 18 February 2004 (ICTR-96-13,* Reports 2004*, p. X)*

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 to Disclose Closed Session Testimony and Exhibits Received Under Seal for Prosecution Witness X to the Defence", filed on 24 May 2004;

HEREBY DECIDES the motion.

1. The Prosecution in the case of *Prosecutor v. Bizimungu et al*., being heard before Trial Chamber II, requests disclosure of closed session transcripts, and exhibits under seal, in the trial of *Prosecutor v. Nahimana et al*. of the testimony of a witness who is also expected to testify in the *Bizimungu* case. This disclosure is sought to permit the Prosecution in the *Bizimungu* case to fulfil its obligation under Rule 66 (A) (ii) to disclose prior statements of the witness to the Defence.

2. Rule 75 was amended during the plenary meeting of the Judges of the Tribunal on 23 and 24 April 2004. Following circulation of the written texts proposed at that meeting, amendments to the Rules were adopted by the Judges on 14 May 2004. The relevant parts of Rule 75 now read :

> (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 Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

…

(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).

…

(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.

In accordance with Rule 6, the amendments entered into force immediately upon adoption. Accordingly, the present motion is subject to this newly amended Rule 75.

3. Before the adoption of these amendments, motions for the disclosure of closed session testimony were frequently made by both the Defence and the Prosecution to the Chamber which had issued the applicable witness protection order. These requests were without exception granted. The decisions recognized the obligation of the Prosecution to disclose the prior statements; the legitimate need of the Defence for the prior statements; and the ongoing authority of the Chamber which had issued the witness protection order to modify its witness protection decisions as it considered appropriate[1]. Disclosure of the closed session testimony was always granted on condition that the Defence, on behalf of itself and the Accused, agreed to be bound by the terms of the witness protection order in the case in which the testimony was heard. Further, the timing of disclosure of such statements was to be determined in

[1] *Niyitegeka*, Decision on Release of Closed Session Transcript of Witness KJ for Use in the Trial of *Bagosora et al*. (TC), 17 February 2004; *Ntakirutimana*, Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of *Bagosora et al*. (TC), 17 February 2004; *Musema*, Decision on Release of Closed Session Transcript of Witness AB for Use in the Trial of *Bagosora et al*. (TC), 18 February 2004; *Bagosora et al*., Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Nahimana et al*., Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 7 October 2003.

accordance with the witness protection order applicable in the case in which the disclosure was requested.

4. Rule 75 (F) was intended to create a mechanism for the routine disclosure of closed session testimony, and obviate the need for individualized applications to the Chambers. Rather than requiring the prior consent of the Defence and the Accused in the second proceedings to be bound by the applicable witness protection order, Rule 75 (F) (i) dictates that the terms of the witness protection order in the first proceedings shall automatically apply *mutatis mutandis* to the parties in the second proceedings, unless modified. Rule 75 (F) (ii) prohibits the Prosecution from using the terms of a witness protection order in a prior case as an excuse for failing to comply with its disclosure obligations, and requires the Prosecution to notify the Defence of the nature of the protective measures in the first proceedings. Therefore, without any intervention of the Chamber, the Prosecution is required to disclose the prior closed session testimony and related exhibits of the witness in accordance with Rule 66 (A) (ii).

5. Rule 75 (F) is not conditional upon Rules 75 (C) or 75 (E). Rule 75 (C) requires the Registry to inform witnesses that their testimony may be disclosed in other proceedings in accordance with Rule 75 (F). Such a requirement ensures transparency between the Tribunal and the witnesses who appear before it. Failure to notify the witness of the effect of Rule 75 (F) cannot relieve the Prosecution of its obligation to disclose the testimony. The fact that the Prosecution and the Defence in the second proceeding are bound *mutatis mutandis* by the terms of the witness protection order in the first provides a sufficient safeguard of the non-disclosure of the witness's identity. Rule 75 (E) allows a Chamber "wherever appropriate" to state prospectively whether the transcript shall be made available in other proceedings. Rule 75 (F) is not expressly conditional upon such a provision. Such an interpretation would almost completely frustrate its purpose.

6. The present Prosecution request is for authorization to disclose closed session testimony and exhibits heard in the trial of *Nahimana et al*. to the Defence in the trial of *Bizimana et al*., in compliance with its obligations under Rule 66 (A) (ii). Such authorization is no longer required following the newly adopted Rule 75. The Prosecution is reminded of its obligation under Rule 75 (F) (ii) to inform the Defence of "the nature of the protective measures ordered in the first proceedings", by which the parties are automatically bound upon disclosure of the protected material.

FOR THE ABOVE REASONS, THE CHAMBER DECLARES that the motion is moot.

Arusha, 3 June 2004

[Signed] : Erik Møse, Presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

***

Order to Registrar
9 June 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Ngeze – counsel – withdrawal – authority of the co-counsel

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case,

HAVING received correspondence from Appellant Hassan Ngeze to Ms. Felicité Talon, Chief of the Court Management Section's Appeals Unit in Arusha, dated 28 May 2004, which requests her to "forward this request of clarification to the honorable Judge Weinberg de Roca, for necessary orders" ("Ngeze's Letter");

NOTING that Ngeze's Letter indicates that Appellant Ngeze feels unable to file motions through assigned lead counsel John Floyd because a request for his withdrawal is pending, and that he is unable to file motions through assigned co-counsel Bharhat Chadha because co-counsel lacks the requisite written authority from lead counsel;

RECALLING the "Order concerning filings by Hassan Ngeze" filed 24 May 2004 (24 May 2004 Order) which ordered that, in light of his repeated unnecessary, duplicative, and contradictory filings, and of his repeated failure to adhere to the Rules of Procedure and Evidence and the Practice Direction, Appellant Ngeze "shall make all further submissions relating to his appeal through his Counsel";

REMINDING Appellant Ngeze that the 24 May 2004 Order specifically indicated that the requirement of filing through counsel did not apply to "submissions relating uniquely to his representation by assigned Counsel, which should be filed with the Appeals Chamber only after the Appellant has sought relief from the Registrar and then review by the President";

NOTING that in correspondence dated 5 May 2004 from Mr. Didier Preira, OIC Defence Counsel and Detention Management Section, to counsel Floyd, Mr. Preira indicates that "Lead Counsel shall sign all the documents submitted to the Tribunal unless he authorizes Co-Counsel, in writing, to sign on his behalf";

CONSIDERING that the Pre-Appeal Judge could benefit from the Registrar's response to Ngeze's Letter, indicating the current status of Appellant Ngeze's request to withdraw lead counsel, explaining the reasons for the requirement that all filings must be signed by lead counsel, and outlining any steps taken by the Registry to facilitate the 24 May 2004 Order or to address the matters raised in Ngeze's Letter;

HEREBY

REQUESTS the Registrar to file a Response no later than 21 June 2004;

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

Dated this 9th day of June 2004, at The Hague, The Netherlands.

[Signé] : Inés Mónica Weinberg de Roca

***

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-A)

(Original : English)

Appeals Chamber

Juge : Weinberg de Roca

Nahimana – appellant's brief – extension of page limits – exceptional circumstances – compliance with the Practice Direction on Length of Briefs – time limit – motion denied

International instruments cited : Statute, art. 20 – Rules of procedure and evidence, Rule 112 – Practice Direction on the Length of Briefs and Motions on Appeal dated 16 September 2002, paragraphs 1, 5 and C.1.b

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Judgement and Sentence, 3 December 2003 (ICTR-99-52-T,* Reports 2003*, p. 376) – Appeals Chamber,* The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case,[1]

BEING SEISED of the "*Requête de la défense aux fins de modification des limites fixées pour le nombre de pages et de mots du mémoire de l'appelant*" filed on 10 June 2004 by Appellant Ferdinand Nahimana ("Appellant Nahimana's Motion"), which requests permission to file an appellant's brief of no more than two-hundred pages and no more than sixty thousand words *inter alia* on the basis of : (1) the Appellant's right to a fair and public hearing guaranteed in Article 20 of the Statute of the

[1] "Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge" 19 December 2003.

Tribunal; (2) the exceptional scope of the proceedings; (3) the exceptional size of the Trial Chamber's Judgement[2]; (4) the exceptional number of issues considered in the Judgement; (5) the exceptional practical and theoretical importance of the issues considered in the Judgement; (6) the exceptional severity of the conviction and sentence imposed by the Judgement;

CONSIDERING the "Prosecutor's Response" filed on 14 June 2004 in which the Prosecution opposes the relief sought in Appellant Nahimana's Motion because it was not made "in advance" as required by paragraph 5 of the Practice Direction on the Length of Briefs and Motions on Appeal dated 16 September 2002 ("Practice Direction on Length of Briefs") and because the Appellant has failed to demonstrate the necessity for a departure from the normal page limit;

BEING FURTHER SEISED of the "Prosecutor's urgent motion concerning defects in Ferdinand Nahimana's Appellant's Brief and for directions regarding the time limits applicable to the Respondent's Brief(s) in this joint appeal", filed 22 June 2004 ("Prosecution's Motion") in which the Prosecution requests : (1) that Appellant Nahimana be ordered to re-file his Appellant's Brief because it does not comply with the Practice Direction on Length of Briefs or the Practice Direction on Formal Requirements for Appeals From Judgement dated 16 September 2002 ("Practice Direction on Formal Requirements"); and (2) that the Prosecution be provided with clear guidance as to when the Respondent's Briefs or Consolidated Respondent's Brief are due in light of the delay in filing occasioned by the stay of proceedings relating to Appellant Jean-Bosco Barayagwiza;

CONSIDERING that Appellant Nahimana's Motion was filed prior to the deadline for filing the Appellant's Brief and therefore the Prosecution's argument that it was not filed "in advance" is without merit;

CONSIDERING that paragraph 1 (a) of the Practice Direction on Length of Briefs provides that "the brief of an appellant on appeal from a final judgement of a Trial Chamber will not exceed 100 pages or 30,000 words, whichever is greater" and that paragraph 5 of the Practice Direction on Length of Briefs requires a party seeking an extension of the page limit to "provide an explanation of the exceptional circumstances that necessitate the oversized filing";

CONSIDERING 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;

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, as pointed out in the Prosecution's Motion, Appellant Nahimana's "*Mémoire d'appel*" filed on 17 June 2004 fails to comply with the relevant Practice Directions in that :

[2] "Judgement and Sentence", 3 December 2003 ("Judgement").

(a) The grounds of appeal and arguments are not set out and numbered in the same order as in the Appellant's Notice of Appeal[3] as required by paragraph 4 of the Practice Direction on Formal Requirements;

(b) The paragraphs are not numbered consecutively from beginning to end as required by paragraph 10 of the Practice Direction on Formal Requirements;

(c) The line-spacing and formatting do not comply with the requirements in the Practice Direction on Length of Briefs;

NOTING that while a respondent's brief is ordinarily due within forty days of the filing of the appellant's brief pursuant to Rule 112 of the Rules of Procedure and Evidence ("Rules"), paragraph C.1.b of the Practice Direction on the Length of Briefs provides that if the Prosecution is filing a consolidated Respondent's Brief, then the time limit shall run from the filing date of the last appellant's brief;

FINDING that this schedule remains unaffected by any delays in filing the appellants' briefs;

HEREBY,

DISMISSES Appellant Nahimana's Motion;

ORDERS Appellant Nahimana to re-file his Appellant's Brief in strict compliance with the Rules and the Practice Directions no later than 9 July 2004; and

CLARIFIES that :

(a) If the Prosecution intends to file individual Respondent's Briefs in response to each of the three appeals, then each Respondent's Brief is due 40 days from the filing of the relevant Appellant's Brief; and

(b) If the Prosecution intends to file a single consolidated Respondent's Brief, then it is due 40 days from the filing of the last of the three appellant's briefs;

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

Dated this 24th day of June 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

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Decision on Ngeze's Motion for a Stay of Proceedings 4 August 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

Ngeze – grounds of appeal, appellant's brief, notice of appeal, variation – authorisation by the Appeals Chamber – good cause – appointment of new counsel – fair-

[3] "Acte d'appel" filed 4 May 2004.

ness and efficiency of the proceedings – stay of proceedings – motion granted in part

International instruments cited : Rules of procedure and evidence, Rule 108 – Practice Direction on Formal Requirements for Appeals From Judgement of 16 September 2002, paras. 2 and 3

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

BEING SEISED OF "Appellant Hassan Ngeze's motion for the amendment of the grounds of appeal and of the appeal brief as well request to arrest the further appeal proceedings pending the determination of this motion" filed 12 July 2004, in which Appellant Ngeze requests, in light of the Registrar's decision to replace his lead counsel, that he be permitted to re-file his Notice of Appeal and Appeals Brief and that the proceedings be stayed;

NOTING that the Prosecution has not filed a response;

CONSIDERING that, pursuant to Rule 108 of the Rules of Procedure and Evidence[2], the Appeals Chamber may, on good cause being shown by motion, authorize a variation of the grounds of appeal and that such a variation may also require a variation of the Appellant's Brief;

FINDING that, once lead counsel has been appointed, then Appellant Ngeze may file a motion to vary or substitute the Notice of Appeal and Appellant's Brief filed by his previous counsel, but that it would be premature to decide the merits of a future application for variation at the present time;

FINDING that, in order to preserve the fairness and efficiency of the proceedings, it is necessary to stay the proceedings against Appellant Ngeze until a new lead counsel has been assigned to represent him;

HEREBY

GRANTS the Motion in part; and

STAYS the proceedings in relation to Appellant Ngeze until a new lead counsel has been appointed by the Registrar.

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

Dated this fourth day of August 2004, 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] See also Practice Direction on Formal Requirements for Appeals From Judgement of 16 September 2002, paras. 2-3.

Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief 31 August 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

Nahimana – appellant's brief – extension of page limits – exceptional circumstances – right to a full defence – pre-appeal judge, Appeals Chamber – time limit – response to the appellant's brief – motion denied

International instruments cited : Statute, art. 20 – Rules of procedure and evidence, Rule 108 – Practice Direction on the Length of Briefs and Motions on Appeal dated 16 September 2002, paragraphs 1 and 5 – Practice Direction on Procedure for the Filing of Written Submission in Appeal Proceedings before the Tribunal of 16 September 2002, paragraphs 11 and 12

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, 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-A,* Reports 2004*, p. X)*

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 "Requête de la défense aux fins de dépôt du mémoire d'appel révisé" filed 8 July 2004 (Motion), in which Ferdinand Nahimana (Appellant) asks that the Appeals Chamber, rather than the Pre-Appeal Judge, consider his request to file an Appellant's Brief in excess of the page limits prescribed in the Practice Direction on the Length of Briefs and Motions on Appeal dated 16 September 2002 ("Practice Direction on Length of Briefs"), submitting *inter alia* that it would be impossible to reduce the length of the Appellant's Brief any further without abandoning grounds of appeal, which would affect the Appellant's right to a full defence guaranteed by Article 20 of the Statute and which would be contrary to counsel's ethical obligations to his client;

RECALLING the "Decision on Ferdinand Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana's Appellant's Brief," rendered by the Pre-Appeal Judge on 24 June 2004 ("Pre-Appeal Judge's

Decision"), in which the Pre-Appeal Judge rejected a motion for an extension of page limits and ordered the Appellant to "re-file his Appellant's Brief in strict compliance with the Rules and the Practice Directions no later than 9 July 2004"[1];

NOTING the Appellant's Brief consisting of 174 pages plus 12 pages of annexes, which was unsuccessfully faxed to the Registry along with the Motion on 8 July 2004, and which was re-transmitted on 20 July 2004[2];

NOTING the "Prosecutor's Response" filed 23 July 2004 ("Response"), in which the Prosecution objects to the filing of the Appellant's Brief in its present form, arguing that it is merely a repeated attempt to file an oversized brief that does not comply with either the Pre-Appeal Judge's Decision or the Practice Direction on Length of Briefs;

NOTING the "Réplique de la défense à la réponse du procureur visant a voir rejeter la requête de la défense aux fins de dépôt du mémoire d'appel révisé" filed 30 July 2004 ("Reply");

CONSIDERING that Rule 108 (H) of the Rules of Procedure and Evidence of the International Tribunal ("Rules") permits the Appeals Chamber to exercise any of the functions of the Pre-Appeal Judge, and that the Pre-Appeal Judge has referred this matter to the attention of the full bench;

CONSIDERING that although the ten-day time limit for filing a response prescribed in paragraph 11 of the Practice Direction on Procedure for the Filing of Written Submission in Appeal Proceedings before the Tribunal of 16 September 2002 ("Practice Direction on Procedure") ordinarily runs from the filing of a motion, it was reasonable in this case for the Prosecution to wait for the filing of the full version of the Appellant's Brief on 20 July 2004 before filing a response, and that therefore the Appeals Chamber recognizes the Response as validly filed;

CONSIDERING that although the Appellant's Reply was filed on 30 July 2004, after the expiry on 27 July 2004 of the four-day period for filing a reply prescribed in paragraph 12 of the Practice Direction on Procedure, the late filing of the Appellant's Reply did not delay the proceedings in this case and it is in the interests of justice to recognize it as validly filed;

CONSIDERING that paragraph 1 (a) of the Practice Direction on Length of Briefs provides that "the brief of an appellant on appeal from a final judgement of a Trial Chamber will not exceed 100 pages or 30,000 words, whichever is greater" and that paragraph 5 of the Practice Direction on Length of Briefs requires a party seeking an extension of the page limit to "provide an explanation of the exceptional circumstances that necessitate the oversized filing";

CONSIDERING 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;

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

[1] Pre-Appeal Judge's Decision, p. 3.
[2] In the original transmission, the Registry received 173 of 186 pages.

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;

FOR THE FOREGOING REASONS,

HEREBY DISMISSES the Motion; and

ORDERS Appellant Nahimana to re-file his Appellant's Brief in strict compliance with the Rules and the Practice Directions no later than 30 September 2004.

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

Dated this 31st day of August 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***

Order Considering Filings by Hassan Ngeze 17 September 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

Ngeze – counsel – further submissions – excessive copies

International cases cited :

I.C.T.R : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

HAVING RECEIVED the following documents from Appellant Hassan Ngeze ("Appellant") :

1. Letter to Ms. Aminatta N'gum dated 3 September 2004;
2. Letter to Registrar Dieng dated 14 September 2004;

FINDING that although the Appellant has sent copies of the abovementioned documents to the Appeals Chamber, the Appeals Chamber is not seised of the matters raised therein;

[1] "Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge" 19 December 2003.

NOTING that the Appellant has been assigned Co-counsel Bharat Chadha to represent him on appeal;

REMINDING the Appellant that the practice of copying all correspondence to the Appeals Chamber, regardless of its relevance to any matter currently under appeal, is unnecessary and unduly complicates the proceedings;

RECALLING the "Order Concerning Filings By Hassan Ngeze" of 24 May 2004 in which the Pre-Appeal Judge held that "all further submissions which the Appellant wishes to make to the Appeals Chamber should be made on his behalf by one of his Counsel, except for submissions relating uniquely to his representation by assigned Counsel, which should be filed with the Appeals Chamber only after the Appellant has sought relief from the Registrar and then review by the President" and ordered that Appellant Ngeze **"**shall make all further submissions relating to his appeal through his Counsel";

HEREBY

ORDER the Registrar to serve this Order on the Appellant together with copies of the two documents listed above;

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

Dated this 17th day of September 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

***

Decision on Hassan Ngeze's Motion Seeking Leave to Marry 28 September 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

Ngeze – leave to marry – management of the United Nations Detention Unit, Registry, Appeals Chamber – 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, Art. 8 (3) (C)

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-

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);

BEING SEISED of the "Appellant Hassan Ngeze's Motion for the Grant of Leave to Marry at the UNDF Premises Before the Determination of his Pending Appeal" filed 10 September 2004 (Motion);

CONSIDERING that the Registry of the International Tribunal, and not the Appeals Chamber, is responsible for the day-to-day management of the United Nations Detention Unit, including the determination of the facilities available to a detainee pursuant to Article 8 (3) (C) of the Directive for the Registry of the International Criminal Tribunal for Rwanda Judicial and Legal Services Division Court Management Section, 8 June 1998, as amended;

FINDING therefore that 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, in the event of an adverse decision, the Appellant should follow the relevant complaints procedures set out in the Rules of Detention[1];

HEREBY DISMISSES the Motion;

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

Dated this 28th September 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***

Order Concerning Response by the Prosecutor to Filing by Hassan Ngeze 30 September 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Weinberg de Roca, Pre-Appeal Judge

Ngeze – new evidence, already rejected – motion denied

International cases cited :

[1] 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.

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134) – Appeals Chamber,* The Prosecutor v. Jean-Bosco Barayagwiza*, Order Considering Filings by Hassan Ngeze, 17 September 2004 (ICTR-99-52-A,* Reports 2004*, p. X)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

HAVING RECEIVED the "Prosecutor's response to Hassan Ngeze's "Request for the Grant of Authority and Other Facilities to my Present Counsel Mr. Bharat Chadha, to Visit and Collect New Evidences Discovered after the Judgment. The said New Evidence will be filed in due course under ICTR Rules", filed 27 September 2004 (Prosecution Filing);

NOTING that the correspondence referred to by the Respondent has already been rejected in the "Order Concerning Filings by Hassan Ngeze" of 17 September 2004 and that therefore the Appeals Chamber is not seised of any motion requiring a response from the Respondent;

HEREBY

REJECTS the Prosecution's Filing;

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

Dated this 30th day of September 2004, at The Hague, The Netherlands

[Signed] : Inés Mónica Weinberg de Roca

***

Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings 22 October 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

Barayagwiza – assignment of counsel, delay – stay of proceedings – provisional release – abuse of process, Registrar – declaration of means – appellant indigent – rights of co-appellant's – interest of justice – motion granted in part

1 "Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge" 19 December 2003.

International instruments cited : Rules of procedure and evidence, Rules 33 (B) and 45(G) – Directive on the Assignment of Defence Counsel, 9 January 1996 as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003 and 24 April 2004, Art. 7, 10, 10 bis *and 18*

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 "Demande d'arrêt définitif des procédures pour abus de procédure" filed by Jean-Bosco Barayagwiza ("Appellant") on 7 September 2004 ("Motion"), in which the Appellant argues that the Registrar has committed an abuse of process in delaying the assignment of defence counsel and asks the Appeals Chamber to order the assignment of two defence counsel or either a permanent stay of proceedings or provisional release of the Appellant;

NOTING the "Prosecutor's Response" filed 14 September, in which the Prosecution opposes the Motion, arguing *inter alia* that the abuse of process doctrine is inapplicable and that the request for a permanent stay of proceedings or provisional release is unmeritorious, but nevertheless requests that the Registrar be directed to expedite the process of appointing new counsel for the Appellant;

NOTING the "Réplique à la réponse du Procureur datée du 14 septembre 2003 à ma 'demande d'arrêt définitif des procédures pour abus de procédure'" filed 20 September 2004;

NOTING the "Registrar's Representation pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding Jean Bosco Barayagwiza's Motion for a Stay of Proceedings" (Registrar's Representation) filed 17 September 2004, in which the Registrar explains that Appellant has caused the delay in appointing new counsel by refusing to fill out a new Declaration of Means form and explaining that Duty Counsel, Mr. John Maruma, was assigned on 9 September 2004 "to give assistance and advice to Mr. Barayagwiza on his rights";

NOTING the "Réplique à la réponse du Greffier datée du 17 septembre 2003 à ma 'demande d'arrêt définitif des procédures pour abus de procédure'" filed 24 September 2004, in which the Appellant Barayagwiza argues *inter alia* that the Registrar failed to inform him that the new Declaration of Means form was required for the assignment of counsel or that his refusal to complete the form was causing the delay and notes that counsel was assigned to other detainees without requiring a new Declaration of Means form;

NOTING that under Articles 7 and 10 of the Directive on the Assignment of Defence Counsel ("Directive")[1], the Registrar shall invite a suspect or accused

[1] Directive on the Assignment of Defence Counsel, document prepared by the Registrar and approved by the Tribunal on 9 January 1996 as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003 and 24 April 2004.

requesting the assignment of counsel to make a Declaration of Means on the appropriate form in order to determine whether the suspect or accused is indigent in deciding whether to grant the request for the assignment of counsel.

NOTING that Article 10 *bis* of the Directive provides :

> Assignment of Counsel in the Interests of Justice
>
> If a suspect or accused,
>
> (i) Either requests an assignment of Counsel but does not comply with the requirement set out above within a reasonable time; or
>
> (ii) Fails to obtain or to request assignment of Counsel, or to elect in writing that he intends to conduct his own defence,
>
> the Registrar may nevertheless assign him Counsel in the interests of justice in accordance with Rule 45 (E) of the Rules and without prejudice to Article 18.

CONSIDERING that further delays in appointing counsel for the Appellant may have an adverse effect on the rights of the other Appellants in this case;

FINDING that, notwithstanding the Appellant's refusal to complete a new Declaration of Means Form, it would be in the interests of justice and would expedite resolution of the issues before the Tribunal for the Registrar to assign counsel to Appellant Barayagwiza;

CONSIDERING that the Registrar may continue to investigate and review Appellant's financial status by all available means;

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, and that in such a case Rule 45 (G) of the Rules of Procedure and Evidence would also allow the Trial Chamber to "[m]ake an order of contribution to recover the cost of providing counsel," thereby protecting the resources of the Tribunal;

HEREBY grants the Motion in part, and

ORDERS the Registrar to appoint counsel for Appellant Barayagwiza pursuant to Rule 10 *bis* of the Directive no later than 29 October 2004.

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

Dated this 22nd October 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***

Corrigendum to Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings of 22 October 2004 26 October 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

Barayagwiza – assignment of counsels, names

International instruments cited : Rules of procédure and évidence, Rule 54

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),

NOTING that our "Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings" of 22 October 2004 ("Decision") did not properly list the names of counsel in this case;

HEREBY ORDERS pursuant to Rule 54 of the Rules of Procedure and Evidence that the Decision be altered to include the following names as Counsel for the Appellants :

Mr. Jean-Marie Biju-Duval
Mr. John Maruma
Mr. Bharat Chadha

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

Dated this 26th day of October 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***

Order to Registrar
2 November 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Ngeze – assignment of counsel – stay of proceedings – delay in the proceedings, reasons

International case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING that the Registrar terminated the assignment of John Floyd III as lead counsel for Appellant Hassan Ngeze on 21 June 2004[2];

NOTING the "Decision on Ngeze's Motion for a Stay of Proceedings" of 4 August 2004, in which the Pre-Appeal Judge stayed the proceedings in relation to Appellant Ngeze until a new lead counsel is appointed by the Registrar;

CONSIDERING that the appeals proceedings in this case have been delayed by the fact that Appellant Ngeze still does not have a lead counsel;

HEREBY

ORDER the Registrar to file a report to the Pre-Appeal Judge, no later than 8 November 2004, indicating the reasons for the delay in appointing Lead Counsel for Appellant Ngeze and setting out the steps taken to ensure that Appellant Ngeze's lead counsel is appointed promptly.

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

Dated this 2 November 2004, 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 of Withdrawal of Mr. John C. Floyd III as Lead Counsel for the Accused Hassan Ngeze, 21 June 2004.

Order to Appoint Counsel to Jean Bosco Barayagwiza 3 November 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Mónica Weinberg de Roca

Barayagwiza – stay of proceedings – assignment of counsel, delay – list of eligible counsels – interest of justice

International instruments cited : Rules of procedure and evidence, Rule 33 (B)

International case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Decision on Jean Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance 19 May 2004 (ICTR-99-52-A,* Reports 2004*, p. X)*

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);

NOTING that the proceedings in this case have been stayed since 19 May 2004, pending the withdrawal of Mr. Barletta Caldarera's assignment and pending the appointment of new lead counsel[1];

NOTING that the Registrar withdrew Mr. Barletta Caldarera's assignment as counsel for the Appellant Jean Bosco Barayagwiza ("Appellant Barayagwiza") on 29 June 2004[2];

NOTING that a Duty Counsel, Mr. John Maruma, was assigned on 9 September 2004 "to give assistance and advice to Mr. Barayagwiza on his rights" but that he was not selected by the Appellant and was not assigned to assist in relation to the appeal proceedings;

NOTING the "Decision on Jean Bosco Baryagwiza's 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 by 29 October 2004 (Decision to Appoint Counsel);

[1] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004.

[2] *Décision de retrait de la commission d'office de Me. Giacomo Caldarera conseil principal de l'accusé Jean Bosco Barayagwiza*, 29 June 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 Baryagwiza's Motion for Appointment of Counsel or a Stay of Proceedings", filed 27 October 2004, in which the Registrar indicated that he was having problems meeting the Appeals Chamber's deadline of 29 October 2004 because :

(i) Appellant Barayagwiza had submitted a list of three names of counsel (Mr. Ronnie MacDonald, Mr. Richard Harvey and Mr. Scott T. Johnson) who were no longer available for appointment. Following the provision of these names, the Registrar had assigned Mr. Ronnie MacDonald to another case as co-counsel on 5 October 2004, determined that Mr. Richard Harvey was no longer eligible for appointment, and been advised that Mr. Scott T. Johnson would prefer to be assigned as co-counsel rather than as lead counsel;

(ii) On 25 October 2004, the Registrar wrote to Appellant Barayagwiza requesting him to re-submit, no later than 26 October 2004, three new names of eligible counsel for consideration by the Registrar, but the Appellant refused to comply;

NOTING that, on 29 October 2004, Appellant Barayagwiza wrote to the Registrar explaining that he understood that his preferred counsel Mr. Richard Harvey could be reinstated on the list of eligible counsel, but that he would submit two other names, Mr. Daniel Lighter and Mr. Donald P. Herbert to complete the required list;

NOTING the "*Réponse au* «Registrar' (sic) Representation» *datée du 27 octobre 2004* 'Regarding the Appeals Chamber Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or Stay of Proceedings'" filed 1 November 2004, in which the Appellant denies that the delay in appointing counsel was caused by him and explains :

(i) That he submitted three names of counsel, as required, on 21 July 2004, but that the Registrar had persuaded his selected candidates to withdraw their candidature for lead counsel;

(ii) That he was served with the Decision to Appoint Counsel on 25 October 2004, and was asked to provide a list of three candidates for lead counsel the following day without having been provided with a list of eligible counsel :

(iii) That, given the urgency, he asked the Registrar to reinstate Mr. Richard Harvey, whom he had already identified as an ideal candidate, to the list of eligible counsel;

(iv) That on 27 October 2004, Appellant Barayagwiza was informed by letter that he had to provide three names, excluding that of Mr. Harvey and that, if he failed to do so, the Registrar would appoint counsel without taking his preferences into account;

(v) That he therefore "played Russian roulette" and submitted the names of Mr. Lighter and Mr. Herbert, whom he had identified in July as being available;

(vi) That his preferred lead counsel is Mr. Harvey and that his preferred co-counsel is Mr. Herbert;

CONSIDERING that, Mr. Harvey was withdrawn from the list of eligible counsel on 2 April 2004[3];

CONSIDERING that the Appeals Chamber has already determined that it would be in the interests of justice and would expedite resolution of the issues before the Tribunal for the Registrar to assign counsel to Appellant Barayagwiza and that further delays in appointing counsel for the Appellant may have an adverse effect on the rights of the other Appellants in this case;

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 the Appellant Barayagwiza;

(ii) If Mr. Richard Harvey is not eligible or available, to appoint Mr. Donald Herbert as lead counsel;

(iii) To ensure that Appellant Barayagwiza is represented by lead counsel no later than Wednesday, 10 November 2004.

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

Dated this third day of November 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***

Order Concerning Appointment of Lead Counsel to Hassan Ngeze 11 November 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding; Mohamed Shahabuddeen; Florence Mumba; Fausto Pocar; Inés Monica Weinberg de Roca

Ngeze – assignment of counsel, procedure – list of eligible counsel – Tribunal's Legal Aid System – interest of justice – stay of proceedings – rights of co-appellants

International instruments cited : Rules of procedure and evidence, Rule 33 (C) – Directive on the Assignment of Defence Counsel, 9 January 1996 as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003 and 24 April 2004, Art. 10 bis

[3] Decision of Withdrawal of Mr. Richard Harvey as Co-counsel of Mr. Juvenal Kajelijeli, 2 April 2004. In the decision, the Registrar explained that Mr. Harvey resigned as co-counsel because he was unavailable due to other commitments. The Registrar noted that Mr. Harvey had a legal obligation to prioritize the work of the Tribunal and accordingly withdrew him from the list of eligible counsel.

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 I994 ("Appeals Chamber" and "Tribunal", respectively);

NOTING that the Registrar terminated the assignment of Mr. John Floyd III as lead counsel for Appellant Hassan Ngeze ("Appellant Ngeze") on 21 June 2004[1];

NOTING the "Decision on Ngeze's Motion for a Stay of Proceedings" of 4 August 2004, in which the Pre-Appeal Judge stayed the proceedings in relation to Appellant Ngeze until a new lead counsel is appointed by the Registrar;

NOTING the "Registrar's Representation Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding the Order of the Appeals Chamber Regarding Assignment of Counsel to Hassan Ngeze" of 8 November 2004[2], in which the Registrar explains that the delay in appointing lead counsel has been caused by Appellant Ngeze, who bas failed to fully comply with the requirement that he submit three names of eligible counsel for consideration for appointment as lead counsel, and has instead selected his co-counsel Mr. Chadha and two names that are hot on the list of eligible counsel;

NOTING the Registrar's concern that such non-compliance with the established procedures for the appointment of counsel pursuant to the Tribunal's Legal Aid System should not be encouraged[3];

NOTING that Article 10 *bis* of the Directive on the Assignment of Defence Counsel ("Directive")[4], provides :

> Assignment of Counsel in the Interests of Justice
>
> If a suspect or accused,
>
> (i) Either requests an assignment of Counsel but does not comply with the requirement set out above within a reasonable time; or
>
> (ii) Fails to obtain or to request assignment of Counsel, or to elect in writing that intends to conduct his own defence,
>
> the Registrar may nevertheless assign him Counsel in the interests of justice in accordance with Rule 45 (E) of the Rules and without prejudice to Article 18.

CONSIDERING that the appeals proceedings in this case have been stayed until Appellant Ngeze has lead counsel and that further delays in appointing counsel may have an adverse effect on the rights of the other Appellants in this case;

---

[1] Decision of Withdrawal of Mr. John C. Floyd III as Lead Counsel for the Accused Hassan Ngeze, 21 June 2004.

[2] Submitted pursuant to a request by the Pre-Appeal Judge, Order to Registrar, 2 November 2004.

[3] Registrar's Representation Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Order of the Appeals Chamber Regarding Assignment of Counsel to Hassan Ngeze, 8 November 2004, para. 18.

[4] Directive on the Assignment of Defence Counsel, document prepared by the Registrar and approved by the Tribunal on 9 January 1996 as amended 6 June 1997, 8 June 1998, 1 July 1999, 27 May 2003 and 24 April 2004.

FINDING that, notwithstanding the Appellant's failure to comply with the procedures for appointing counsel, it would be in the interests of justice and would expedite resolution of the issues before the Tribunal for the Registrar to assign counsel to Appellant Ngeze;

CONSIDERING that AppelIant Ngeze has indicated that he wishes to be represented by Mr. Chadha, his currently appointed co-counsel;

CONSIDERING that the Registrar has stated that he is prepared to "immediately appoint as Lead Counsel Mr. Chada (sic)";

HEREBY ORDERS the Registrar to appoint Mr. Bharat Chadha as lead counsel for Appellant Ngeze pursuant to Rule 10 *bis* of the Directive, no later than 18 November 2004;

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

Dated this eleventh day of November 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***

Order to Registrar
26 November 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre.Appeal Judge

Ngeze – press conference – submissions by counsel – lack of response by the Registrar

International case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134)*

I, Inés Monica Weinberg de Roca, Pre-Appeal Judge in this case[1],

HAVING RECEIVED on 19 November 2004 "Applicant Hassan Ngeze's application for the review of the Registrar's (sic) Decision of refusing his request to have

[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-appeal Judge, 19 December 2003.

[a] press conference with the journalists to make his comment on his conviction and sentence given by the Trial Chamber"("Application");

RECALLING the "Order Concerning Filings By Hassan Ngeze" of 24 May 2004 in which, as Pre-Appeal Judge, I held that "all further submissions which the Appellant wishes to make to the Appeals Chamber should be made on his behalf by one of his Counsel, except for submissions relating uniquely to his representation by assigned Counsel, which should be filed with the Appeals Chamber only after the Appellant has sought relief from the Registrar and then review by the President";

WHEREAS Mr. Bharat Chadha has been appointed as Lead Counsel to the Appellant Hassan Ngeze and, as such, ail submissions relevant to the Appellant's case must be properly filed by Counsel on behalf of the Appellant;

CONSIDERING, nonetheless, that the alleged lack of response by the Registrar to the Appellant's request to hold a press conference cannot be interpreted as a decision on his part refusing the Appellant' s request;

HEREB¥

REJECT the Application of Hassan Ngeze as currently filed, without prejudice to the Appellant's right to re-file through Counsel in accordance with the Rules and the Practice Direction,

ORDER the Registrar to serve this Order on the Appellant together with copy of the Application;

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

Dated this 26th day of November 2004, at The Hague, The Netherlands

[Signed] : Inés Monica Weinberg de Roca

***

Order to registrar
29 November 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Barayagwiza – assignment of counsel – stay of proceedings – interest of justice – proceedings delayed – reasons

International case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134) – Appeals 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-A,* Reports 2004*, p. X)*

I, Inès Monica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING that the appeal proceedings in this case have been stayed since 19 May 2004, pending the withdrawal of Mr, Barletta Caldarera's assignment as lead counsel to Appellant Jean Bosco Barayagwiza ("Appellant Barayagwiza") and pending the appointment of new lead counsel[2];

NOTING that the Registrar withdrew Mr. Barletta Caldarera's assignment as lead counsel for the AppelIant Barayagwiza on 29 June 2004[3];

NOTING the "Decision on Jean Bosco Baryagwiza's 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 by 29 October 2004;

NOTING the "Order to Appoint Counsel to Jean Bosco Barayagwiza" of 3 November 2004, in which the Appeals Chamber ordered the Registrar to ensure that Appellant Barayagwiza is represented by lead counsel no later than 8 November 2004;

CONSIDERING that the appeals proceedings in this case have been delayed by the fact that Appellant Barayagwiza still does hot have a lead counsel;

HEREBY ORDER the Registrar to file a report to the Pre-Appeal Judge, no later than 2 December 2004, indicating the reasons for the delay in appointing Lead Counsel for Appellant Barayagwiza and setting out the steps taken to ensure that Appellant Barayagwiza's lead counsel is appointed promptly.

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

Dated this 29 November 2004, at The Hague, The Netherlands.

[Signed] : Inés Weinberg de Roca

***

[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] *Décision de Retrait de la Commission d'office de Me. Giacomo Caldarera conseil principal de l'accusé Jean Bosco Barayagwiza*, 29 June 2004.

Decision on Hassan Ngeze's Motion for an Extension of Time 2 December 2004 (ICTR-99-52-A)

(Original : English)

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Appeals Chamber

Ngeze – extension of time – notice of appeal, appellant's brief – appointment of counsel – material communication – Registry, Appeals Chamber

International instruments cited : Rules of procedure and evidence, Rules 108, 111

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134) – Appeals Chamber,* The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order Concerning Filings by Hassan Ngeze, 24 may 2004 (ICTR-99-52-A,* Reports 2004*, p. X)*

I, Inés Mónica Weinberg de Roca, Pre-Appeal Judge in this case[1],

BEING SEISED of "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, in which Appellant Hassan Ngeze seeks an extension of "at least 18 months commencing after the constitution of a full defense team and supply of a complete set of documents (hard copy) / material including audio and video recordings by the Registry and the determination of the intended motion for presenting additional evidence" before filing a motion to amend his Notice of Appeal and Appeal Brief, and in which Appellant Ngeze explains that this extension is required, *inter alia*, because :

> (i) The current Notice of Appeal and Appeal Brief were submitted by Mr. John Floyd III ("Former Counsel"), whose appointment was withdrawn by the Registrar for reasons of conflict of interest and lack of trust;
>
> (ii) The necessity of providing sufficient time for the newly appointed Lead Counsel, Mr. Bharat B. Chadha, to review the complex case and the large volume of transcripts and exhibits, totalling 750,000 pages, in conformance with Counsel's ethical obligations;
>
> (iii) The delay in appointing a full defence team, to be comprised of lead counsel, co-counsel, and three legal assistants, and in authorising an exemption for the defence team from the maximum number of hours usually imposed by the Registry;

1 Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

(iv) The failure of the Registry to supply an index of the case, documents and materials from the Former Counsel, and video and audio CD recordings of the entire proceedings in both English and French;

(v) The imposition of the normal time limits would result in grave injustice to the Appellant;

NOTING that Former Counsel for the Appellant Ngeze filed a Notice of Appeal on 9 February 2004[2], and an Appellant's Brief on 21 June 2004[3];

NOTING the "Decision on Ngeze's Motion for a Stay of Proceedings" of 4 August 2004, in which the Pre-Appeal Judge stayed the proceedings in relation to Appellant Ngeze until the appointment of a new Lead Counsel and noted that Appellant Ngeze may file a motion to vary or substitute the Notice of Appeal and Appellant's Brief filed by his Former Counsel;

NOTING that the stay was therefore lifted on 17 November 2004, when Mr. Chadha was appointed as Lead Counsel;

NOTING that, pursuant to Rule 108 of the Rules, the Appellant's Notice of Appeal is due thirty days from the delivery of the Judgement and that, pursuant to Rule 111 of the Rules, the Appellant's Brief is due seventy-five days thereafter;

CONSIDERING that the Judgement and Sentence was delivered on 3 December 2003;

CONSIDERING that Mr. Chadha has been assigned to the case, first as Co-counsel and then as Lead Counsel, since 6 May 2004 and therefore has had time to familiarize himself with the relevant aspects of the case;

CONSIDERING that Ms. Nathalie Leblanc, who was a legal assistant at trial, is currently assigned as a legal assistant on the appeal;

CONSIDERING that Appellant Ngeze has not identified any specific documents which are missing from his files and has not provided any explanation why the audio and visual recordings of the entire proceedings in both English and French are necessary for the preparation of the appeal;

CONSIDERING that the responsibility for communicating relevant documents and materials to Appellant Ngeze lies with the Registry and that if the Appellant Ngeze is missing necessary materials, then he should first request the Registry to provide the specific materials, and in the event of a continued failure to provide necessary materials relevant to the preparation of the appeal, the Appellant may apply to the Appeals Chamber for assistance;

HEREBY ORDER Appellant Ngeze to file a motion to amend his Notice of Appeal, if any, no later than 17 December 2004, and to file his Appellant's Brief no later than 1 March 2005; and

REQUEST the Registry to facilitate and expedite the appointment of a co-counsel for Appellant Ngeze and to ensure that Appellant Ngeze is provided with the necessary documents and materials for his defence.

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

[2] Order Concerning Filings by Hassan Ngeze, 24 May 2004.
[3] Defence Appeal Brief, 21 June 2004.

Dated this 2 December 2004, at The Hague, The Netherlands.

[Signed] : Inés Mónica Weinberg de Roca

***

Order to Registrar
10 December 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Ngeze – English translation – Kangura newspaper

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134)*

I, Inés Monica Weinberg de Roca, Pre-Appeal Judge in this case[1],

BEING SEISED OF "Appellant Hassan Ngeze's Urgent Motion for Supply of English Translation of 71 Kangura Newspapers Filet by the Prosecutor with the Registry during Trial" filed 3 December 2004 ("Motion"), in which Appellant Hassan Ngeze requests that the Registrar ordered to translate 71 issues of Kangura necessary for the preparation of the appeal;

HEREBY REQUESTS the Registrar to file a report to the Pre-Appeal Judge, no later than 15 December 2004, indicating the number of pages which the Appellant has requested to be translated, the number of pages already translated at the trial phase, the estimated rime for the completion of the requested translation into English, and any other information which the Registrar considers would be helpful to the Appeals Chamber in deciding the Motion;

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

Dated this 10 December 2004, at The Hague, The Netherlands.

Judges : Inés Monica Weinberg de Roca

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[1] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

Scheduling Order
14 December 2004 (ICTR-99-52-A)

(Original : English)

Appeals Chamber

Judges : Inés Monica Weinberg de Roca

Ngeze, Nahimana, Barayagwiza – Appeals Chamber – status conference – expeditious proceedings – English translation

International instruments cited : Rules of procedure and evidence, Rules 65 bis (A) and (B)

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza et al.*, Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003 (ICTR-99-52-A,* Reports 2003*, p. 1134)*

I, Inés Monica 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 ("Rules") "the Appeals Chamber or an Appeals Chamber Judge" may convene a status conference to organise exchanges between the parties so as to ensure expeditious proceedings;

BEING SEISED OF "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 the Extension of Time and his Further Request for an Order of (sic) a Status Conference Pursuant to Rule 65 *bis* of the Rules of Procedure and Evidence" ("Reconsideration Motion"), dated 4 December 2004 and; "Appellant Hassan Ngeze's Urgent Motion for Supply of English Translation of 71 Kangura Newspapers Filed by the Prosecutor with the Registry During Trial", ("Kangura Motion") dated 3 December 2004;

NOTING my Order to the Registrar, dated 10 December 2004, in which the Registrar was requested to file a report to the Pre-Appeal Judge, no later than 15 December 2004, indicating the number of pages which the Appellant Hassan Ngeze has requested to be translated, the number of pages already translated at the trial stage, the estimate time for completion of the requested translation into English, and any other information which the Registrar considers would be helpful to the Appeals Chamber in deciding the Kangura Motion;

NOTING that the issues raised in the Kangura Motion and the Reconsideration Motion are primarily relevant to the Appeal of Hassan Ngeze;

1 Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003.

CONSIDERING therefore that the presence of Appellants Ferdinand Nahimana, Jean-Bosco Barayagwiza and their respective Counsel is not required;

PURSUANT to sub-Rule 65 *bis* (B) of the Rules;

HEREBY ORDER that a Status Conference be held before me on 15 December 2004 at 15:00hrs.

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

Done this 14th day of December 2004, at Arusha, Tanzania

[Signed] : Inés Monica Weinberg de Roca

***

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.

- 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.

- 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

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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.

- 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.

- 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.

Decision on Motion from Casmir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA 23 January 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Judge Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Bizimungu – witness testimony – admissibility– amended indictment – indictment, material facts, specific acts with which the Accused is charged, sufficiently precise – fair trial – evidence – ICTY – interest of justice – motion granted

International instruments cited : Statute, art. 6 (1), 6 (3), 20

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Judgement, 21 February 2003 (ICTR-96-10-T and ICTR-96-17-T,* Reports 2003*, p. 2752)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the form of the Indictment", 24 February 1999 (IT-97-25-T) – Trial Chamber,* The Prosecutor v. Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 (IT-97-25-T) – Trial Chamber,* The Prosecutor v. Brdjanin et al.*, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001 (IT-97-36-T) – Trial Chamber,* The Prosecutor v. Brdjanin et al.*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (IT-97-36-T) – Appeals Chamber,* The Prosecutor v. Furundija et al.*, Judgement, 21 July 2000 (IT-95-17/1-A) – Appeals Chamber,* The Prosecutor v. Kupreskic et al*, Judgement, 23 October 2001 (IT-95-16-A)*

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of "Motion from Casimir Bizimungu Opposing to the Testimony of Witnesses GKB, GAP, GKC, GKD et GFA" filed on 19 January 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Motion from Casimir Bizimungu Opposing to the Testimony of Witnesses (GKB), GAP, GKC, GKD et GFA (sic)" filed on 21 January 2004, (the "Response");

TAKING INTO CONSIDERATION the submissions made by both parties when this matter was taken up in open court on 22 January 2004;

NOTING the "Decision on Prosecutor's Request to Leave to Amend the Indictment" issued on 6 October 2003, (the "Decision on the Amended Indictment");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence requests the Trial Chamber to declare that the testimony of Witnesses GKB, GAP, GKC, GKD and GFA concerning events that occurred in Ruhengeri *préfecture* are not admissible. The Defence asserts that, "since the testimony of Witness GKB, the Prosecutor is presenting factual elements regarding the Amended Indictment, leaving aside the Trial Chamber's Decision on the Amended Indictment". Further, according to the Defence, "in order to justify new allegations against Casimir Bizimungu in the Amended Indictment, [the Prosecutor] tries to avoid the Decision rendered by the Trial Chamber by simply presenting his new elements during the trial".

2. The Defence argues that, "even if the Appeals Chamber grants the Prosecutor's Request for Leave to File an Indictment, the trial would very likely be adjourned in order to respect the rights of the accused".

3. The Defence submits that, "since the current Indictment does not say a word to charge the defendant Casimir Bizimungu in Ruhengeri *préfecture* and since the supporting document does not say a word in this regard, the Defence for Casimir Bizimungu had no occasion to prepare his defence and investigate in relation with theses new allegations". Quoting the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") in the cases of *The Prosecutor v. Kupreskic et al.*[1] and *The Prosecutor v. Brdjanin et al.*[2], the Defence states that, "the principle that the evidence which should be taken into account by the Chamber in the evaluation of the guilt of an accused should have been specified in the Indictment".

4. The Defence submits that, "the admissibility of the testimony of the five witnesses mentioned does not respect the requirements of a fair trial"[3] because the facts relating to Ruhengeri *préfecture* are material facts of the case against Casimir Bizimungu, which are not being stated in the Indictment.

5. For the foregoing reasons, the Defence for Casimir Bizimungu requests the Trial Chamber to declare that the testimony of Witnesses GKB, GAP, GKC, GKD and GFA concerning events that occurred in Ruhengeri *préfecture* are not admissible.

[1] *The Prosecutor v. Kupreskic et al*, Case N° IT-95-16-A, Judgement, 23 October 2001, para. 323.

[2] *The Prosecutor v. Brdjanin et al*., Case N° IT-97-36-T, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001, para. 62.

[3] *The Prosecutor v. Kupreskic et al, op. cit.*, paras. 88-89.

Prosecution Submissions

6. The Prosecutor opposes the motion on the grounds *inter alia* that, "all the evidence sought to be excluded is relevant to the Indictment". According to the Prosecutor, "the evidence falls squarely within the ambit and scope of the Indictment : it supports the different modes of participation of the accused in the 1994 genocide and other transgressions of international humanitarian law in different parts of Rwanda and on divers dates as alleged in the Indictment. The Indictment extensively details the participation of all four accused under both Articles 6 (1) and 6 (3) of the Statute of the Tribunal". The Prosecutor states that the allegation made by the Defence in the said Motion that the evidence from Witnesses GKB, GAP, GKC, GKD, and GFA fall outside the Indictment is erroneous, in that it fails to appreciate and recognise the fact that the Indictment alleges that the accused participated variously and in different parts of Rwanda in the genocide and other crimes committed throughout Rwanda in 1994.

7. The Prosecutor argues that, "the evidence being adduced by the witnesses clearly relate(s) to the crimes with which the accused are charged". According to him, "the evidence clearly relates to the divers modes of participation of the accused in those crimes as alleged in the Indictment in divers areas and dates. In a nutshell, the evidence relates to the material allegations of the Prosecution case as embodied in the Indictment".

8. The Prosecutor submits that, "the Indictment meets all requirements of an Indictment, namely that it sets out the material facts of the Prosecution case with enough details to inform the accused clearly of the charges against them so that they may prepare their defence". The Prosecutor refers to the Tribunal and ICTY jurisprudence and mentions that, "it is not required that the Indictment state the evidence by which such material facts are to be proved"[4].

9. The Prosecutor notes that, "ICTR and ICTY jurisprudence hold that a determination as to whether or not evidence/testimony or a particular fact adduced by a witness is material to the indictment cannot be determined in the abstract, but is dependent on the nature of the Prosecution case"[5]. According to the Prosecutor, "all the evidence adduced or about to be adduced by the witnesses is relevant and material to the Indictment, bearing in mind the nature of the Prosecution case, the massiveness and widespread nature of the crimes in Rwanda and the participation of all four accused in these crimes as articulated above, as well as in the Prosecutor's Pre-trial Brief, including their participation in a common or joint criminal enterprise to kill Tutsis".

[4] *The Prosecutor v. Kupreskic et al*., op. cit. para. 88; *The Prosecutor v. Elizaphan and Gerard Ntakirutimana,* Cases N° ICTR-96-10-T & ICTR-96-17-T, Judgement, 21 February 2003, paras. 42-43; *The Prosecutor v. Furundija et al.,* Case N° IT-95-17/1-A, Judgement, 21 July 2000, para. 147; *The Prosecutor v. Krnojelac,* Case N° IT-97-25-T, "Decision on the Defence Preliminary Motion on the form of the Indictment", 24 February 1999, paras. 7 and 12; *The Prosecutor v. Krnojelac,* Case N° IT-97-25-T, "Decision on Preliminary Motion on Form of Amended Indictment", 11 Februay 2000, paras. 17 and 18, *The Prosecutor v. Brdjanin et al.,* Case N° IT-97-36-T, "Decision on Objections by Momir Talic to the Form of the Amended Indictment", 20 February 2001, para. 18.

[5] *The Prosecutor v. Kupreskic et al, op. cit*., para. 89.

10. In the alternative, the Prosecutor submits that, "the evidence sought to be adduced, or already adduced in testimony encompasses more particularized and specific evidence to support various aspects of participation of the accused in the 1994 crimes at various locations and at diverse dates as alleged in the Indictment and sufficient notice thereof was furnished to the Accused".

11. Therefore, the Prosecutor prays the Trial Chamber to dismiss the said Motion in its entirety and to admit the testimony of Witnesses GKB, GAP, GKC, GKD and GFA.

DELIBERATIONS

12. It is observed that there are no specific acts alleged against Casimir Bizimungu in relation to events that took place in Ruhengeri *préfecture* in any part of the Indictment. When questioned by the Trial Chamber, the Prosecutor was unable to show the specific acts pleaded in the Indictment in respect of Casimir Bizimungu in Ruhengeri *préfecture*. The Trial Chamber considers that it is a requirement of the law that an Indictment should contain a statement of material facts setting out the specific acts with which the Accused is charged, in sufficient detail, to enable him to prepare his defence. This forms the essence of a fair trial as guaranteed by the provisions of Article 20 of the Statute.

13. The Chamber's attention has been drawn to the fact that, in the attempt to seek an amendment to the Indictment, the Prosecutor provided details which he omitted to state in the Indictment which was confirmed on 12 May 1999. It should be noted that the failure to include the facts in the Indictment cannot be cured by references in the Pre-Trial Brief or evidence adduced at trial. In this regard, the Trial Chamber would follow the jurisprudence of the Appeals Chamber in the case of *The Prosecutor v. Kupreskic et al.* in respect of this issue, which states that :

> An indictment shall, pursuant to Article 18 (4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged". Similarly, Rule 47 (C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4) (a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into 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. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence[6].

[6] *The Prosecutor v. Kupreskic et al*., *op. cit*., para. 88.

14. It is noted that in some paragraphs of the Indictment, it is stated that "in several *préfectures*, including Butare, Kibuye, Kigali, Gitarama and Gisenyi, ministers […] gave orders to commit, instigated, assisted in committing and did themselves commit massacres of members of the Tutsi population […]"[7]. The Trial Chamber, agrees with the reasoning of the ICTY in the case of *The Prosecutor v. Blaskic*[8], and considers that phrases such as "including but not limited to" as well as other ambiguous phrases such as "among others" are to be avoided in order to ensure that the Indictment is specific and not too vague for the purposes of identifying the crimes against which the Accused must defend himself.

15. The Trial Chamber is of the view that the failure of the Prosecutor to mention the material facts in the Indictment regarding the involvement of Casimir Bizimungu in the events that took place in Ruhengeri *préfecture* upon which Witnesses GKB and GAP, who have already testified, and Witnesses GKC, GKD and GFA, who are yet to be called, leads to the conclusion that the said testimony should be disregarded in respect of Casimir Bizimungu.

16. In the particular circumstances of this case and taking into consideration the facts as alleged in the Indictment, which was confirmed in 1999, the Prosecutor is directed not to lead any evidence in relation to the events involving Casimir Bizimungu in Ruhengeri *préfecture* from Witnesses GKC, GKD and GFA.

17. Furthermore, the Trial Chamber is of the view that an objection of this type should have been raised as soon as possible, at the minimum before the commencement of the evidence of the disputed witnesses.

18. Therefore the Trial Chamber observes that the Defence should have presented the said motion before GKB's testimony was taken. Nevertheless, in the interest of justice, the Trial Chamber now considers that this decision should also apply to the evidence given by Prosecution Witnesses GKB as well as GAP on the events involving Casimir Bizimungu in Ruhengeri *prefecture*.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the said Motion.

Arusha, 23 January 2004

[Signed] : Asoka de Zoysa Gunawardana, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

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[7] Indictement, para. 6.30.

[8] The Prosecutor v. Blaskic, Case N° IT-95-14-T, "Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)", 4 April 1997, paras. 22-24.

Decision on Prosper Muginareza's Motion to Vary Protective Measures and to Order the Prosecutor to Provide an Unredacted Copy of Admittedly Exculpatory Statement 29 January 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Mugiraneza – witness protective measures – disclosure obligation of the Prosecutor, evidence – unredacted statements – disclosure of identifying information – interview of witness, agreement of the witness – good cause – motion granted

International instruments cited : Rules of procedure and evidence, Rule 68

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Casimir Bizimungu et al.*, Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses, 15 October 2003 (ICTR-99-50-I,* Reports 2003*, p. 1186)*

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion to Vary Protective Measures and to Order the Prosecutor to Provide an Unredacted Copy of Admittedly Exculpatory Statement" filed on 17 September 2003, (the "said Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion to Vary Protective Measures and to Order the Prosecutor to Provide an Unredacted Copy of Admittedly Exculpatory Statement" filed on 22 September 2003, (the "Response");

NOTING the "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion to Vary Protective Measures and to Order the Prosecutor to Provide an Unredacted Copy of Admittedly Exculpatory Statement" filed on 23 September 2003, (the "Reply");

NOTING the Prosecutor submission titled "Pseudonym of Witness Referred to in Mugiraneza's motion of 17 September 2003" filed on 22 January 2004, (the "Prosecutor's Submission");

NOTING the "Prosper Mugiraneza's Request for Rulings on Pending Motions" filed on 27 November 2003, (the "Request");

TAKING INTO CONSIDERATION the "Decision on Prosecutor's Motion for Protective Measures for Witnesses" issued on 12 July 2000, (the "Protective Measures Decision");

ARGUMENTS OF THE PARTIES

Defence Motion

1. The Defence requests the Trial Chamber to order the Prosecutor to provide it with "an unredacted copy of a statement containing information which is, in the opinion of the Office of the Prosecutor, exculpatory". The Defence asserts that they received a letter dated 1 July 2002 in which the Prosecutor informs the Defence that a paragraph of a statement, which was in the possession of the Prosecutor, contains exculpatory material. However, the Prosecutor only attaches the said paragraph without mentioning the pseudonym of the said witness and did not provide the Defence with a copy of the whole statement.

2. In support of its contention, the Defence attaches the letter sent by the Prosecutor to the Defence where he, according to the Defence, concedes that the said statement is exculpatory.

3. Therefore the Defence moves the Trial Chamber to :

a) order the Office of the Prosecutor to provide him with an unredacted copy of the statement referred to in the Prosecutor's letter.

b) order the Office of the Prosecutor to provide him with sufficient identifying information so that the Defence may locate and contact the witness.

c) authorize Mugiraneza's representatives to meet with and interview the witness under such conditions, as the witness desires.

Prosecutor's Response

4. The Prosecutor opposes the disclosure of the whole statement as well as the identity of the said witness as, according to the Prosecutor, it would constitute a violation of the Protective Measures Decision of 12 July 2000.

5. According to the Prosecutor, the Defence is not entitled to the disclosure of the whole statement as it has already received the excerpt that contains exculpatory material. Therefore, the Prosecutor, in disclosing the excerpt, has fully complied with Rule 68 of the Rules of Procedure and Evidence (the "Rules").

6. Finally the Prosecutor argues that, "the practice and the Rules of the Tribunal does not provide for the interviewing of witnesses prior to testimony at trial".

7. Therefore the Prosecutor prays the Trial Chamber to hold that,

a) the Defence has failed to demonstrate its entitlement to the variation of the Protective Measures Decision;

b) the Defence has no right in law or pursuant to the Rules, to interview a Prosecution's witness before trial;

c) the said Motion should be dismissed in its entirety.

Defence Reply

8. The Defence has replied that it is entitled to receive this allegedly exculpatory statement under Rule 68. According to the Defence, the Prosecutor does not intend to call this witness as a Prosecution witness and therefore this witness should not be covered by the Protective Measures Decision of 12 July 2000. Furthermore, the Defence for Prosper Mugiraneza pointed out that it needs all the information related to this witness in order to investigate "potentially exculpatory evidence so that he can present it to the Trial Chamber as part of the truth finding process".

DELIBERATIONS

Identity of the Witness mentioned in the said Motion

9. In his submission, the Prosecutor has brought to the Trial Chamber's attention that, the pseudonym of the witness referred to in the said Motion was Witness GTF and that the later appeared as Number 68 on the Prosecutor's witness list filed on 21 October. The Trial Chamber is satisfied that Witness GTF is a Prosecution witness and that the Protective Measures Decision applies to this witness.

Scope of Rule 68 of the Rules

10. Rule 68 of the Rules reads as follows :

> The Prosecutor shall, as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

11. According to the Defence, the statement of Witness GTF contains exculpatory material. Without making an assessment of the credibility, the relevancy or the nature of the evidence given by the witness, the Trial Chamber is of the opinion that the information provided by the Defence in the said Motion can be considered as sufficient to come within the scope of Rule 68.

Disclosure of unredacted statement and identifying information of Witness GTF

12. Considering that the requested unredacted statement of Witness GTF has been disclosed by the Prosecutor to the Defence, on 8 October 2003, the Trial Chamber is of the opinion that this part of the said Motion is now rendered moot and should be dismissed.

13. Regarding the identifying information contained in the cover sheets attached to Witness GTF's statement, the Trial Chamber considers that the Prosecutor has complied with the "Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses"[1] of 15 October 2003. He has disclosed all the identifying information related to Witness GTF on 21 October 2003. Therefore, the Trial Chamber is of the opinion that this part of the said Motion is also now rendered moot and should be dismissed.

Defence' Request for Interview of Witness GTF

14. The Trial Chamber recalls the provisions of paragraph 3 (i) of the Protective Measures Decision :

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

15. The Trial Chamber is satisfied that Witness GTF is a Prosecution witness and that the Protective Measures Decision applies to this witness. The Trial Chamber is also satisfied that the Defence has made a written request on reasonable notice to the Prosecutor and the Trial Chamber to contact and interview Witness GTF. The Trial Chamber considers that, since the Defence has shown good cause that the said witness may be in possession of exculpatory evidence pursuant to Rule 68, the Defence should be granted access to the witness and be given the opportunity to interview Witness GTF. The Trial Chamber, however, considers that such interview should take place in accordance with all relevant provisions of the Protective Measures Decision and after the consent of the witness is obtained in terms of paragraph 3.1) of the Protective Measures Decision.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the said Motion in the following terms :

(a) The Prosecutor shall disclose the relevant information for the location of Witness GTF. The Defence is required to follow the provisions of the Protective Measures Decision, particularly paragraphs 3.e), 3.f) and 3.g).

(b) The parties shall arrange between themselves, for the Defence to interview Witness GTF, in the presence of a representative of the Office of the Prosecutor.

(c) The Registry shall facilitate the interview according to its established procedures, and also according to the laws and procedures of the country of residence of the witness.

[1] *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-I, "Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses", 15 October 2003.

(d) However, before the interview can take place, the Registrar should satisfy himself that Witness GTF is indeed willing to be interviewed by the Defence. Should he be not satisfied on this point, the interview shall not proceed, and the Registrar shall inform the Parties and the Chamber accordingly.

Arusha, 29 January 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Prosper Mugiraneza's Request for Rulings on Pending Motion 29 January 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Mugiraneza – rulings sought already issued – moot motion – motion denied

International instruments cited : Rules of procedure and evidence, Rule 68

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Request for Rulings on Pending Motions" filed on 27 November 2003, (the "said Motion");

TAKING INTO CONSIDERATION the "Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68" issued on 10 December 2003;

FURTHER TAKING INTO CONSIDERATION the "Decision on Prosper Mugiraneza's Motion to Vary Protective Measures and to order the Prosecutor to Provide an Unredacted Statement Copy of Admittedly Exculpatory Statement" issued on 29 January 2004;

CONSIDERING that the primarily relief sought in the said Motion is to have the Trial Chamber rule on the above-mentioned motions, the Trial Chamber is of the view that, as rulings have been issued on the said Motions, this Motion is now moot and should be dismissed.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the said Motion in all respects.

Arusha, 29 January 2004

[Signed] : Asoka de Zoysa Gunawardana, Khalida Rachid Khan, Lee Gacuiga Muthoga

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Decision on Motion to Exclude Portions of the Evidence of Witness Prosper Higiro 30 January 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Mugenzi – exclusion of evidence – disclosure obligation of the Prosecutor – cross-examination, time to prepare – new material, timeous notice – discrepancies in testimony, credibility – technical non-compliance with the Rules – no real prejudice – motion denied

International instruments cited : Rules of procedure and evidence, Rule 67 (D)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of the "Motion to Exclude Portions of the Evidence of the Witness Prosper Higiro" filed on 22 January 2004, (the "Motion");

NOTING the "Prosecutor's Response to Motion from Justin Mugenzi to Exclude Some Portions of the Evidence of the Witness Prosper Higiro" filed on 26 January 2004, (the "Response");

NOTING the "Second Motion to Exclude Portions of the Evidence of the Witness Prosper Higiro" filed on 27 January 2004, (the "Second Motion");

TAKING INTO CONSIDERATION the submissions made by both parties when this matter was taken up in open court on 27 January 2004;

RECALLING the Chamber's ruling thereupon, denying the Motion;

NOW DELIVERS the reasons for its ruling :

1. This Decision deals with two Motions submitted by the Defence of Justin Mugenzi. The first Motion requested certain portions of the evidence of Prosecution Witness Prosper Higiro to be excluded from the Chamber's consideration. The second Motion repeated the same request, additionally dealing with the Prosecution Response, which included a second will-say statement. It also adds further sections of his testimony which the Defence wish to have excluded from the Chamber's consideration.

2. The Chamber is in possession of the full arguments of the Parties, having received both written submissions, and also having afforded the Parties the opportunity to argue their positions in court on 27 January 2004. This Motion was ruled upon by the Chamber after having heard those arguments, and after deliberation, the Chamber now delivers its reasoning.

3. The fundamental issue taken up in the Defence Motion is that they had not been given enough time to adequately prepare for cross-examination on all issues on which this Witness testified, because certain areas of this witness's testimony in court (enumerated in the Motion and the Second Motion) were not alluded to in either the prior statement of this witness, nor in the will-say statements released by the Prosecution to the Defence.

4. The Defence does not suggest that it must be forewarned of every single point upon which the Witness will testify, however it does feel that upon certain important issues, adequate advance notice of the expected areas on which the witness will testify must be given. Basically, in the submission of the Defence, this was not done. Either there was insufficient detail in the statements and the will-say documents given, or (specifically in the case of the will-say documents) it was not released to the Defence within a time it considers to be sufficient.

5. According to the Defence, the same situation occurred with the testimony of Witness FW, and in order to correct any possible prejudice the Chamber ruled to exclude certain portions of that testimony. In the instant case, the Defence however admits that :

> It is fair to observe that a great deal of entirely new material was adduced by the Prosecution through this witness which was not prejudicial to the Defence. Much of it was, in its general nature, exculpatory. The example given above of evidence about David Gatera is one such piece of material. The Defence have not sought to summarise that material here, nor do they take objection to its adduction, but the principle, that of a massive failure to comply with the rules of disclosure by the Prosecution, remains the same[1].

6. The Chamber in its directions to the Parties, and its oral ruling of 3 December 2003 made plain the Rules that it requires the Parties, and specifically the Prosecution, to follow in respect of disclosures.

7. Having considered the matter, the Chamber is of the view that the infringement complained of is rather more of a technical than a substantive nature, and that this technical infringement does not merit the exclusion of the evidence complained of. The new material deals with areas reasonably within the knowledge of the Accused (whether or not he agrees with the content) and which are reasonably incidental to matters on which the Defence had timeous notice. Many of these new matters which

1 Second Motion, para. 25.

the Defence complain of may relate to the credibility of the Witness. Contradictions or omissions between in court testimony and prior statements would often fall into this category. The Chamber observes that Defence Counsel, after having consulted with the Accused, can adequately deal with such matters in cross-examination and that the Court provided the Defence with additional time to consult the Accused.

8. Part of the "new" material from the testimony of the Witness which the Defence requests should be disregarded by the Chamber relates to an instruction given by the Accused that he ordered a gendarme to "shoot this little guy [the Witness]"[2].The Chamber notes that, in his statement dated 23 November 1995, the Witness refers to this event in the following terms :

> "He [Mugenzi] even sacked me when I was his '*Directeur de Cabinet*'. This happened on 15 November 1993 and he [Mugenzi] aimed his rifle at my head."[3]

The Chamber does not consider that the discrepancies between the two versions of the same event constitute new material, and that it goes to the question of credibility.

9. In any event, the Chamber is of the view that it may be appropriate for the Defence to refer to this matter during the closing arguments. At that stage, the Chamber will be able to evaluate evidence appropriately.

10. The Defence have suffered no real prejudice in this matter. The Chamber considers that apart from technical non-compliance with the Rules, the principal consideration for excluding or disregarding the testimony is the extent to which such testimony has prejudiced the Defence. Therefore, a party must show that such evidence, if received or considered, would cause material prejudice to that party. In this regard the Defence has failed to do so.

11. The Chamber reiterates that the Prosecution must continue to abide by the Rules of disclosure, specifically Rule 67 (D), and also the directions of this Chamber enunciated in its oral ruling of 3 December 2003.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 30 January 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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[2] Second Motion, para. 5.
[3] Statement of Prosper Higiro, 23 November 1995, p. 2.

Decision on Motion from Casmir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF AND GKI 3 February 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Bizimungu – admissibility of witness testimony – indictment, material facts, sufficient detail – fair trial – evidence – motion granted

International instruments cited : Statute, art. 20

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of "Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI" filed on 27 January 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI" filed on 3 February 2004, (the "Response");

TAKING INTO CONSIDERATION the submissions made by both parties when this matter was taken up in open court on 3 February 2004;

NOTING the "Decision on Motion form Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA", filed on 23 January 2004, (the "Decision of 23 January 2004");

DELIBERATIONS

1. The Trial Chamber recalls its reasoning set out in its Decision of 23 January 2004. It is observed that there are no specific acts alleged against Casimir Bizimungu in relation to events that took place in Ruhengeri *préfecture* in any part of the Indictment. When questioned in open court by the Trial Chamber, the Prosecutor was unable to show the specific acts pleaded in the Indictment in respect of Casimir Bizimungu in Ruhengeri *préfecture*.

2. The Trial Chamber considers that it is a requirement of the law that, in addition to the charges against the Accused, an Indictment should contain a statement of the material facts which the Prosecutor intends to rely on in support of the charges. This

must be given in sufficient detail so as to enable the Accused to prepare his defence. This forms the essence of a fair trial as guaranteed by the provisions of Article 20 of the Statute.

3. The Trial Chamber is of the view that the failure of the Prosecutor to mention the material facts in the Indictment regarding the involvement of Casimir Bizimungu in the events that took place in Ruhengeri *préfecture* upon which Witnesses AEI, GKE, GKF and GKI are yet to testify, leads to the conclusion that the said testimony should be disregarded in respect of Casimir Bizimungu.

4. After a careful analysis of the statements made by Witness AEI dated 30 April 1997, 1 April 1999 and 27 January 2000, the Trial Chamber is of the view that only the content of the statements dated 30 April 1997 and 27 January 2000 can be admitted into evidence. As the statement dated 1 April 1999 covers events involving Casimir Bizimungu in Ruhengeri *préfecture*, the Prosecutor is directed not to lead any evidence from this statement involving Casimir Bizimungu in Ruhengeri *préfecture*. Moreover, the statements made by Witness GKE on 12 May 2003 and Witness GKF on 10 April 2003 contain only events involving Casimir Bizimungu in Ruhengeri *préfecture.* Accordingly, the Prosecutor shall not lead evidence in relation to the facts referred to in these statements. As for Witness GKI, he has made four statements dated 7 February 2001, 18-19 June 2002, 25 June 2002 and 11 February 2003. In the statement dated 11 February 2003, Witness GKI only refers to matters involving Casimir Bizimungu in Ruhengeri *préfecture.* Therefore, evidence relating to events implicating Casimir Bizimungu in Ruhengeri *préfecture* shall not be led by the Prosecutor. In relation to the other three statements made by this witness, the Prosecutor may lead evidence of their contents.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the said Motion in terms set out in the above paragraph 4.

Arusha, 3 February 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief 5 February 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Mugiraneza – witness testimony, exclusion – indictment, material facts, specific acts, sufficient detail – fair trial – evidence – conspiracy to commit genocide, complicity in genocide – appropriate time to raise an objection seeking to exclude evidence – cross-examination – no prejudice – motion granted in part

International instruments cited : Statute, art.20 – Rules of procedure and evidence, Rule 5 (B)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief" filed on 29 January 2004, (the "said Motion");

NOTING the "Prosecutor's Response to a Motion from Prosper Mugiraneza to Exclude Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ and LY" filed on 3 February 2004, (the "Response");

TAKING INTO CONSIDERATION the submissions made by both parties when this matter was taken up in open court on 5 February 2004;

NOTING the "Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA", filed on 23 January 2004, (the "Decision of 23 January 2004") AND the "Decision on Motion from Casimir Bizimungu Opposing to the Testimony of Witnesses AEI, GKE, GKF and GKI" filed on 3 February 2004, (the "Decision of 3 February 2004);

SUBMISSIONS OF THE PARTIES

1. The Defence for Prosper Mugiraneza moves the Trial Chamber to grant similar relief to that which was granted by the Trial Chamber in its Decision of 23 January 2004 and to exclude the evidence of those witnesses whose testimony does not relate to material facts pleaded in the Indictment, which was confirmed on 12 May 1999.

2. According to the Defence, the written statements of Prosecution Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF[1], GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ contain evidence of several criminal acts implicating Prosper Mugiraneza in Kibungo *préfecture*. The Defence submits that the Indictment does not refer to any material fact involving Prosper Mugiraneza in the events that took place in Kibungo *préfecture*. As for Witness LY, the Defence argues that his written statements mention events allegedly implicating Prosper Mugiraneza in Cyangugu *préfecture*, which are not pleaded in the Indictment. Therefore, the Defence submits that the evidence relating to events involving Prosper Mugiraneza in Kibungo and Cyangugu *prefectures* should not be considered by the Trial Chamber.

3. Furthermore, the Defence moves the Trial Chamber to disregard the evidence given by Witness GTE[2] in relation to events implicating Prosper Mugiraneza in Kibungo *préfecture* and not alleged in the Indictment. The Defence concedes that Counsel for Prosper Mugiraneza should have opposed the admission of the testimony of Witness GTE at the time she gave evidence in Court. However, the Defence requests the Trial Chamber to exercise its discretion pursuant to Rule 5 (B) of the Rules of Procedure and Evidence to exclude the impugned evidence given by Witness GTE, in the interests of justice. In addition, the Defence submits that Witness GTE refused to answer some of the questions put to her in cross-examination by Counsel for Prosper Mugiraneza. In the circumstances, according to the Defence, the right of the Accused to a fair trial has been denied.

4. The Prosecutor submits that the evidence sought to be excluded falls "squarely within the ambit of the Indictment as the Indictment charges the Accused with different modes of participation in the commission of genocide and other transgressions of international humanitarian law throughout Rwanda, not excluding any *préfecture*". According to the Prosecutor, "the participation involved, *inter alia*, participation in a joint criminal enterprise for the elimination of Tutsis throughout Rwanda. The criminal enterprise was executed by different members of the Interim Government throughout the 11 *préfectures* of Rwanda not excluding Kibungo".

5. In the oral submissions in Court on 5 February 2004, the Prosecutor added that, although no specific place is mentioned in the Indictment, the evidence that these witnesses would give can be admitted to prove the charges of Conspiracy and Complicity

[1] The Trial Chamber considers that, even if the pseudonym GTF was given to two witnesses on the Prosecutor's Witness list filed on 21 October 2003, for the purpose of this decision, GTF will be assigned to the witness that appears under No. 7 on the Prosecutor's Witness list dated 21 October 2003.

[2] Witness GTE testified on 1 and 2 December 2003.

in Genocide, as this evidence goes to prove the acts constituting the said offences, committed throughout Rwanda.

DELIBERATIONS

6. The Trial Chamber recalls its reasoning set out in the Decisions of 23 January 2004 and 3 February 2004. The Trial Chamber observes that there are no specific acts alleged against Prosper Mugiraneza in relation to events that took place in Kibungo and Cyangugu *préfectures* in any part of the Indictment. When questioned in open court by the Trial Chamber, the Prosecutor was unable to show the specific acts pleaded in the Indictment in respect of Prosper Mugiraneza in Kibungo and Cyangugu *préfectures*.

7. The Trial Chamber considers that it is a requirement of the law that, in addition to the charges against the Accused, an Indictment should contain a statement of the material facts which the Prosecutor intends to rely on in support of the charges. This must be given in sufficient detail so as to enable the Accused to prepare his defence. This forms the essence of a fair trial as guaranteed by the provisions of Article 20 of the Statute.

8. The Trial Chamber observes that the Prosecutor has failed to mention as material facts in the Indictment the involvement of Prosper Mugiraneza in the events that took place in Kibungo and Cyangugu *préfectures*. Hence, the evidence sought to be adduced from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ and LY will not be relevant or admissible against Prosper Mugiraneza, in so far as it implicates him in Kibungo and Cyangugu *préfectures*. Therefore, the Trial Chamber is of the view that the Prosecutor shall not be permitted to lead any evidence, relating to events implicating Prosper Mugiraneza in Kibungo and Cyangugu *prefectures* from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ and LY.

9. However, the Trial Chamber notes that the Indictment charges the Accused with Conspiracy to Commit Genocide as alleged in Count 1 of the Indictment and Complicity in Genocide as alleged in Count 3 of the Indictment. The Trial Chamber considers that in certain paragraphs of the Indictment, for example paragraphs 6.14, 6.23, 6.25, 6.31 and 6.68, adequately set out the material facts in relation to the commission of those offences. Therefore, the Trial Chamber is of the view that evidence from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ can be adduced in support of those charges.

10. Finally, the Trial Chamber notes that Witness GTE and Witness GKP have already testified before this Chamber on 1 and 2 December 2003 and on 5 and 8 December 2003 respectively. The Trial Chamber is of the view that the appropriate time to raise an objection seeking to exclude the evidence of the said witnesses was before the commencement of the evidence of the disputed witnesses or at least during the testimony of these witnesses. Furthermore, the Defence for Prosper Mugiraneza did not take the objection at the appropriate time, and since it had the opportunity to cross-examine the said witnesses, the Trial Chamber considers that no prejudice has been caused to the Accused. Therefore the Trial Chamber does not find any rea-

son to exclude the evidence of these two witnesses in respect of events implicating Prosper Mugiraneza in Kibungo *préfecture*.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the said Motion in terms set out in the above paragraphs 8 and 9.

DENIES the said Motion in all other respects.

Arusha, 5 February 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Bicamumpaka's Motion For Judicial Notice 11 February 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Bicamumpaka – judicial notice – adjudicated facts, determined in a proceeding before the Tribunal – fact of common knowledge – no possible review by the Appeals Chamber – motion denied

Insternational instruments cited : Rules of procedure and evidence, Rule 94 (B)

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Decision on the Prosecutor's Motion for Judicial Notice of adjudicated facts, 22 November 2001 (ICTR-96-10-T and ICTR-96-17-T,* Reports 2001, *p. 3030) – Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002 (ICTR-97-21-T,* Reports 2002, *p. X) – Trial Chamber II,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosecution's Motion for Judicial Notice Pursuant to rules 73, 89 and 94, 2 December 2003 (ICTR-99-50-T,* Reports 2003, *p. 1222) – Appeals Chamber,* Juvenal Kajelijeli v. The Prosecutor, *Notice of Appeal, 31 December 2003 (ICTR-98-44A-A) – Appeals Chamber,* The Prosecutor v. Juvenal Kajelijeli, *Prosecution's Notice of Appeal, 5 January 2004 (ICTR-98-44A-A,* Reports 2004, *p. X)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zoran Kupreskic et al., *Decision on the Motions of Drago Jospovic, Zoran Kupreskic and Vlatko Kupreskic to admit additional evidence pursuant to rule 115 and for judicial notice taken pursuant to rule 94 (B), 8 may 2001 (ICTY-IT-95-16)*

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Trial Chamber");

BEING SEIZED of "Motion of Defendant Bicamumpaka for Judicial Notice, Rule 94 of the Rules of Procedure and Evidence", filed on 20 January 2004, (the "Motion');

HAVING RECEIVED the "Prosecutor's Response to Motion of Defendant Bicamumpaka for Judicial Notice" filed on 26 January 2004;

CONSIDERING the matter pursuant to Rule 94 (B) of the Rules of Procedure and Evidence (the "Rules"), solely on the basis of the written submissions of the Parties.

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence seeks that the date on which Juvénal Kajelijeli was appointed *bourgmestre* of Mukingo *commune*, that is 26 June 1994, be taken judicial notice of as an adjudicated fact by the Trial Chamber. According to the Defence, the fact was adjudicated by Trial Chamber II in paragraphs 6 and 268 of the Judgment in *Prosecutor v. Kajelijeli* of 1 December 2003.

Prosecution Submissions

2. The Prosecutor submits that the exact date on which Juvénal Kajelijeli was appointed *bourgmestre* of Mukingo *commune* cannot be judicially noticed as requested by the Defence because the fact has not acquired the status of common knowledge. Consequently, the Prosecutor prays the Chamber to dismiss the Defence Motion.

DELIBERATIONS

3. Rule 94 (B) of the Rules reads as follows :

> (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.

4. Rule 94 (B) does not delimit the nature or scope of "adjudicated facts". Nevertheless, "adjudicated facts" has been defined as including within its ambit those facts which have been finally determined in a proceeding before the Tribunal[1]. The Trial Chamber may at the request of a Party or *proprio motu* take judicial notice of any facts or documentary evidence which has been adjudicated upon in proceedings before this Tribunal, if such facts or documentary evidence relate to the matter at issue in the proceedings before it[2].

5. The Trial Chamber finds that an adjudicated fact is one upon which it has deliberated, and thereupon made a finding in proceedings that are final, in that no appeal has been instituted therefrom or if instituted, the facts have been upheld.

6. The Trial Chamber recalls that the Appeals Chamber has considered that "a request must specifically point out the paragraph(s) or parts of the judgement of which it wishes judicial notice to be taken, and refer to *facts*, as found by the trial chamber"[3]. In this case, the Trial Chamber notes that the Defence has set out the facts and the paragraphs of the Judgment of which it wishes this Chamber to take judicial notice of under the Rule 94 (B).

7. The Trial Chamber notes that the fact sought to be judicially noticed was adjudicated in paragraphs 6 and 268 of the Judgment in *Prosecutor v. Kajelijeli* of 1 December 2003. Nevertheless, the Chamber does not deem it proper to consider as an adjudicated fact an issue which is yet to be settled by way of a possible review by the Appeals Chamber, or on which the right of appeal has not yet been exhausted[4]. The Chamber notes that "such decision must be conclusive in that it is not under challenge before the Appeals Chamber or, if challenged, the Appeals Chamber upheld it"[5].

8. The Trial Chamber notes that the Judgment in *Prosecutor v. Kajelijeli* is still the subject of appeal by the Accused as well as by the Prosecutor[6]. For that reason the facts contained in the Kajelijeli Judgement are not "adjudicated facts" within the meaning of the Statute. Therefore the Chamber is of the view that, this motion should be dismissed because the finality required has not been reached on the fact that is required to be taken judicial notice.

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[1] *The Prosecutor v. Ntakirutimana*, Case N° ICTR-96-10-T, "Decision on the Prosecutor's Motion for Judicial Notice of adjudicated facts", 22 November 2001, para. 26. (the "*Ntakirutimana* Decision"). *The Prosecutor v. Pauline Nyiramasuhuko et al*., Case N° ICTR-97-21-T, "Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence", 15 May 2002, para. 39. *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-T, "Decision on Prosecution's Motion for Judicial Notice Pursuant to rules 73, 89 and 94", 2 December 2003, para. 34. (the "*Bizimungu* Decision").

[2] The "*Nyiramasuhuko* Decision", para. 40.

[3] *Prosecutor v. Zoran Kupreskic et al.*, Case N° ICTY-IT-95-16, "Decision on the Motions of Drago Jospovic, Zoran Kupreskic and Vlatko Kupreskic to admit additional evidence pursuant to rule 115 and for judicial notice taken pursuant to rule 94 (B)", 8 may 2001, para. 12. (the "*Kupreskic* Decision").

[4] The *Kupreskic* Decision, para. 6.

[5] The *Bizimungu* Decision, para. 34; the *Ntakirutimana* Decision, para. 26.

[6] *Juvenal Kajelijeli v. The Prosecutor*, Case ICTR-98-44A-A, Notice of Appeal, 31 December 2003; *The Prosecutor v. Juvenal Kajelijeli*, Case ICTR-98-44A-A, Prosecution's Notice of Appeal, 5 January 2004.

FOR THE ABOVE REASONS, THE TRIBUNAL :

DENIES the Motion in its entirety.

Arusha, 11 February 2004.

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment 12 February 2004 (ICTR-99-50-AR50)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Mugiraneza, Bizimungu – amended indictment – discretion of the Trial Chamber – jurisdiction of the Appeals Chamber – additional evidence – balance between the right of the Accused to a trial without undue delay and the complexity of the case – delay in the commencement of trial – prejudice – amendments that narrow and amendments that expend the scope of the indictment, intertwines – burden of proof – genocide, complicity in genocide, single count, no duplicity – certification to appeal – appeal dismissed

International instruments cited : Statute, art. 19, 20 – Rules of procedure and evidence, Rules 50, 72, 73 (B)

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Alfred Musema*, Judgement and Sentence, 27 January 2001 (ICTR-96-13-T)* – The Prosecutor v. Bizimungu et al.*, Prosecutor's Request for Leave to File an Amended Indictment, 26 August 2003 (ICTR-99-50-I)* – The Prosecutor v. Casimir Bizimungu et al.*, Prosper Mugiraneza's and Jérôme Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment, 3 September 2003 (ICTR-99-50-I)* – The Prosecutor v. Casimir Bizimungu et al.*, Prosecutor's Reply to Prosper Mugiraneza's and Jérôme Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment, 5 September 2003 (ICTR-99-50-I)* – The Prosecutor v. Casimir Bizimungu et al.*, Réponse de la défense de Casimir Bizimungu au "Prosecutor's Request for Leave to File an Amended Indictment," 24 September 2003 (ICTR-99-50-I)* – The Prosecutor v. Casimir Bizimungu et al.*, Prosecutor's Reply to Casimir Bizimungu's Response to the Prosecutor's Request for Leave to Amend the Indictment, 2 October 2003 (ICTR-99-50-I) – Trial Chamber II,* The Prosecutor v. Jérôme Bicamumpaka*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 (ICTR-99-50-I,* Reports 2003*, p. 1168) – Trial Chamber II,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment, 29 October 2003 (ICTR-99-50-I,* Reports 2003*, p. 1202) – Appeals Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Appli-*

Décision relative à l'appel interlocutoire interjeté par le Procureur de la décision de la Chambre de première instance II, rendue le 6 octobre 2003, refusant d'autoriser le dépôt d'un acte d'accusation modifié 12 février 2004 (ICTR-99-50-AR50)

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président de Chambre; Mohamed Shahabuddeen; Mehmet Gûney; Fausto Pocar; Inés Mónica Weinberg de Roca

Mugiraneza, Bizimungu – acte d'accusation, modification – pouvoir d'appréciation de la Chambre de première instance – compétence de la Chambre d'appel – éléments de preuve nouveaux – mise en balance du droit de l'accusé à être jugé sans retard excessif avec la complexité de l'affaire – retard dans l'ouverture du procès – préjudice – modifications restreignant et élargissant le champ d'application de l'acte d'accusation, confusion – charge de la preuve – génocide, complicité dans le génocide, même chef d'accusation – pas de duplicité – certification pour interjeter appel – appel rejeté

Instruments internationaux cités : Statut, art. 19, 20 – Règlement de procédure et de preuve, art. 50, 72, 73 (B) – Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 16 septembre 2002

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Alfred Musema*, jugement et sentence, 27 janvier 2001 (ICTR-96-13-T)* – Le Procureur c. Casimir Bizimungu et consorts*, Requête du Procureur aux fins d'obtenir l'autorisation de déposer un acte d'accusation modifié, 26 août 2003 (ICTR-99-50-I)* – Le Procureur c. Casimir Bizimungu et consort*, Mémoire conjoint de Prosper Mugiraneza et de Jerôme Bicamumpaka en opposition à la Requête du Procureur en modification de l'acte d'accusation, 1er septembre 2003 (ICTR-99-50-I)* – Le Procureur c. Casimir Bizimungu et consorts*, Réponse de la défense de Casimir Bizimungu au « Prosecutor's Request for Leave to File an Amended Indictment », 24 septembre 2003 (ICTR-99-50-I)* – Le Procureur c. Casimir Bizimungu et consorts*, Réplique du Procureur à la Réponse de Casimir Bizimungu à la Requête du Procureur aux fins d'obtenir l'autorisation de déposer un acte d'accusation modifié, 2 octobre 2003 (ICTR-99-50-I) – Chambre de première instance II,* Le Procureur c. Casimir Bizimungu*, Décision relative à la requête du Procureur demandant l'autorisation de désposer un acte d'accusation modifié, 6 octobre 2003 (ICTR-9-50-I,* Recueil 2003*, p. 1169) – Chambre de première instance II,* Le Procureur c. Casimir Bizimungu et consorts*, Decision on prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment, 29 octobre 2003 (ICTR-99-50-1,* Recueil 2003*, p. 1202) – Chambre d'appel,* Le Procureur c. Théoneste Bagosora et consorts*, Decision on Application for Extension of Time to File Response to Interlocutory Appeal, 3 novembre 2003 (ICTR-*

cation for Extension of Time to File Response to Interlocutory Appeal, 3 November 2003 (ICTR-98-41-AR93, Reports 2003*, p. 204) – Appeals Chamber,* The Prosecutor v. Edouard Karemera et al.*, 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 (ICTR-98-44-AR73,* Reports 2003*, p. 1504)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Kovačević*, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998 (IT-97-24-AR73) – Appeals Chamber,* The Prosecutor v. Kupreškić*, Appeal Judgment, 23 October 2001 (IT-95-16-A) – Appeals Chamber,* Prosecutor v. Milosević*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 (IT-99-37-AR73, IT-01-50-AR73 and IT-01-51-AR73)*

1. 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" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment," filed by the Prosecution on 3 November 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the written submissions of the parties.

PROCEDURAL HISTORY

2. On 26 August 2003, the Prosecution filed a request for leave to amend the indictment in the Trial Chamber ("Request")[1]. Appended to the Request was an amended indictment dated 28 July 2003 ("Amended Indictment"), which the Prosecution sought to substitute for the operative indictment filed on 16 August 1999 ("Current Indictment"). Two of the Accused, Mugiraneza and Bicamumpaka, filed a joint response, arguing *inter alia* that the Prosecution's Request was untimely and would unduly postpone the commencement of trial[2]. The Accused Bizimungu also filed a separate response, which argued *inter alia* that the Amended Indictment contained new allegations regarding which the Defence had not made any investigations, such that the Defence would be prejudiced if required to meet the case set forth in

[1] *Prosecutor v. Bizimungu et al.*, N° ICTR-99-50-I, Prosecutor's Request for Leave to File an Amended Indictment, 26 August 2003.

[2] *Prosecutor v. Bizimungu et al.*, N° ICTR-99-50-I, Prosper Mugiraneza's and Jérôme Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment, 3 September 2003.

98-4 1-AR93, Reports 2003*, p. 204) – Chambre d'appel,* Le Procureur c. Edouard Karemera et consorts*, Décision relative à l'appel interlocutoire interjeté par le Procureur de la Décision rendue le 8 octobre 2003 par la Chambre de première instance III refusant d'autoriser le dépôt d'un acte d'accusation modifié, 19 décembre 2003 (ICTR-98-44-AR73,* Recueil 2003*, p. 1505)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Kovacevic*, Arrêt motivant l'ordonnance rendue le 29 mai 1998 par la Chambre d'appel, 2 juillet 1998 (IT-97-24-AR73) – Chambre d'appel,* Le Procureur c. Kupreskic*, Arrêt, 23 octobre 2001 (IT-95-16-A) – Chambre d'appel,* Le Procureur c. Milosevic*, Motifs de la décision relative à l'appel interlocutoire de l'Accusation contre le rejet de la demande de jonction, 18 avril 2002 (IT-99-47-AR73, IT-01-50-AR73 et IT-01-51-AR73)*

1. 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 (la «Chambre d'appel» et le «Tribunal international» respectivement) est saisie de l'«appel interjeté par le Procureur de la décision de la Chambre de Première instance II, rendue le 6 octobre 2003, refusant d'autoriser le dépôt d'un acte d'accusation modifié», déposé par le Procureur le 3 novembre 2003 (l'«appel»). La Chambre d'appel, par la présente, statue sur ledit appel sur la base des conclusions écrites des parties.

RAPPEL DE LA PROCÉDURE

2. Le 26 août 2003, le Procureur a saisi la Chambre de première instance d'une requête aux fins d'obtenir l'autorisation de déposer un acte d'accusation modifié (la «requête»)[1], à laquelle il avait joint en annexe un acte d'accusation modifié daté du 28 juillet 2003 (l'«acte d'accusation modifié») et qu'il entendait présenter en lieu et place de l'acte d'accusation en vigueur, déposé le 16 août 1999 (l'«acte d'accusation actuel»). Deux des accusés, en l'occurrence Mugiraneza et Bicamumpaka, ont déposé une réponse conjointe, dans laquelle ils faisaient valoir, notamment, que la requête du Procureur avait été déposée trop tardivement et qu'elle ne ferait que reporter indûment la date d'ouverture du procès[2]. L'accusé Bizimungu, quant à lui, a déposé une réponse distincte, dans laquelle il soutenait, entre autres, que l'acte d'accusation modifié contenait de nouvelles allégations au sujet desquelles la défense n'avait mené aucune enquête ce qui, dès lors, porterait préjudice à la défense si celle-ci devait y

[1] *Le Procureur c. Bizimungu et consorts*, affaire n° ICTR-99-50-I, Requête du Procureur aux fins d'obtenir l'autorisation de déposer un acte d'accusation modifié, 26 août 2003.

[2] *Le Procureur c. Bizimungu et consort*, affaire n° ICTR-99-50-I, Mémoire conjoint de Prosper Mugiraneza et de Jerôme Bicamumpaka en opposition à la Requête du Procureur en modification de l'acte d'accusation, 1er septembre 2003.

the Amended Indictment[3]. The Accused Mugenzi did not file a response to the Prosecution's Request[4]. The Prosecution submitted replies to both responses[5].

3. On 6 October 2003, the Trial Chamber issued its decision dismissing the Prosecution's Request ("Decision"). The Decision stated that the Request arose under Rule 50 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Trial Chamber noted that, in exercising its discretion under Rule 50 of the Rules, it would consider "the particular circumstances of the case" and balance the rights of the Accused under Articles 19 and 20 of the Statute of the International Tribunal, including the "right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay," against "the complexity of the case."[6]

4. The Trial Chamber held that some of the changes reflected in the Amended Indictment, namely removal of certain counts and deletion of the "Historical Context" section, did not necessarily require an amendment under Rule 50 of the Rules[7].

5. The Trial Chamber next held that the Prosecution's intention to replace two counts charging genocide and complicity in genocide with a single count charging genocide and, in the alternative, complicity in genocide, was "irregular and would render the count bad for duplicity and will pose problems particularly when [the Trial Chamber] has to pronounce judgment and sentence on one or the other of the charges."[8] The Trial Chamber found that it was "not in the interests of judicial economy" to allow that amendment[9].

6. Finally, the Trial Chamber addressed the Prosecution's request to amend the Current Indictment following the discovery of new evidence that was not available at the time the Current Indictment was confirmed. The Trial Chamber concluded that "the expansions, clarifications and specificity made in support of the remaining counts do amount to substantial changes which would cause prejudice to the Accused."[10] The Trial Chamber stated, as an example, the fact that although the Current Indictment "contains broad allegations in support of the Counts," the Amended Indictment contains "specific allegations detailing names, places, dates and times wherein the

[3] *Prosecutor v. Bizimungu et al.*, N° ICTR-99-50-I, *Réponse de la défense de Casimir Bizimungu au* "Prosecutor's Request for Leave to File an Amended Indictment," 24 September 2003.

[4] See Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 ("Decision"), para. 30.

[5] *Prosecutor v. Bizimungu et al.*, N° ICTR-99-50-I, Prosecutor's Reply to Casimir Bizimungu's Response to the Prosecutor's Request for Leave to Amend the Indictment, 2 October 2003; *Prosecutor v. Bizimungu et al.*, N° ICTR-99-50-I, Prosecutor's Reply to Prosper Mugiraneza's and Jérôme Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment, 5 September 2003.

[6] Decision, para. 27.

[7] *Ibid.*, para. 31.

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*, para. 34.

répondre[3]. L'accusé Mugenzi n'a pas déposé de réponse à la requête du Procureur[4]. Le Procureur a répliqué aux deux réponses[5] qui ont été déposées.

3. Le 6 octobre 2003, la Chambre de première instance a rendu sa décision rejetant la requête du Procureur (la «décision»). Dans cette décision, la Chambre fait observer que la requête a été déposée en vertu de l'article 50 du Règlement de procédure et de preuve du Tribunal international (le «Règlement»). Elle a indiqué qu'en vertu du pouvoir discrétionnaire qui lui est conféré par l'article 50 du Règlement, elle examinerait «les circonstances particulières de l'affaire» et mettrait en balance les droits garantis aux accusés par les articles 19 et 20 du Statut du Tribunal international, notamment le «droit d'être informé, dans le plus court délai, de façon détaillée, de la nature et des motifs de l'accusation [portée contre elle], le droit à un procès équitable et rapide d'être jugée sans retard excessif», avec «la complexité de l'affaire»[6].

4. La Chambre de première instance a estimé que certaines des modifications exposées dans l'acte d'accusation modifié – en l'occurrence le retrait de certains chefs d'accusation et la suppression de la partie intitulée «contexte historique» – ne nécessitaient pas forcément une modification de l'acte d'accusation sous le régime de l'article 50 du Règlement[7].

5. La Chambre de première instance a ensuite jugé que l'intention du Procureur de substituer un chef d'accusation unique de génocide et, subsidiairement, de complicité dans le génocide, aux deux chefs d'accusation de génocide et de complicité dans le génocide initialement retenus était «irrégulière et rendrait le chef d'accusation mal fondé pour cause de duplicité, ce qui ne manquera pas de poser problème surtout lorsque [la Chambre de première instance] aura à prononcer jugement et sentence relativement à l'une ou l'autre des charges»[8]. Elle a estimé qu'il «n'était pas dans l'intérêt de l'économie judiciaire» d'autoriser une telle modification[9].

6. Enfin, la Chambre de première instance a examiné la requête du Procureur en modification de l'acte d'accusation actuel motif pris de la découverte de nouveaux éléments de preuve qui n'étaient pas disponibles au moment de la confirmation de l'acte d'accusation actuel. Elle a conclu que «les développements, clarifications et précisions apportés à l'appui des chefs restants constituaient des modifications substantielles susceptibles de porter préjudice aux accusés»[10]. Elle a fait observer, à titre d'exemple, le fait que, contrairement à l'acte d'accusation actuel qui «contient des allégations à caractère général à l'appui des chefs d'accusation», l'acte d'accusation modifié contient «des allégations précises en ce qu'il mentionne des noms, des lieux,

[3] *Le Procureur c. Bizimungu et consorts*, n° ICTR-99-50-I, Réponse de la défense de Casimir Bizimungu au «Prosecutor's Request for Leave to File an Amended Indictment», 24 septembre 2003.

[4] Voir *Decision on the Prosecutor's Request for Leave to File an Amended Indictment*, 6 octobre 2003 (la «Décision»), par. 30.

[5] *Le Procureur c. Bizimungu et consorts*, n° ICTR-99-50-I, Réplique du Procureur à la Réponse de Casimir Bizimungu à la Requête du Procureur aux fins d'obtenir l'autorisation de déposer un acte d'accusation modifié, 2 octobre 2003;

[6] Décision, par. 27.

[7] *Ibid*., par. 31.

[8] *Ibid*.

[9] *Ibid*.

[10] *Ibid*., par. 34.

Accused are alleged to have participated in the commission of specific crimes."[11] The Trial Chamber found that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence."[12]

7. The Trial Chamber also noted that trial was scheduled to begin on 3 November 2003. In the Trial Chamber's view, granting the Prosecution leave to amend the indictment would "not only cause prejudice to the Accused but would also result in a delay for the commencement of the trial for the reasons outlined above."[13] In such circumstances, the Trial Chamber concluded that "it would not be in the interests of justice" to grant leave to amend the indictment[14]. The Trial Chamber therefore denied the Prosecution's Request in its entirety.

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73 (B) of the Rules[15], and the Prosecution filed this Appeal. The Accused Mugiraneza filed a timely response[16], to which the Prosecution replied[17]. The Accused Bizimungu moved for an extension of time in which to respond to the Appeal, which the Appeals Chamber granted[18]; Bizimungu then filed a timely response to the Appeal on 25 November 2003[19], to which the Prosecution did not reply.

9. The Accused Bicamumpaka filed a response on 10 December 2003, 37 days after the filing of the Appeal and 14 days after the expiry of the extension granted to the Accused Bizimungu[20]. The Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, dated 16 September 2002 ("Practice Direction"), provides that responses to interlocutory appeals governed by the Practice Direction are due ten days after the filing of the appeal[21]. The Appeals Chamber notes, however, that the Practice Direction does not specifically provide a deadline for responses to appeals that follow certification of the Trial Chamber, although the Appeals Chamber has recently suggested that the response time of ten

[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*, para. 35.
[14] Decision, para. 35.
[15] *Prosecutor v. Bizimungu et al.*, N° ICTR-99-50-I, Decision on the Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment, 29 October 2003.
[16] Prosper Mugiraneza's Reply to the Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 10 November 2003 ("Mugiraneza Response").
[17] Prosecutor's Response to Mugiraneza's Opposition to Prosecutor's Appeal to File Amended Indictment, 17 November 2003.
[18] Decision on Casimir Bizimungu's Motion for an Extension of Time, 20 November 2003.
[19] *Mémoire de l'intimé Casimir Bizimungu en réponse au* "Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment," 25 November 2003 ("Bizimungu Response").
[20] *Mémoire de l'intimé Jérôme Bicamumpaka en réponse au* "Prosecutor's Appeal Against Trial Chamber II Decision of October 6th 2003 Denying Leave to File Amended Indictment," 10 December 2003.
[21] Practice Direction, arts. II.2, III.8.

et les dates et moments auxquels les accusés auraient participé à la commission de crimes bien précis»[11]. Pour la Chambre de première instance, «de telles modifications substantielles justifiaient que soit accordé à l'accusé le temps nécessaire pour préparer sa défense»[12].

7. La Chambre de première instance a également relevé que l'ouverture du procès était prévue pour le 3 novembre 2003. Elle a estimé qu'autoriser le Procureur à modifier l'acte d'accusation serait «de nature non seulement à porter préjudice à l'accusé, mais aussi à retarder l'ouverture du procès pour les motifs sus-exposés»[13]. Vu les circonstances, elle a conclu qu'«il ne serait pas dans l'intérêt de la justice» de faire droit à la requête du Procureur[14]. Partant, elle a rejeté la requête du Procureur dans sa totalité.

8. Par la suite, la Chambre de première instance a certifié que la décision était susceptible d'appel interlocutoire en vertu de l'article 73 (B)[15] du Règlement, à la suite de quoi le Procureur a déposé l'appel. L'accusé Mugiraneza a déposé une réponse dans les délais[16], à laquelle le Procureur a répliqué[17]. L'accusé Bizimungu a demandé le report du délai pour répondre à l'appel, demande à laquelle la Chambre d'appel a accédé[18]; puis ce fut Bizimungu, qui a déposé dans les délais une réponse à l'appel le 25 novembre 2003[19], à laquelle le Procureur n'a pas répliqué.

9. Le 10 décembre 2003, soit 37 jours après le dépôt de l'appel et 14 jours après l'expiration du délai supplémentaire accordé à l'accusé Bizimungu[20], l'accusé Bicamumpaka a déposé une réponse. La Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, datée du 16 septembre 2002 (la «Directive pratique»), dispose que les réponses aux appels interlocutoires régis par la Directive pratique sont déposées dans les dix jours suivant le dépôt de l'appel[21]. La Chambre d'appel relève, cependant, que la Directive pratique ne prévoit pas expressément un délai pour le dépôt des réponses aux appels faisant suite à la certification par la Chambre de première instance, bien que la Chambre d'appel ait laissé entendre dernièrement que le même délai de dix jours devrait également s'appliquer aux appels

[11] *Ibid*.

[12] *Ibid*.

[13] *Ibid*., par. 35.

[14] Décision par. 35.

[15] *Le Procureur c. Bizimwngu et consorts*, no ICTR-99-50-1, *Decision on prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment*, 29 octobre 2003.

[16] *Prosper Mugiraneza's Reply to the Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, 10 novembre 2003 («Réponse de Mugiraneza»).

[17] *Prosecutor's response to Mugiraneza's Opposition to Prosecutor's Appeal to File Amendment Indictment*, 17 novembre 2003.

[18] *Decision on Casimir Bizimungu's Motion for an extension of time*, 20 novembre 2003.

[19] Mémoire de l'intimé Casimir Bizimungu en réponse au «Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment», 25 novembre 2003 («Réponse de Bizimungu»).

[20] Mémoire de l'intimé Jérôme Bicamumpaka en réponse au «Prosecutor's Appeal against Trial Chamber II Decision of 6 October 2003 denying Leave to File Amended Indictment», 10 décembre 2003.

[21] Directive pratique, article II.2, III.8.

days should also apply to appeals following certification[22]. The Appeals Chamber affirms this interpretation of the Practice Direction. However, since that interpretation may not have been apparent to the Accused Bicamumpaka, the Appeals Chamber has decided to consider his response.

JURISDICTION

10. The Accused Mugiraneza raises a threshold challenge to the Appeals Chamber's jurisdiction, claiming that the Amended Indictment is not a proper proposed indictment because it was signed by the Prosecutor on 28 July 2003 but subsequently altered before the Request was filed on 26 August 2003. This objection is not well-founded. A motion for leave to amend an indictment need only submit the proposed amendments to the indictment or the text of the proposed amended indictment. There is no requirement in Rule 50 that the proposed indictment be signed by the Prosecutor. Although the discrepancy between the date of signature and the date of finalization of the Amended Indictment might deserve an explanation (which the Prosecution has provided, namely that the results of further investigations warranted further changes between 28 July and 26 August 2003[23]), the discrepancy does not deprive the Appeals Chamber of jurisdiction in this matter.

DISCUSSION

11. The Appeals Chamber's recent decision in *Prosecutor v. Karemera et al.* ("*Karemera*") reaffirmed that Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber and that "appellate intervention is warranted only in limited circumstances."[24] 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."[25]

[22] *Prosecutor v. Bagosora et al.*, N° ICTR-98-41-AR93, Decision on Application for Extension of Time to File Response to Interlocutory Appeal, 3 November 2003, pp. 2-3.

[23] Appeal, para. 46.

[24] *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.

[25] *Ibid.* (quoting *Prosecutor v. Milosević*, N°S. IT-99-37-AR73, IT-01-50-AR73 and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5 (footnotes omitted)).

consécutifs à la certification[22]. La Chambre d'appel confirme cette interprétation de la Directive pratique. Mais, comme cette interprétation ne semble pas avoir été évidente pour l'accusé Bicamumpaka, la Chambre d'appel a décidé de prendre sa réponse en considération.

COMPÉTENCE

10. L'accusé Mugiraneza soulève une question préjudicielle mettant en cause la compétence de la Chambre d'appel en soutenant que l'acte d'accusation modifié n'a pas été présenté en bonne et due forme car il avait été signé par le Procureur le 28 juillet 2003, puis modifié par la suite avant le dépôt de la requête le 26 août 2003. Cette objection est sans fondement, car une demande d'autorisation de modifier un acte d'accusation ne doit exposer que les modifications envisagées à l'acte d'accusation initial ou présenter le texte du projet d'acte d'accusation modifié. Qui plus est, rien dans l'article 50 ne dit que le Procureur doit signer l'acte d'accusation proposé. Bien que la non-concordance relevée entre la date de signature et celle de la mise au point définitive de l'acte d'accusation modifié mériterait explication (explication que le Procureur a, au demeurant, fournie, à savoir que les résultats d'enquêtes complémentaires avaient rendu nécessaires d'autres modifications qui ont été apportées entre le 28 juillet et le 26 août)[23], ce décalage n'ôte cependant rien à la compétence de la Chambre d'appel en l'espèce.

DISCUSSION

11. La décision rendue dernièrement par la Chambre d'appel dans l'affaire *Le Procureur c. Karemera et consorts* («*Karemera*») a réaffirmé que la décision relative à l'autorisation de modifier l'acte d'accusation relevant du pouvoir d'appréciation de la Chambre de première instance en vertu de l'article 50 du Règlement, «la Chambre d'appel ne peut intervenir que dans des cas limités»[24]. Il appartient à la partie qui conteste l'exercice de ce pouvoir de démonter que «la Chambre de première instance s'est méprise sur le principe à appliquer ou sur la règle de droit à prendre en compte dans l'exercice de son pouvoir discrétionnaire, qu'elle a attaché de l'importance à des éléments étrangers à l'affaire ou non pertinents, ou qu'elle n'a pas ou pas suffisamment pris en compte les éléments dignes de l'être, ou qu'elle a commis une erreur concernant les faits sur la base desquels elle a exercé son pouvoir discrétionnaire»[25].

[22] *Le Procureur c. Bagosora et consorts*, no ICTR-98-4 1-AR93, Decision on Application for Extension of Time to File Response to Interlocutory Appeal, 3 novembre 2003, pp. 2-3.

[23] Appel, par. 46.

[24] *Le Procureur c. Karemera et consorts*, n°ICTR-98-44-AR73, Décision relative à l'appel interlocutoire interjeté par le Procureur de la Décision rendue le 8 octobre 2003 par la Chambre de première instance III refusant d'autoriser le dépôt d'un acte d'accusation modifié, 19 décembre 2003 («Karemera»), par. 9.

[25] *Ibid*. (Citant *Le Procureur c. Milosevic*, affaires n°IT-99-47-AR73, IT-01-50-AR73 et IT-01-51-AR73, Motifs de la décision relative à l'appel interlocutoire de l'Accusation contre le rejet de la demande de jonction, 18 avril 2002, par. 5. (notes de bas de page omises)).

12. The Prosecution submits that the Trial Chamber balanced the right of the Accused to a trial without undue delay against the complexity of the case, but failed to take into account "a multiplicity of other material considerations or values against which the rights of the accused must be balanced to reach a correct decision."[26] First, the Prosecution charges that the Trial Chamber did not consider "the obtaining of new and additional evidence since the confirmation of the old Indictment."[27] The Appeals Chamber does not agree that the Trial Chamber ignored this factor. The Trial Chamber understood the Prosecution's position to be that "the Prosecution seeks leave to amend the current Indictment following the discovery of new evidence which was not available at the time of confirmation of the current Indictment."[28] The Trial Chamber then stated, in the context of its discussion of the merits of the Prosecution's Request :

> "The Chamber considers the Prosecution's further request to amend the current Indictment following its discovery of new evidence which was not available at the time of confirmation of the current Indictment which thereby necessitates the expansion of the remaining Counts."[29]

In light of these statements, it is plain that the Trial Chamber considered the fact that the Prosecution's Request was based on newly obtained evidence.

13. The Prosecution also contends that the Trial Chamber failed to give due consideration to the fundamental purposes of the International Tribunal, including "the gravity or seriousness of the crimes with which the accused is/are indicted; the mandate or fundamental purpose of the [International] Tribunal to bring to justice all those responsible for the heinous crimes in Rwanda in 1994; the rights of victims; the obligation of the Prosecutor to prosecute the accused to the full extent of the law and to present before the [International] Tribunal all relevant evidence reflecting the totality of the accused's participation in the crimes; and establishing the totality of truth of what happened in Rwanda and those who are responsible in order to promote justice and reconciliation."[30] Although the Trial Chamber did not mention these factors in the Decision, it does not follow that they were not considered at all[31]. Furthermore, *Karemera* cautioned against placing significant weight on such factors when they are invoked "without further elaboration."[32] The Prosecution's Appeal, like the appeal in *Karemera*, "has not shown that proceeding to trial on the Current Indictment will impair the rights of victims or undermine the mandate of the International Tribunal."[33] The Appeals Chamber therefore cannot

[26] Appeal, para. 13.
[27] Appeal, para. 14.
[28] Decision, para. 29.
[29] *Ibid.*, para. 32.
[30] Appeal, para. 17 (italics omitted).
[31] See *Prosecutor v. Kupreškić*, N° IT-95-16-A, Appeal Judgment, 23 October 2001, para. 458 ("[F]ailure to list in the Trial Judgement, each and every circumstance placed before [the Trial Chamber] and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question.").
[32] *Karemera*, para. 16.
[33] *Ibid.*, para. 23.

12. Le Procureur soutient que la Chambre de première instance a mis en balance le droit de l'accusé à être jugé sans retard excessif avec la complexité de l'affaire, mais a ignoré «une multiplicité d'autres considérations ou impératifs importants qu'il convient d'opposer aux droits des accusés pour arriver à une décision correcte»[26]. Premièrement, le Procureur reproche à la Chambre de première instance de n'avoir pas pris en compte le fait que «des éléments de preuve nouveaux et supplémentaires ont été obtenus depuis la confirmation de l'ancien acte»[27]. La Chambre d'appel ne partage pas l'avis que la Chambre de première instance aurait ignoré ces éléments. En effet, la Chambre de première instance croyait comprendre que «le Procureur demande l'autorisation de modifier l'acte d'accusation actuel suite à la découverte de nouveaux éléments de preuve qui n'étaient pas disponibles au moment de la confirmation de l'acte d'accusation actuel»[28]. Elle a ajouté, dans le contexte de son examen du bien-fondé de la requête du Procureur, que : «La Chambre examine la demande supplémentaire du Procureur à l'effet de modifier l'acte d'accusation actuel suite à la découverte de nouveaux éléments de preuve qui n'étaient pas disponibles au moment de la confirmation de l'acte d'accusation actuel, ce qui nécessite en conséquence le développement des chefs d'accusation restants»[29]. À la lumière de ces déclarations, il est manifeste que la Chambre de première instance a tenu compte du fait que la requête du Procureur était fondée sur des éléments de preuve nouvellement obtenus.

13. Le Procureur soutient également que la Chambre de première instance n'a pas suffisamment pris en compte les objectifs fondamentaux du Tribunal international, notamment «la gravité des crimes dont les accusés doivent répondre, le mandat ou l'objectif fondamental du Tribunal [international] de traduire en justice tous les responsables des crimes odieux commis au Rwanda en 1994, les droits des victimes, l'obligation du Procureur de poursuivre les accusés avec toute la rigueur de la loi et de présenter au Tribunal [international] tous les éléments de preuve permettant de prendre pleinement la mesure de la participation des accusés aux crimes visés, et la nécessité de faire toute la lumière, dans l'intérêt de la justice et de la réconciliation, sur les événements du Rwanda et sur les responsables de ces événements»[30]. Ce n'est pas parce que la Chambre de première instance n'a pas mentionné ces considérations dans sa décision que l'on peut forcément en déduire qu'elle n'en avait pas du tout tenu compte[31]. Qui plus est, dans l'affaire *Karemera*, la Chambre de céans a déclaré qu'il fallait faire attention de ne pas accorder trop d'importance à ces considérations, «du moins lorsqu'elles sont présentées d'une façon aussi générale»[32]. Dans le présent appel tout comme dans l'appel interjeté dans l'affaire *Karemera*, [le Procureur] «n'a pas démontré que l'ouverture du procès sur la base de l'acte d'accusation actuel portera atteinte aux droits des victimes ou à la mission du Tribunal international»[33]. Dès

[26] Appel, par. 13.
[27] Appel, par. 14.
[28] Décision, par. 29.
[29] *Ibid*., par. 32.
[30] Appel, par. 17 (les italiques ont été omis).
[31] Voir *Le Procureur c. Kupreskic*, no IT-95-16-A, Arrêt, 23 octobre 2001, par. 458 («[Le] fait que, dans le Jugement, la Chambre n'a pas passé en revue toutes les circonstances invoquées et examinées, ne signifie pas nécessairement qu'elle les ait ignorées ou qu'elle ne les ait pas appréciées.
[32] *Karemera*, par. 16.
[33] *Ibid*., par. 23.

conclude that the Trial Chamber exceeded its discretion by failing to give weight to the factors advanced by the Prosecution.

14. The Prosecution also argues that, while the Trial Chamber did balance the right of the Accused to a trial without undue delay against the complexity of the case, it failed to give this latter factor "appropriate weight."[34] Yet the Trial Chamber expressly noted in paragraph 27 of the Decision that the "complexity of the case" is a factor to be balanced against the rights of the Accused. The Trial Chamber was not required to itemize in the Decision the various obstacles that, according to the Prosecution, impeded a faster investigation of this case. In such circumstances, it suffices that the complexity of the case was taken into account as a factor weighing in the Prosecution's favour. The Prosecution's objection that the complexity of the case should have tipped the balance is merely a claim that the Trial Chamber reached the wrong result, although it considered the right factor. Disagreement with the result of an exercise of discretion, without more, is not a basis for appellate interference.

15. The Prosecution's next argument challenges the Trial Chamber's reliance on the finding that amending the indictment would have delayed the start of trial past the scheduled start date of 3 November 2003. The Trial Chamber found that the amendments involved "substantial changes" which would cause prejudice and that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence."[35] The Trial Chamber then concluded that the amendments would cause "a delay for the commencement of trial" and that it "would not be in the interests of justice to grant the Motion."[36] The Prosecution contends that the Trial Chamber treated the start date of 3 November 2003 as absolutely inflexible and not subject to change under any circumstance. The Prosecution submits that the Trial Chamber should instead have considered the possibility of postponing the trial date if an amendment to the indictment is justifiable in light of the totality of the circumstances.

16. The Prosecution is certainly correct that the Trial Chamber must consider all of the circumstances bearing on a motion to amend the indictment. Interference with the orderly scheduling of trial, however, is one such circumstance. The Appeals Chamber stated in *Karemera* that "a postponement of the trial date and a prolongation of the pretrial detention of the Accused" are "some, but not all"[37] of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial "without undue delay,"[38] which in turn bears on the broader question whether the amendment is justified under Rule 50 of the Rules. The Trial Chamber should also consider such factors as the nature and scope of the proposed

[34] Appeal, para. 26.
[35] Decision, para. 34.
[36] *Ibid.*, para. 35.
[37] *Karemera*, para. 19.
[38] *Ibid.*, para. 13 (quoting Statute of the International Tribunal, Art. 20 (4) (c)).

lors, la Chambre d'appel ne peut conclure que la Chambre de première instance a outrepassé son pouvoir discrétionnaire en n'accordant pas d'importance aux considérations invoquées par le Procureur.

14. Le Procureur soutient également que, bien que la Chambre de première instance ait effectivement mis en balance le droit de l'accusé à être jugé sans retard excessif avec la complexité de l'affaire, cette dernière considération n'a cependant pas reçu de la Chambre toute «l'importance requise»[34]. Et pourtant, la Chambre de première instance a expressément déclaré au paragraphe 27 de la décision que la «complexité de l'affaire» est un élément qui doit être mis en balance avec les droits de l'accusé. La Chambre de première instance n'était pas tenue d'énumérer dans la décision les différents obstacles qui, de l'avis du Procureur, ont ralenti les enquêtes dans la présente affaire. Dans ces circonstances, il suffit que la complexité de l'affaire ait été prise en compte comme facteur jouant en faveur du Procureur. L'objection du Procureur selon laquelle la complexité de l'affaire aurait dû faire pencher la balance revient tout simplement à dire que bien que la Chambre de première instance ait tenu compte du facteur qu'il fallait, elle n'en est pas moins parvenue à une décision erronée. Un désaccord, sans plus, quant aux effets de l'exercice d'un pouvoir discrétionnaire ne saurait justifier l'intervention de la Chambre d'appel.

15. L'argument suivant du Procureur fait grief à la Chambre de première instance de s'être appuyée sur la conclusion selon laquelle la modification de l'acte d'accusation aurait reporté l'ouverture du procès au-delà de la date prévue du 3 novembre 2003. La Chambre de première instance a estimé que les modifications constituaient des «modifications substantielles» susceptibles de porter préjudice aux accusés et «justifiaient que soit accordé à ceux-ci le temps nécessaire pour préparer leur défense»[35]. La Chambre de première instance a ensuite conclu que ces modifications étaient de nature «à retarder l'ouverture du procès» et qu'il «ne serait pas dans l'intérêt de la justice de faire droit à la requête»[36]. Le Procureur objecte que la Chambre de première instance a considéré la date d'ouverture du procès du 3 novembre 2003 comme étant une date absolument péremptoire, qui ne saurait en aucun cas être changée. Le Procureur soutient que la Chambre de première instance aurait dû, plutôt, envisager la possibilité de la repousser si, au vu de l'ensemble des circonstances, la modification de l'acte d'accusation se justifiait.

16. Le Procureur a certainement raison de dire que la Chambre de première instance doit tenir compte de tous les facteurs touchant à une requête en modification de l'acte d'accusation. Certes, l'ingérence dans le bon déroulement du calendrier est un de ces facteurs. La Chambre d'appel a déclaré dans la décision *Karemera* que «le report de la date du procès et la prolongation de la détention préventive des accusés» constituaient «certains, mais pas tous» les éléments d'appréciation[37] à prendre en considération dans l'analyse de la question de savoir si un projet de modification violerait le droit de l'accusé «à être jugé sans retard excessif»[38] qui, à son tour, se rapporte à la question de portée plus générale qui est de savoir si la modification se jus-

[34] Appel, par. 26.
[35] Décision, par. 34.
[36] *Ibid*., par. 35.
[37] *Karemera*, par. 19.
[38] *Ibid*., par. 13 (citant l'article 20 (4) (c) du Statut du Tribunal international).

amendments, whether the Prosecution was diligent in pursuing its investigations and in presenting the motion, whether the Accused and the Trial Chamber had prior notice of the Prosecution's intention to seek leave to amend the indictment, when and in what circumstances such notice was given, whether the Prosecution seeks an improper tactical advantage[39], and whether the addition of specific allegations will actually improve the ability of the Accused to respond to the case against them and thereby enhance the overall fairness of the trial[40]. Likewise, the Trial Chamber must also consider the risk of prejudice to the Accused and the extent to which such prejudice may be cured by methods other than denying the amendment, such as granting adjournments or permitting the Accused to recall witnesses for cross-examination[41]. The above list is not exhaustive; particular cases may present different circumstances that also bear on the proposed amendments.

17. In this case, it cannot be said that the Trial Chamber failed to consider the above-listed points. To begin with, they were specifically argued by the Prosecution in its Request[42] and summarized in the Decision[43]. Although the Decision does not mention them in its summary of its deliberations, that omission is not error of itself; the Trial Chamber is not required to enumerate and dispose of all of the arguments raised in support of a motion. Absent a showing that the Trial Chamber actually refused to consider any factors other than the determination that the amendment would delay the start of trial, or a showing that the Trial Chamber's conclusion was so unreasonable that it cannot have considered all pertinent factors, the Appeals Chamber must conclude that the Trial Chamber took account of all of the arguments put to it.

18. In this case, the Trial Chamber's Decision sufficiently shows that it considered factors other than delay in the commencement of trial. The Decision states that the factors of prejudice and delay are to some extent independent, i.e. the proposed amendments would "not only" prejudice the accused but "would also" cause a delay[44]. This language suggests that the potential delay, which was required to give the Accused "adequate time to prepare" their defence[45], would not suffice to eliminate all of the prejudice to the Accused that would result from the Amended Indictment. In other words, the Trial Chamber concluded that the Accused would suffer prejudice in the conduct of their defence *even if they were given more time to prepare*, and

[39] See *ibid.*, paras. 15, 20-30; *Prosecutor v. Kovačević*, N° IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, dated 2 July 1998, paras. 29, 31.
[40] See *Karemera*, para. 27.
[41] See *ibid.*, para. 28.
[42] See Request, paras. 13-23.
[43] Decision, paras. 1-24.
[44] *Ibid.*, para. 35.
[45] *Ibid.*, para. 34.

tifie au regard de l'article 50 du Règlement. La Chambre de première instance doit également prendre en considération une série de facteurs au nombre desquels la nature et la portée des modifications proposées, la question de savoir si le Procureur a agi avec diligence pour mener ses enquêtes et présenter la requête, si l'accusé et la Chambre de première instance avaient été informés au préalable de l'intention du Procureur de demander l'autorisation de modifier l'acte d'accusation, quand et dans quelles circonstances une telle notification avait été faite, si le Procureur cherche à s'assurer un avantage tactique injuste[39], et si l'addition d'allégations précises va effectivement permettre aux accusés de mieux répondre aux accusations retenues contre eux et, partant, rendre le procès, dans son ensemble, plus équitable[40]. De même, la Chambre de première instance doit également prendre en considération le risque du préjudice susceptible d'être causé aux accusés et la mesure dans laquelle il est possible de remédier à ce préjudice par des mesures autres que le rejet de la modification, comme les ajournements ou le fait d'autoriser les accusés à rappeler des témoins à la barre pour être contre-interrogés[41]. La liste ci-dessus n'est pas exhaustive, des cas particuliers pouvant présenter des circonstances différentes touchant également aux modifications proposées.

17. En l'espèce, on ne saurait affirmer que la Chambre de première instance n'a pas pris en considération les points énumérés ci-dessus. D'abord, le Procureur a expressément abordé ces points dans sa requête[42], et ils sont résumés dans la Décision[43]. Bien que la Décision ne les mentionne pas dans le résumé des délibérations, cette omission ne constitue pas, en soi, une erreur; la Chambre de première instance n'est pas tenue d'énumérer et de statuer sur tous les arguments soulevés à l'appui d'une requête. En l'absence de preuve montrant que la Chambre de première instance a effectivement refusé d'examiner un quelconque élément, se bornant à décider que la modification de l'acte d'accusation retarderait l'ouverture du procès, ou en l'absence de toute preuve comme quoi la conclusion de la Chambre de première instance était si déraisonnable que cette dernière n'aurait pu avoir pris en compte tous les facteurs pertinents, la Chambre d'appel doit conclure que la Chambre de première instance a effectivement tenu compte de tous les arguments dont elle était saisie.

18. Dans la présente affaire, la décision de la Chambre de première instance montre à suffisance qu'elle avait pris en compte des facteurs autres que le retard dans l'ouverture du procès. Selon la décision, les considérations relatives au préjudice et au retard sont, dans une certaine mesure, des considérations indépendantes l'une de l'autre, autrement dit, les modifications proposées étaient de nature, «non seulement» à porter préjudice aux accusés, mais aussi «à causer un retard»[44]. Cette formulation laisse entendre que le retard potentiel, en raison duquel on devait accorder aux accusés «le temps nécessaire pour préparer» leur défense[45], ne suffirait pas pour éliminer tout le préjudice que les accusés auraient subi en conséquence de la modification de

[39] Voir *Ibid*., par 15, 20 à 30; *Le Procureur c. Kovacevic*, n° IT-97-24-AR73, Arrêt motivant l'ordonnance rendue le 29 mai 1998 par la Chambre d'appel, 2 juillet 1998, par. 29 et 31.
[40] Voir *Karemera*, par. 27.
[41] Voir *Ibid*., par. 28.
[42] Voir la Requête, par. 13 à 23.
[43] Décision, par. 1 à 24.
[44] *Ibid*., par. 35.
[45] *Ibid*., par. 34.

that that prejudice was not sufficiently counterbalanced by any factors weighing in the Prosecution's favour.

19. The Trial Chamber's finding of incurable prejudice is supported by the submissions of the Accused that the Amended Indictment contains not only specific allegations that clarify the charges against the Accused – amendments that can actually enhance the overall fairness of the trial[46] – but also an expansion of the charges beyond the scope of the Current Indictment[47]. Although the Prosecution may seek leave to expand its theory of the Accused's liability after the confirmation of the original indictment, the risk of prejudice from such expansions is high and must be carefully weighed. On the other hand, amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged and usually accepted.

20. In this case, the Trial Chamber noted that the proposed changes in the Amended Indictment consist primarily of "expansions" as well as clarifications[48]. Had the Prosecution solely attempted to add particulars to its general allegations, such amendments might well have been allowable because of their positive impact on the fairness of the trial. However, the Prosecution chose to combine changes that narrowed the indictment with changes that expanded its scope in a manner prejudicial to the Accused. Rather than distinguishing these categories of changes, which might have enabled the Trial Chamber to allow the former without allowing the latter, the Prosecution's Motion and Amended Indictment intertwined the two, such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request. The Trial Chamber was not required to disaggregate the changes that would have caused prejudice from those that would not. However, this holding does not preclude the Prosecution from coming forward with a new proposed indictment that would provide greater notice of the particulars of the Prosecution's case without causing prejudice in the conduct of trial.

21. The Prosecution has not met its burden of showing that the Trial Chamber failed to consider any of the relevant factors placed before it, nor was its conclusion so unreasonable as to compel appellate intervention in this matter. On the contrary, the Trial Chamber's dismissal of the Motion was reasonable and lay within the Chamber's discretion.

22. The Prosecution also challenges the Trial Chamber's refusal of its request to charge genocide and complicity in genocide alternatively but in a single count. The

[46] See *Karemera*, para. 27.
[47] See Bizimungu Response, paras. 23-26.
[48] Decision, paras. 5.

l'acte d'accusation. En d'autres termes, la Chambre de première instance a conclu que les accusés subiraient un préjudice dans la conduite de leur défense même si on leur accordait plus de temps pour se préparer, et qu'aucun des facteurs jouant en faveur du Procureur ne serait à même de contrebalancer ce préjudice.

19. La conclusion de la Chambre de première instance selon laquelle le préjudice que subiraient les accusés est irrémédiable est étayée par les arguments avancés par les accusés, qui affirment que l'acte d'accusation modifié contient non seulement des allégations précises qui clarifient les accusations portées contre eux – modifications qui peuvent effectivement contribuer à rendre le procès, dans son ensemble, plus équitable[46] –, mais aussi un élargissement de ces mêmes accusations au-delà du champ d'application de l'acte d'accusation actuel[47]. Bien que le Procureur puisse éventuellement demander l'autorisation d'étoffer sa théorie de la responsabilité de l'accusé après la confirmation de l'acte d'accusation initial, le risque de préjudice que de tels développements pourraient causer n'est pas négligeable et doit, de ce fait, être bien pesé. Par contre, les modifications qui restreignent la portée de l'acte d'accusation et concourent, par voie de conséquence, à rendre les procédures plus équitables et efficaces doivent être encouragées et elles sont généralement acceptées.

20. En l'espèce, la Chambre de première instance a fait observer que les modifications envisagées dans l'acte d'accusation modifié constituent principalement des «développements» et des clarifications[48]. Si le Procureur n'avait cherché qu'à apporter des précisions à ses allégations à caractère général, de telles modifications auraient sans doute été acceptables à cause de l'incidence positive qu'elles auraient sur l'équité du procès. Mais, il a choisi de combiner des modifications qui ont restreint le champ d'application de l'acte d'accusation avec des modifications qui en ont élargi la portée de façon préjudiciable pour les accusés. Plutôt que de distinguer nettement ces deux catégories de modifications, ce qui aurait certainement permis à la Chambre de première instance d'accepter les premières et de rejeter les secondes, la requête du Procureur et l'acte d'accusation modifié ont inextricablement imbriqué les deux de telle sorte qu'on ne pouvait facilement les séparer les unes des autres. Dès lors, la Chambre de première instance avait raison de rejeter la requête dans sa totalité, d'autant qu'elle n'était pas tenue de séparer les modifications susceptibles de porter préjudice de celles qui ne le seraient pas. Toutefois, cette décision n'interdit pas au Procureur de soumettre un nouveau projet d'acte d'accusation qui aurait l'avantage de fournir de plus amples détails sur sa thèse sans pour autant nuire au bon déroulement du procès.

21. Le Procureur ne s'est pas déchargé du fardeau qui pèse sur lui de rapporter la preuve que la Chambre de première instance n'a pas tenu compte d'un quelconque élément pertinent dont elle a été saisie, ou que la conclusion à laquelle elle est parvenue en l'espèce est si déraisonnable que la Chambre d'appel doit intervenir. Bien au contraire, le rejet de la requête par la Chambre de première instance était raisonnable et relevait de son pouvoir d'appréciation.

22. Le Procureur fait également grief à la Chambre de première instance d'avoir rejeté sa demande tendant à inculper les accusés de génocide et, subsidiairement, de

[46] Voir Karemera, par. 27.
[47] Voir Réponse de Bizimungu, par. 23 à 26.
[48] Décision, par. 5.

Prosecution relies on the Trial Chamber judgement in *Musema*, which stated that an accused cannot be convicted of both genocide and complicity in genocide, since one cannot be both a principal perpetrator of an act and an accomplice thereto[49]. While the Prosecution is correct that the *Musema* judgement would permit and indeed require that the crimes of genocide and complicity in genocide be charged in the alternative, it says nothing about charging them in the same count.

23. The rule against duplicity generally forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence[50]. The Appeals Chamber need not decide at this time whether genocide and complicity in genocide constitute separate offences or different means of committing the same offence. Regardless of which option is correct, the Trial Chamber was justified in concluding that there was no need to enter into this debate, which would have expended judicial time and resources in a manner that would have little effect on this case. This risk is evident from the suggestion of the Accused Mugiraneza that the amendment might have led him to file a motion under Rule 72 of the Rules challenging the form of the indictment[51]. The Trial Chamber's conclusion that arguments about potential duplicity were "problems" that were "not in the interests of judicial economy"[52] is reasonable, particularly given that the Prosecution does not allege that it has suffered any prejudice from the denial of this amendment. The Trial Chamber was therefore justified in avoiding the filing of further motions challenging the validity of the indictment. Accordingly, the Trial Chamber acted within its discretion in refusing this amendment. This aspect of the Appeal is therefore dismissed.

24. The Accused Bizimungu submits that the Prosecution should not be permitted to withdraw the section on "Historical Context" from the Current Indictment[53] The Trial Chamber stated that the Prosecution could drop material from the Current Indictment without seeking leave to amend it under Rule 50 of the Rules[54]. The Accused Bizimungu did not seek certification to appeal this issue, so the Appeals Chamber is without jurisdiction to address it.

[49] See *Prosecutor v. Musema*, N° ICTR-96-13-T, Judgement and Sentence, 27 January 2001, para. 175.

[50] See, *e.g.*, 4 LaFave, Israel and King, *Criminal Procedure* §19.3 (c) (2d ed. 1999).

[51] Mugiraneza Response, para. 23.b.

[52] Decision, para. 31.

[53] Bizimungu Response, paras. 28-31.

[54] Decision, para. 31.

complicité dans le génocide, mais, ce, dans le même chef d'accusation. Le Procureur invoque à cet égard le jugement *Musema*, dans lequel il est déclaré qu'une même personne ne peut pas se voir déclarée coupable de génocide et de complicité dans le génocide car elle ne peut pas être à la fois l'auteur principal et le complice d'un fait spécifique[49]. Certes, le Procureur a raison de dire que l'on pourrait affirmer que le Jugement *Musema* autorise et, mieux, exige que les crimes de génocide et de complicité dans le génocide soient imputés à titre subsidiaire l'un par rapport à l'autre, il reste cependant muet sur l'imputation des deux crimes dans le même chef d'accusation.

23. La règle interdisant la duplicité interdit d'imputer deux infractions distinctes dans le même chef d'accusation, bien qu'il soit possible, dans le même chef d'accusation, d'imputer des modes différents de perpétration de la même infraction[50]. La Chambre d'appel, pour l'heure, n'a pas à trancher la question de savoir si le génocide et la complicité dans le génocide constituent des infractions distinctes ou des modes différents de perpétration de la même infraction. Quoi qu'il en soit, la Chambre de première instance avait raison de conclure qu'il était inutile de s'engager dans un tel débat, qui aurait grevé les ressources et le temps du Tribunal sans pour autant faire avancer les choses. Et ce risque ressort clairement de la position adoptée par l'accusé Mugiraneza, qui a fait observer que si la requête du Procureur avait été accueillie, il aurait déposé une requête sous le régime de l'article 72 du Règlement, remettant en cause la forme de l'acte d'accusation[51]. La conclusion de la Chambre de première instance selon laquelle les arguments sur une éventuelle duplicité constituaient des «problèmes» qui n'étaient «pas dans l'intérêt de l'économie judiciaire»[52] est raisonnable, surtout si l'on sait que le Procureur n'allègue pas avoir subi un quelconque préjudice par suite du rejet du projet de modification de l'acte d'accusation en l'espèce. La Chambre de première instance avait donc raison d'éviter de voir déposer des requêtes supplémentaires contestant la validité de l'acte d'accusation. Dans cet esprit, la Chambre de première instance a agi dans les limites de son pouvoir d'appréciation en rejetant cette modification. Ce volet de l'appel est donc rejeté.

24. L'accusé Bizimungu soutient que le Procureur ne devrait pas être autorisé à retirer de l'acte d'accusation actuel la partie intitulée «contexte historique»[53]. La Chambre de première instance a déclaré que le Procureur pouvait, en vertu de l'article 50 du Règlement, retirer une quelconque partie de l'acte d'accusation sans en demander l'autorisation[54]. L'accusé Bizimungu n'ayant pas sollicité de certification pour interjeter appel de cette question, la Chambre d'appel n'est donc pas compétente pour l'examiner.

[49] Voir *Le Procureur c. Musema*, n° ICTR-96-13-T, jugement et sentence, 27 janvier 2001, par. 175.

[50] Voir, par ex., 4 LaFave, Israel et King, Criminal procedure, par. 19.3 (c) (2e éd. 1999).

[51] Réponse de Mugiraneza

[52] Décision, par. 31.

[53] Réponse de Bizimungu, par. 28 à 31.

[54] Décision, par. 31.

DISPOSITION

25. The Appeals Chamber dismisses the Appeal.

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

Done this 12th day of February 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

Individual opinion of Judge Pocar

1. I concur with the decision of the Appeals Chamber to dismiss this appeal, and I also agree with its reasoning that the Trial Chamber correctly exercised its discretion under Rule 50 of the Rules. In my view, however, the decision should also state that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, set forth in Rule 47 of the Rules, are not satisfied. In failing to do so, both in this appeal and in the *Karemera* appeal decision rendered on 19 December 2003, the Appeals Chamber has neglected to provide necessary guidance to Trial Chambers on a crucial issue that may affect a number of cases in the future.

2. To me, therefore, this decision remains incomplete, and furthermore, it may be misleading. In paragraph 11 of the decision, it is stated that "…Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber…." This may give the impression that a decision to allow an amendment rests solely in the discretion of a Trial Chamber, without more. I do not believe, however, that such a decision is solely a matter of discretion, because the conditions set forth in Rule 47 of the Rules must be taken into account by the Trial Chamber when it carries out its assessment. To dispel confusion, the Appeals Chamber should have pronounced on the issue even if the parties did not raise it expressly.

3. Article 18 (1) of the Statute of the International Tribunal provides that "[t]he 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." The confirmation of an indictment can therefore only take place if a *prima facie* case exists. This statutory requirement is echoed in Rule 47 (E) of the Rules, which states that "[t]he reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine,

DISPOSITIF

25. Par ces motifs, la Chambre d'appel rejette l'appel.

Fait en français et en anglais, le texte anglais faisant foi.

Fait à La Haye (Pays-Bas), le 12 février 2004

[Signé] : Theodor Meron

Opinion individuelle du Juge Pocar

1. Je souscris à la décision de la Chambre d'appel de rejeter le présent appel; je marque également mon adhésion à son raisonnement selon lequel la Chambre de première instance a correctement exercé son pouvoir d'appréciation en vertu de l'article 50 du Règlement. Cela dit, la décision doit également, à mon avis, préciser que l'autorisation de modifier un acte d'accusation ne doit pas être accordée dès lors que l'acte d'accusation ne remplit pas les conditions prévues à l'article 47 du Règlement pour la confirmation d'un acte d'accusation. En omettant de le faire, aussi bien dans le présent appel que dans la décision qu'elle a rendue le 19 décembre 2003 en l'affaire *Karemera*, la Chambre d'appel a négligé de donner aux Chambres de première instance les orientations nécessaires sur une question cruciale qui peut avoir des répercussions sur nombre de cas à venir.

2. C'est pourquoi j'estime que cette décision demeure non seulement incomplète, mais, serait, par surcroît, de nature à induire en erreur. En effet, au paragraphe 11 de la décision, il est déclaré que «…la décision relative à l'autorisation de modifier l'acte d'accusation [relève] du pouvoir d'appréciation de la Chambre de première instance en vertu de l'article 50 du Règlement…». Cela peut donner l'impression que la décision autorisant la modification d'un acte d'accusation relève exclusivement du pouvoir discrétionnaire d'une Chambre de première instance, sans plus. Je ne crois cependant pas qu'une telle décision relève exclusivement du pouvoir d'appréciation de la Chambre de première instance, car celle-ci doit tenir compte des conditions énoncées à l'article 47 du Règlement lorsqu'elle est appelée à analyser cette question. Afin de lever toute confusion, la Chambre d'appel aurait dû se prononcer sur la question même si les parties ne l'ont pas expressément soulevée.

3. L'article 18 (1) du Statut du Tribunal international dispose que :

> «[L]e 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. À défaut, il le rejette.»

La confirmation d'un acte d'accusation ne peut donc intervenir que si au vu des présomptions il y a lieu d'engager des poursuites. Cette condition statutaire est reprise à l'article 47 (E) du Règlement, qui dispose que :

applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect."

4. Rule 50 of the Rules governs the amendment of indictments. This rule does not set forth conditions for allowing an amendment to an indictment. But it does preserve the rights of the accused in relation to new charges — for example, it provides for a further appearance to enable the accused to enter a plea on the new charges, and it also provides for a further period of thirty days to file preliminary motions pursuant to Rule 72 in relation to the new charges. Hence, after a request for an amendment is allowed, the new charges are subject to the same rules that would have applied if they had been presented in the original indictment.

5. In the same way, before an amendment is allowed, the inquiry must be governed by Rule 47, applicable to all indictments submitted, and a *prima facie* case must be presented. The illogic of any contrary view aside, the following may be noted. First, Rule 50 is placed in the same section in which the provisions for the confirmation of indictments are located, and no derogation from the general rule can be inferred from the text. Second, it cannot be that an amended indictment satisfies fewer requirements than those that were necessary for the original indictment's confirmation. Such an approach would allow the conditions set out in the Statute and Rule 47 to be circumvented in a given case on any number of additional amendments.

6. For these reasons, I believe that the Appeals Chamber should have stated, in this decision, that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, articulated in Rule 47 of the Rules, are not satisfied.

Done this 12th day of February, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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> «[L]e 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.»

4. L'article 50 du Règlement régit la modification des actes d'accusation. Cette disposition n'énonce pas les conditions dans lesquelles la modification d'un acte d'accusation peut être autorisée. Par contre, elle préserve les droits de l'accusé au regard des nouveaux chefs d'accusation. Ainsi, elle prévoit la tenue d'une nouvelle comparution pour permettre à l'accusé de plaider coupable ou non coupable des nouveaux chefs qui lui sont imputés et lui accorde en plus un délai supplémentaire de trente jours pour lui permettre de soulever les exceptions prévues à l'article 72 relativement aux nouveaux chefs qui lui sont imputés. Ainsi, après que l'autorisation de modifier l'acte d'accusation a été accordée, les nouveaux chefs sont soumis aux mêmes règles qui se seraient appliquées s'ils avaient été présentés dans l'acte d'accusation initial.

5. Dans le même ordre d'idées, l'analyse préalable à l'autorisation de la modification de l'acte d'accusation doit être régie par l'article 47, qui s'applique à tous les actes d'accusation soumis à confirmation, et il doit être établi qu'au vu des présomptions il y a lieu d'engager des poursuites. Hormis le caractère illogique de toute opinion contraire, on peut faire les observations suivantes : premièrement, l'article 50 figure sous la même rubrique que les dispositions relatives à la confirmation des actes d'accusation, et on ne peut déduire du texte aucune dérogation par rapport à la règle générale. Deuxièmement, il est inconcevable qu'un acte d'accusation modifié doive satisfaire à des conditions moins rigoureuses que celles qui étaient requises pour la confirmation de l'acte d'accusation initial. Une telle démarche permettrait, dans un cas donné, de se soustraire aux conditions stipulées par le Statut et l'article 47 par différentes modifications additionnelles.

6. Pour ces motifs, je crois que la Chambre d'appel aurait dû déclarer dans la décision en l'espèce que la modification d'un acte d'accusation ne doit pas être autorisée si les conditions requises pour confirmer l'acte d'accusation, telles que prévues à l'article 47 du Règlement ne sont pas remplies.

Fait à La Haye (Pays-Bas), le 12 février 2004.

[Signé] : Fausto Pocar

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Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004 20 February 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Certification to appeal – discretion of the Chamber – specificity of the indictment – evidence – right to appeal – outcome of the trial – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 26 January 2004 Excluding the Testimony of Witnesses GKB GAP GKC GKD and GFA" filed on 30 January 2004, (the "said Motion");

NOTING the "Response from Casimir Bizimungu to the Prosecutor's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 26 January 2004" filed on 9 February 2004, (the "Response");

HAVING HEARD the parties submissions on his matter in open court on 18 February 2004;

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence (the "Rules") particularly Rule 73 (B) of the Rules which reads :

> 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.

SUBMISSIONS OF THE PARTIES

Submissions of the Prosecution

1. The Prosecution seeks, pursuant to Rule 73 (B) of the Rules certification by the Trial Chamber for leave to appeal the Trial Chamber's Decision of 26 January 2004 (the "Impugned Decision").

(i) General Reasons

2. The Prosecution contends that the Trial Chamber erred in law in holding that the Indictment does not adequately specify the acts committed by the Accused Casimir Bizimungu which constitute the offences the Accused is charged with, although the acts constituting the said offences were committed throughout the country, not excluding any of the eleven prefectures. Further it was submitted that the Accused Casimir Bizimungu had additional notice by the disclosures of prior statements of the witnesses for the Prosecution. It was also argued that the Accused Casimir Bizimungu as a Minister operated at the national level and that gave the Accused sufficient notice of the acts committed by him that constituted the charges against him thereby enabling him to properly prepare his defence.

3. The Prosecution submitted that there is divergent jurisprudence regarding the required specificity of an indictment and notice to an Accused person before this Tribunal to allow the Prosecution to lead evidence of certain facts, and that the Tribunal would benefit from an authoritative ruling on this matter by the Appeals Chamber.

4. Finally, as a general reason, the Prosecution submitted that the Tribunal according to its mandate has a wider duty to ensure that the full picture is revealed about what happened in Rwanda, and the Impugned Decision of the Trial Chamber effectively means that a part of this story involving the Accused in Ruhengeri *préfecture* will remain untold.

(ii) Justification for Appeal specifically under Rule 73 (B) of the Rules

5. The Prosecution submitted 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, and for which an immediate resolution by the Appeals Chamber would materially advance proceedings, thus satisfying the requirements of Rule 73 (B) of the Rules for certification to appeal.

6. The Prosecution submitted that as a result of the Impugned Decision, evidence of Witnesses GKB and GAP already on record which points to the Accused's guilt has been expunged from the record. Furthermore, the Prosecution has been directed not to lead any evidence from Witnesses GKC, GKD and GFA due to testify as to the Accused's participation in the Genocide and other transgressions of international humanitarian law in Ruhengeri *préfecture*. In the submission of the Prosecution, the Impugned Decision unfairly ties the hands of the Prosecution, affecting the fair and expeditious conduct of the proceedings and the outcome of the trial.

7. In relation to the requirement of materially advancing the proceedings under Rule 73 (B), the Prosecution submitted in its oral arguments that in reality the trial will be expedited by having this issue settled by the Appeals Chamber. Should the certification be granted, and the Appeals Chamber were subsequently to rule in its favour, the Prosecution would not be forced to find further witnesses to build up its evidence in relation to other acts of the Accused Casimir Bizimungu constituting the offences contained in the Indictment. Instead, the high quality of the evidence that it intends to call in relation to Ruhengeri *préfecture* would allow less witnesses to be called, and court time to be saved.

Defence Submissions

8. The Defence submitted that the right to appeal is not an inherent right; it arises only as the result of a statutory provision. The right to appeal is governed by Rule 73 (B). According to the submissions of the Defence, this Rule should be read restrictively. The Defence added that the conditions of Rule 73 (B) are higher than a requirement of showing a "good cause".

9. The Defence is of the view that the Impugned Decision causes no prejudice to the Prosecution. In its submission, the Prosecution cannot argue that it suffers a prejudice from not being allowed to call testimony not relevant to the Indictment as presently constituted.

10. The Defence submitted that the Prosecution has failed to satisfy the provisions of Rule 73 (B). Specifically, it has failed to demonstrate that the issue is one which affects the outcome of the trial, because the trial can only be conducted on the basis of the Indictment, and the Impugned Decision of the Trial Chamber is clear that the Indictment does not allow for evidence in relation to Ruhengeri *préfecture* to be called, therefore there is no reason to conclude that the outcome of the Trial has in any way been affected. Secondly, the Prosecution have failed to demonstrate that certification to appeal will materially advance the proceedings, and that in actual fact proceedings will be delayed should the Motion be granted.

HAVING DELIBERATED

11. In order to adjudicate on this Motion the Trial Chamber will consider whether the requirements of Rule 73 (B) are met, and whether it is persuaded to use its discretion to grant certification for Appeal, as specified under the Rule.

12. The Chamber notes that in its Motion, the Prosecution recognises that "[t]he principle at stake in this Decision, relates to the degree of specificity that is required for an Indictment to escape the test of vagueness". The Chamber is persuaded that, should the Appeals Chamber overrule the Trial Chamber's Decision, perhaps on the basis that the Indictment was indeed specific enough in all the circumstances of the case to allow the Trial Chamber to accept the evidence relating to the acts committed by the Accused Casimir Bizimungu in Ruhengeri *préfecture* and that the Trial Chamber erred on this point, this may indeed significantly affect the outcome of the Trial and materially advance the proceedings.

13. The Chamber is satisfied that the criteria in Rule 73 (B) have sufficiently been met, and is persuaded that it should exercise its discretion under the Rule to certify the Motion to Appeal.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the said Motion.

Arusha, 20 February 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004 20 February 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Judge Lee Gacuiga Muthoga

Certification to appeal – discretion of the Chamber – specificity of the Indictment, divergent jurisprudence – sufficient notice – evidence, witnesses – right to appeal – fair and expeditious conduct of the proceedings, outcome of the trial – motion granted

International Rules cited : Rules of procedure and evidence, Rule 73

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 3 February 2004 Excluding the Testimony of Witnesses AEI, GKE, GKF and GKI" filed on 6 February 2004, (the "said Motion");

NOTING the "Response from Casimir Bizimungu to the Prosecutor's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 3 February 2004" filed on 12 February 2004, (the "Response");

HAVING HEARD the parties submissions on his matter in open court on 18 February 2004;

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence (the "Rules") particularly Rule 73 (B) of the Rules which reads :

> 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.

SUBMISSIONS OF THE PARTIES

Submissions of the Prosecution

1. The Prosecution seeks, pursuant to Rule 73 (B) of the Rules certification by the Trial Chamber for leave to appeal the Trial Chamber's Decision of 3 February 2004 (the "Impugned Decision").

(i) General Reasons

2. The Prosecution contends that the Trial Chamber erred in law in holding that the Indictment does not adequately specify the acts committed by the Accused Casimir Bizimungu which constitute the offences the Accused is charged with, although the acts constituting the said offences were committed throughout the country, not excluding any of the eleven prefectures. Further it was submitted that the Accused Casimir Bizimungu had additional notice by the disclosures of prior statements of the witnesses for the Prosecution. It was also argued that the Accused Casimir Bizimungu as a Minister operated at the national level and that gave the Accused sufficient notice of the acts committed by him that constituted the charges against him thereby enabling him to properly prepare his defence.

3. The Prosecution submitted that there is divergent jurisprudence regarding the required specificity of an indictment and notice to an Accused person before this Tribunal to allow the Prosecution to lead evidence of certain facts, and that the Tribunal would benefit from an authoritative ruling on this matter by the Appeals Chamber.

4. Finally, as a general reason, the Prosecution submitted that the Tribunal according to its mandate has a wider duty to ensure that the full picture is revealed about what happened in Rwanda, and the Impugned Decision of the Trial Chamber effectively means that a part of this story involving the Accused in Ruhengeri *préfecture* will remain untold.

(ii) Justification for Appeal specifically under Rule 73 (B) of the Rules

5. The Prosecution submitted 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, and for which an immediate resolution by the Appeals Chamber would materially advance proceedings, thus satisfying the requirements of Rule 73 (B) of the Rules for certification to appeal.

6. The Prosecution submitted that as a result of the Impugned Decision, the Prosecution has been barred from leading any evidence from Witnesses AEI, GKE, GKF and GKI due to testify as to the Accused's participation in the Genocide and other transgressions of international humanitarian law in Ruhengeri *préfecture*. In the submission of the Prosecution, the Impugned Decision unfairly ties the hands of the Prosecution, affecting the fair and expeditious conduct of the proceedings and the outcome of the trial.

7. In relation to the requirement of materially advancing the proceedings under Rule 73 (B), the Prosecution submitted in its oral arguments that in reality the trial will be expedited by having this issue settled by the Appeals Chamber. Should the certification be granted, and the Appeals Chamber were subsequently to rule in its favour, the Prosecution would not be forced to find further witnesses to build up its evidence in relation to other acts of the Accused Casimir Bizimungu constituting the offences contained in the Indictment. Instead, the high quality of the evidence that it intends to call in relation to Ruhengeri *préfecture* would allow less witnesses to be called, and court time to be saved.

Defence Submissions

8. The Defence submitted that the right to appeal is not an inherent right; it arises only as the result of a statutory provision. The right to appeal is governed by Rule 73 (B). According to the submissions of the Defence, this Rule should be read restrictively. The Defence added that the conditions of Rule 73 (B) are higher than a requirement of showing a "good cause".

9. The Defence is of the view that the Impugned Decision causes no prejudice to the Prosecution. In its submission, the Prosecution cannot argue that it suffers a prejudice from not being allowed to call testimony not relevant to the Indictment as presently constituted.

10. The Defence submitted that the Prosecution has failed to satisfy the provisions of Rule 73 (B). Specifically, it has failed to demonstrate that the issue is one which affects the outcome of the trial, because the trial can only be conducted on the basis of the Indictment, and the Impugned Decision of the Trial Chamber is clear that the Indictment does not allow for evidence in relation to Ruhengeri *préfecture* to be called, therefore there is no reason to conclude that the outcome of the Trial has in any way been affected. Secondly, the Prosecution have failed to demonstrate that certification to appeal will materially advance the proceedings, and that in actual fact proceedings will be delayed should the Motion be granted.

HAVING DELIBERATED

11. In order to adjudicate on this Motion the Trial Chamber will consider whether the requirements of Rule 73 (B) are met, and whether it is persuaded to use its discretion to grant certification for Appeal, as specified under the Rule.

12. The Chamber notes that in its Motion, the Prosecution recognises that "[t]he principle at stake in this Decision, relates to the degree of specificity that is required for an Indictment to escape the test of vagueness". The Chamber is persuaded that, should the Appeals Chamber overrule the Trial Chamber's Decision, perhaps on the basis that the Indictment was indeed specific enough in all the circumstances of the case to allow the Trial Chamber to accept the evidence relating to the acts committed by the Accused Casimir Bizimungu in Ruhengeri *préfecture* and that the Trial Chamber erred on this point, this may indeed significantly affect the outcome of the Trial and materially advance the proceedings.

13. The Chamber is satisfied that the criteria in Rule 73 (B) have sufficiently been met, and is persuaded that it should exercise its discretion under the Rule to certify the Motion to Appeal.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the said Motion.

Arusha, 20 February 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal for Witness GAP 20 February 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Nzirorera, Mugiraneza – closed session testimony, exhibits received under seal, disclosure to another case – obligation of the Prosecutor to disclose all prior statements – cross-examination – revision by the Chamber – consistency and credibility of the witness testimony – party bound by the same protective measures – motion granted

International instruments cited : Rules of procedure and evidence, Rule 66 (A)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GAP" filed on 26 January 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GAP" filed on 3 February 2004, (the "Response");

NOTING the "Prosper Mugiraneza's Response to Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GAP" filed on 5 February 2004, (the "Prosper Mugiraneza's Submission");

TAKING INTO CONSIDERATION the "Decision on Prosecutor's Motion for Protective Measures for Witnesses" issued on 12 July 2000, (the "Protective Measures Decision");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Joseph Nzirorera, an Accused in the case of *The Prosecutor v. Karemera et al*., Case N° ICTR-98-44-T, moves this Trial Chamber for an order

"authorizing disclosure to him and his counsel the closed session transcripts and exhibits received under seal pertaining to Witness GAP".

2. The Defence mentions that the said witness has already testified in the case of *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, between 19 and 23 January 2004 and is scheduled to testify in the case of *The Prosecutor v. Karemera et al.* in the next Trial session. According to the Defence, dislosure of the closed session testimony and exhibits received under seal is "necessary for the preparation of cross-examination of Witness GAP".

3. The Defence agrees to be bound by the same protective measures that Trial Chamber II has already ordered with respect to the said witness.

Prosecution Submissions

4. In his response dated 3 February 2004, the Prosecutor submits that "he would, in principle, have no objection to the disclosure of certain closed session testimony and exhibits […] relating to Witness GAP, so long as the protective measures afforded by Trial Chamber II obtain."

5. However, the Prosecutor submits that, as the Trial Chamber's Decision of 23 January 2004 excluded all of Witness GAP's testimony from the trial record, "it would not serve any meaningful purpose to disclose the expunged testimony of Witness GAP". Therefore, the Prosecutor argues that the Motion is now rendered moot.

Prosper Mugiraneza's Submissions

6. The Defence for Prosper Mugiraneza responded that it has no objection to the disclosure of the closed session testimony and exhibits received under seal. However, according to the Defence, "regardless of whether some or all of Witness GAP's testimony was 'expunged' by the Trial Chamber and regardless of whether the Trial Chamber will consider that testimony for any purpose, the fact remains that transcripts of the testimony exist and most important, are in possession of the Prosecutor."

7. The Defence for Prosper Mugiraneza submits that, according to Rule 66 (A), the Prosecutor has an obligation to disclose all prior statements of a witness to the Defence.

8. The Defence for Prosper Mugiraneza has no objection to the request that closed session testimony of Witness GAP be made available to the Defence in another Trial Chamber as a prior statement of Prosecution Witness GAP.

DELIBERATIONS

9. The Prosecutor submits that, since the Decision of 23 January 2004 "in essence excluded all of Witness GAP's testimony, it would not serve any meaningful purpose to disclose the transcript of the expunged testimony of Witness GAP".

10. The Trial Chamber notes that the Prosecutor has an obligation, pursuant to Rule 66 (A), to disclose all prior statement of a witness he intends to call. The word "state-

ment" includes also testimony before this Tribunal. It is observed that when a protected witness has given evidence in closed session, the party seeking to obtain a copy of such proceedings should move the Trial Chamber, which granted the protective measures, to vary its order and disclose the closed session testimony.

11. As stated above, the content of a prior deposition is relevant for the Defence to conduct a cross-examination. In this particular case, the fact that the Trial Chamber decided to disregard the testimony of Witness GAP regarding events involving Casimir Bizimungu in Ruhengeri *préfecture* will not prejudice the Defence for Joseph Nzirorera, who is an accused in a different case. The Trial Chamber is of the view that Joseph Nzirorera's right to cross-examine the said witness based on his previous testimony will not be affected by a decision which was motivated by an imprecision in the Indictment in the case of *The Prosecutor v. Casimir Bizimungu et al.*.

12. The Trial Chamber is of the view that the Prosecutor's contention, namely that the testimony of GAP has been expunged from the record and therefore would be meaningless for the Defence of Joseph Nzirorera, is not tenable at law, as the evidential value of such testimony is not affected by the exclusion in the case of *The Prosecutor v. Casimir Bizimungu et al*. for the reasons stated in paragraph 11 above.

13. In accordance with past practice, the Trial Chamber finds that it has the authority to revise decisions applicable to proceedings before it, including the conditions under which closed testimony and exhibits filed under seal are kept with the Registry. The Trial Chamber is of the opinion that, a valid reason for modifying an order governing the testimony of a protected witness is that the said witness is to testify in another case before this Tribunal. A transcript of the witness prior testimony is undoubtedly useful to the assessment of the consistency and credibility of the witness testimony.

14. The Trial Chamber follows past decisions in finding that its Protective Measures Decision should be modified, only to the extent of permitting the moving party access to the protected material, on condition that its terms shall apply *mutatis mutandis* to that party, *viz* the Defence for Joseph Nzirorera in this particular case.

15. The Trial Chamber is of the view that the closed session testimony and the exhibits filed under seal therewith shall be disclosed to the Defence for Joseph Nzirorera. However, the timing of disclosure of the material is a matter for the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al.* which is in a better position to administer such decisions and ensure consistency of protective orders. Therefore, the Trial Chamber is of the opinion that the material shall be made available to the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al*. which will then take the appropriate measures to disclose the material to the Defence for Joseph Nzirorera according to the Protective Measures Decision applicable to witnesses in this case.

FOR THE ABOVE REASONS, THE TRIBUNAL

DECIDES that the transcripts of the closed session trial testimony of Witness GAP in the case of *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, and exhibits filed under seal therewith shall be made available by the Registry to the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al.*, which shall then be in a position to make any order which it sees fit in regards to the timing of its disclosure;

ORDERS that the Defence for Joseph Nzirorera in the case of *The Prosecutor v. Karemera et al*., on receipt of the said closed session testimony of Witness GAP and exhibits filed under seal therewith shall be bound *mutatis mutandis* by the Protective Measures Decision of 12 July 2000 (attached as Appendix A);

DIRECTS the Registry to carry out the terms of this decision, and to continue to enforce the terms of the Protective Measures Decision of 12 July 2000.

Arusha, 20 February 2004

[Signed]; Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal for Witness GKB 20 February 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Nzirorera – closed session testimony, exhibits under seal, disclosure to another case – obligation of the Prosecutor to disclose prior statement of a witness – revision, modification of the order governing the testimony of a protected witness – consistency and credibility of the witness testimony – motion granted

International instruments cited : Rules of procedure and evidence, Rule 66 (A)

International cases cited :

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Tihomir Blaskic*, "Decision on the Appelant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings", 26 September 2000, para. 15 (IT-95-14-A)*

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GKB" filed on 26 December 2003, (the "said Motion");

NOTING the "Prosecutor's Response to Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal for Witness GKB" filed on 2 January 2004, (the "Response");

TAKING INTO CONSIDERATION the "Decision on Prosecutor's Motion for Protective Measures for Witnesses" issued on 12 July 2000, (the "Protective Measures Decision");

Décision relative à la requête de Joseph Nzirorera en communication du procès verbal de la déposition à huit clos et en audience publique du témoin GKB et des pièces à conviction versées au dossier et mises sous scellés 20 février 2004 (ICTR-99-50-T)

(Original : Anglais)

Chambre de première instance II

Juges : Asoka de Zoysa Gunawardana, Président de Chambre; Khalida Rachid Khan; Lee Gacuiga Muthoga

Nzirorera – procès-verbal de déposition à huit clos, pièces à conviction sous scellés, communication à une autre affaire – obligation du Procureur de communiquer les déclarations préalables d'un témoin – révision, modification de l'ordonnance concernant le témoignage d'un témoin protégé – crédibilité et cohérence du témoignage – requête accordée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 66 (A)

Jurisprudence internationale citée :

T.P.I.Y. : Chambre d'appel, Le Procureur c. Tihomir Blaskic*, 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-A)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIEGEANT en la Chambre de première instance II composée des juges Asoka de Zoysa Gunawardana, Président de Chambre, Khalida Rachid Khan et Lee Gacuiga Muthoga (la «Chambre»),

SAISI de la requête de Joseph Nzirorera en communication du procès verbal de la déposition à huis clos du témoin GKB et des pièces à conviction mises sous scellés, déposée le 26 décembre 2003 («ladite requête»),

VU la «Réponse du Procureur à la requête de Joseph Nzirorera en communication du procès verbal de la déposition à huis clos du témoin GKB et des pièces à conviction mises sous scellés», déposée le 2 janvier 2004 («la réponse»),

VU la «Décision relative à la requête du Procureur en prescription de mesures de protection en faveur des témoins», rendue le 12 juillet 2000 («Décision relative aux mesures de protection»),

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Joseph Nzirorera, an Accused in the case of *The Prosecutor v. Karemera et al*., Case N° ICTR-98-44-T, moves this Trial Chamber for an order "authorizing disclosure to him and his counsel the closed session transcripts and exhibits received under seal pertaining to Witness GKB."

2. The Defence mentions that the said witness has already testified in the case of *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, between 8 and 15 December 2003 and is scheduled to testify as Witness GFF in the case of *The Prosecutor v. Karemera et al*. in January 2004. According to the Defence, dislosure of the closed session testimony and exhibits received under seal is "necessary for the preparation of cross-examination of Witness GKB".

3. The Defence agrees to be bound by the same protective measures that this Trial Chamber has already ordered with respect to the said witness.

Prosecution Submissions

4. The Prosecutor objects to the dislosure of closed session testimony and exhibits under seal as Joseph Nzirorera is "not a party to the instant case and therefore lacks the 'Locus Standi' to present the instant motion." According to the Prosecutor, "there is no basis in law for the request of material of confidential significance in the case to which one is not a party." Furthermore, the Defence for Joseph Nzirorera "has not given any particulars of the nature and the testimony that it wishes to rebut with the material in question."

5. The Prosecutor considers that "the instant application is too speculative and too general to be entertained by the Chambers" and therefore should be dismissed.

DELIBERATIONS

6. The Trial Chamber notes that the Prosecutor has an obligation, pursuant to Rule 66 (A), to disclose all prior statement of a witness he intends to call. The word "statement" includes also testimony before this Tribunal. It is observed that when a protected witness has given evidence in closed session, the party seeking to obtain a copy of such proceedings should move the Trial Chamber, which granted the protective measures, to vary its order and disclose the closed session testimony.

ARGUMENTS DES PARTIES

Arguments de la défense

1. La défense de Joseph Nzirorera, accusé en l'affaire *Le Procureur c. Karemera et consorts*, affaire N° ICTR-98-44-T, sollicite de la présente Chambre une ordonnance autorisant la communication à l'accusé et à son conseil du procès verbal de la déposition du témoin GKB à huis clos et des pièces à conviction mises sous scellés y relatives.

2. La défense relève que le témoin en question a déjà déposé en l'affaire *Le Procureur c. Casimir Bizimungu et consorts*, affaire N° ICTR-99-50-T, entre les 8 et 15 décembre 2003 et doit en principe comparaître comme témoin GFF dans l'affaire *Le Procureur c. Karemera et consorts* en janvier 2004. Selon la défense, la communication de sa déposition à huis clos et des pièces à conviction mises sous scellés est utile à la préparation du contre-interrogatoire du témoin GKB.

3. La défense accepte de se conformer aux mêmes mesures de protection que la Chambre a déjà prescrites concernant ledit témoin.

Arguments du Procureur

4. Le Procureur s'oppose à la communication du procès-verbal de la déposition à huis clos et des pièces à conviction mises sous scellés, Joseph Nzirorera n'étant pas partie à la présente cause et n'ayant dès lors pas «qualité» pour introduire la présente requête. Selon le Procureur, rien en droit n'autorise à demander communication de pièces de caractère confidentiel dans une cause à laquelle on n'est pas partie. De plus, la défense de Joseph Nzirorera n'a pas donné de précision quant à la nature des dépositions qu'il voudrait contester au moyen des pièces en question.

5. Le Procureur fait valoir que la présente demande a un caractère trop spéculatif et trop général pour être reçue par la Chambre et devrait donc être rejetée.

DELIBERATIONS

6. La Chambre relève que l'article 66 (A) du Règlement fait obligation au Procureur de communiquer toutes les déclarations préalables d'un témoin qu'il a l'intention de citer à comparaître, le mot «déclarations» englobant le témoignage devant le Tribunal[1]. On observera que lorsqu'un témoin protégé dépose à huis clos, la partie qui souhaite obtenir copie du procès verbal relatif à sa déposition doit demander à la Chambre qui a prescrit les mesures de protection de modifier l'ordonnance correspondante et d'autoriser la divulgation de la déposition à huis clos.

[1] *Le Procureur c. Tihomir Blaskic*, affaire n° IT-95-14-A, TPIY, 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. 15.

7. In accordance with past practice, the Trial Chamber finds that it has the authority to revise decisions applicable to proceedings before it, including the conditions under which closed testimony and exhibits filed under seal are kept with the Registry. The Trial Chamber is of the opinion that, a valid reason for modifying an order governing the testimony of a protected witness is that the said witness is to testify in another case before this Tribunal. A transcript of the witness prior testimony is undoubtedly useful to the assessment of the consistency and credibility of the witness testimony.

8. The Trial Chamber follows past decisions in finding that its Protective Measures Decision should be modified, only to the extent of permitting the moving party access to the protected material, on condition that its terms shall apply *mutatis mutandis* to that party, *viz* the Defence for Joseph Nzirorera in this particular case.

9. The Trial Chamber is of the view that the closed session testimony and the exhibits filed under seal therewith shall be disclosed to the Defence for Joseph Nzirorera. However, the timing of disclosure of the material is a matter for the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al.* which is in a better position to administer such decisions and ensure consistency of protective orders. Therefore, the Trial Chamber is of the opinion that the material shall be made available to the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al*., which will then take the appropriate measures to disclose the material to the Defence for Joseph Nzirorera according to the Protective Measures Decision applicable to witnesses in this case.

FOR THE ABOVE REASONS, THE TRIBUNAL

DECIDES that the transcripts of the closed session trial testimony of Witness GKB in the case of *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, and exhibits filed under seal therewith shall be made available by the Registry to the Trial Chamber seized of the case of *The Prosecutor v. Karemera et al*., which shall then be in a position to make any order which it sees fit in regard to the timing of its disclosure;

ORDERS that the Defence for Joseph Nzirorera in the case of *The Prosecutor v. Karemera et al*., on receipt of the said closed session testimony of Witness GKB and exhibits filed under seal therewith shall be bound *mutatis mutandis* by the Protective Measures Decision of 12 July 2000 (attached as Appendix A);

DIRECTS the Registry to carry out the terms of this decision, and to continue to enforce the terms of the Protective Measures Decision of 12 July 2000.

Arusha, 20 February 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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7. Conformément à la pratique établie, la Chambre estime qu'elle est habilitée à réviser les décisions intéressant les instances dont elle est saisie, y compris les conditions régissant la conservation au Greffe des dépositions à huis clos et des pièces à conviction produites sous scellés. La Chambre est d'avis que le fait que tel témoin protégé soit appelé à déposer dans une autre affaire devant le Tribunal constitue une raison valable pour modifier toute ordonnance intéressant sa déposition. Le procès verbal de la déposition préalable d'un témoin est incontestablement utile, s'agissant d'apprécier la crédibilité et la cohérence de ses dires.

8. Suivant la jurisprudence en cela, la Chambre considère qu'il y a lieu pour elle de modifier sa décision relative aux mesures de protection à seule fin de ménager à la partie demanderesse, à savoir la défense de Joseph Nzirorera, un accès aux documents protégés, les dispositions de la décision en question s'appliquant à elle *mutatis mutandis*.

9. La Chambre est d'avis que le procès verbal de la déposition à huis clos et les pièces à conviction sous scellés y relatives doivent être communiqués à la défense de Joseph Nzirorera. Cependant, il appartiendra à la Chambre saisie de l'affaire *Le Procureur c. Karemera et consorts* de décider du moment opportun pour la communication desdits documents, étant mieux placée pour y pourvoir et veiller à la cohérence des mesures de protection. Par conséquent, la Chambre considère que les documents en question doivent être mis à la disposition de la Chambre saisie de l'affaire *Le Procureur c. Karemera et consorts* qui pourvoira à leur communication à la défense de Joseph Nzirorera compte tenu de l'ordonnance prescrivant des mesures de protection en faveur des témoins en l'espèce.

PAR CES MOTIFS, LE TRIBUNAL

DECIDE que le procès verbal de la déposition à huis clos du témoin GKB en l'affaire *Le Procureur c. Casimir Bizimungu et consorts*, affaire n° ICTR-99-50-T, ainsi que les pièces à conviction sous scellés y relatives seront mis à la disposition de la Chambre de première instance saisie de l'affaire *Le Procureur c. Karemera et consorts* qui prendra telle ordonnance qu'elle jugera utile quant à l'époque de la communication desdits documents;

ORDONNE que la défense de Joseph Nzirorera en l'affaire *Le Procureur c. Karemera et consorts*, lorsqu'elle aura reçu le procès verbal de déposition à huis clos et les pièces à conviction sous scellés, sera liée *mutatis mutandis* par les dépositions de la décision relative aux mesures de protection du 12 juillet 2000 ci-jointe (jointe en annexe A);

CHARGE le Greffe de donner suite à la présente décision et de continuer à appliquer les termes de la décision relative aux mesures de protection rendue le 12 juillet 2000.

Fait à Arusha le 20 février 2004.

[Signé] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief 27 February 2004 (ICTR-99-50-AR73)

(Original : English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding; Florence Mumba; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Mugiraneza – interlocutory appeal – right to be tried without undue delay – fundamental purpose of the Tribunal – conduct of the parties - Prosecutor

International instruments cited : Statute, art. 20 (4) (c) – Rules of procedure and evidence, Rule 73

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");

BEING SEISED OF "Prosper Mugiraneza's Notice of Appeal of the Trial Chamber's Decision Overruling Prosper Mugiraneza's Motion to Dismiss for Violation of Article 20 (4) (c) of the Statute, Demand for Speedy Trial and for Appropriate Relief" ("Notice of Appeal"), filed on 3 November 2003, and "Prosper Mugiraneza's Amended Notice of Appeal of the Trial Chamber's Decision Overruling Prosper Mugiraneza's Motion to Dismiss for Violation of Article 20 (4) (c) of the Statute, Demand for Speedy Trial and For Appropriate Relief", filed on the same date;

BEING SEISED OF "Prosper Mugiraneza's Appellate Brief on Denial of His Motion to Dismiss the Indictment for Violation of Article 20 (4) (c) of the Statute, Demand for Speedy Trial and Appropriate Relief" ("Appeal"), filed on 5 November 2003, and an "Appendix to Prosper Mugiraneza's Appellate Brief on Denial of His Motion to Dismiss the Indictment for Violation of Article 20 (4) (c) of the Statute, Demand for Speedy Trial and Appropriate Relief", filed on 6 November 2003;

NOTING the "Prosecutor's Response in Opposition to Prosper Mugiraneza's Appeal of Denial of His Motion to Dismiss the Indictment for Violation of Article 20 (4) (c) of the Statute, Demand for Speedy Trial and Appropriate Relief" ("Prosecutor's Response to Appeal"), filed on 18 November 2003;

NOTING the "Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (c) of the Statute, Demand for Speedy Trial and for Appropriate Relief" ("Trial Chamber Decision"), delivered on 3 October 2003, whereby the Trial Chamber, in dismissing the motion, stated "(t)hat there is no need to

inquire into any role the Prosecutor might have played about the alleged undue delay";

NOTING the "Decision on Prosper Mugiraneza's Request Pursuant to Rule 73 for Certification to Appeal Denial of His Motion to Dismiss for Violation of Article 20 (4) (c) of the Statute, Demand for Speedy Trial and Appropriate Relief", delivered on 29 October 2003;

CONSIDERING that the Appeals Chamber takes the view that it is necessary to consider, *inter alia*, the following factors when determining whether there has been a violation of the right to be tried without undue delay :

(1) The length of the delay;

(2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;

(3) The conduct of the parties;

(4) The conduct of the relevant authorities; and

(5) The prejudice to the accused, if any;

CONSIDERING that the Trial Chamber erred in considering the factor of the fundamental purpose of the Tribunal in its determination of whether the delay was undue;

CONSIDERING that one of the central factors to consider is the conduct of the parties, including that of the Prosecutor;

FINDING that the Trial Chamber, by stating, "(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay", has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay;

FINDING, therefore, that the Trial Chamber erred in applying the correct legal standard;

FOR THE FOREGOING REASONS, HEREBY, Judge Shahabuddeen and Judge Pocar dissenting, allows the Appeal, vacates the Trial Chamber Decision, and remits the matter to the Trial Chamber for reconsideration in light of the foregoing observations.

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

Done this 27th day of February 2004, at The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

Judge Shahabuddeen appends a dissenting opinion to this decision.

Judge Pocar appends a dissenting opinion to this decision.

Dissenting Opinion of Judge Shahabuddeen

1. As Presiding Judge I have authenticated this decision. I regret that as a member of the bench I am not able to support it[1], particularly with respect to the matter being remitted "to the Trial Chamber for reconsideration in the light of" the Appeals Chamber's finding 'that the Trial Chamber, by stating "(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay", has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay;". The real ground offered there is the omission of the Tral Chamber to inquire into the conduct of the prosecution.

2. The Trial Chamber's decision was not elaborate, but it was not defective. The Appeals Chamber can determine from the decision what led the Trial Chamber to make it; it can in turn interpret the decision in the light of its reasons. In my opinion, the decision was made for the following reasons and is to be interpretcd in the following way :

3. In paragraphs 10 to 12 of its decision, the Trial Chamber referred to a citation from Kanyabashi[2] to the effect that the European Court of Human Rights opined that the "Court has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities,..". Hence, the Trial Chamber knew that, among other things, the conduct of the prosecution was a factor to be considered. It nevertheless said :

> 13. The Chamber consequently finds that undue delay depends on the circumstances. In this case, for the above mentioned reasons, the Trial Chamber considers that the time between the arrest of the Accused and the imminent commencement of his trial is not to be assessed as being undue. (Footnote omitted).
>
> 14. Having held in the circumstances of this case that there is no undue delay, the Trial Chamber considers that there is no need to inquire into any role the Prosecutor might have played about the alleged undue delay.

4. It is thus the case that the Trial Charnber's conclusion that there was no undue delay was made without first inquiring into the conduct of the prosecution. That, as I have said, is the real ground offered by the Appeals Chamber in support of its decision. The question then is how could the Trial Chamber come to such a conclusion without first making that inquiry.

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[1] Dissents in part were filed by the presiding judges in, *inter alia*, *Erdemovic*, IT-96-22-A of 7 October 1997, *Delalic*, IT-96-21-A of 20 February 2001, and *Jelisic*, IT-95-10-A of 5 July 2001. Presidents of the International Court of Justice have also appended dissenting opinions to decisions which they have authenticated. See, *inter alia*, *Ambatielos* Case, I.C.J. Reports 1952. p. 28 at 58; *Interhandel* Case, l.C.J, Reports 1959, p. 6 at 75; *Maritime Safey Cornmittee*. I.C.J. Reports 1960, p. 150 at 173; *Certain Expenses of the United Nations*, I.C.J. Reports 1967, p. 151 at 227; *South West Africa*, I.C.J. Reports 1962, p. 319 at 449; and *Phosphate Lands in Nauru*, I.C.J. Reports 1992, pp. 240 at 301.

[2] Paragraph 12 of the impugned Decision, citing *Kanyabashi*, ICTR-96-15-1, of 23 May 2000.

5. I think that the answer lies in a difference between the method by which the Trial Chamber makes a finding that there has been undue delay and the method by which it makes a finding that there has been no undue delay. A Trial Chamber cannot find that there has been undue delay unless it first inquires into the conduct of the prosecution and is not satisfied by it. But it can find that there has been no undue delay either after inquiring into the conduct of the prosecution or at an earlier stage if it considers that the material presented by the accused does not suffice to disclose a *prima facie* case of undue delay; in the latter situation inquiry into the conduct of the prosecution is not necessary.

6. The Trial Chamber, as was its right, did not use the term "prima facie", but I think that it was guided by the principles represented by the term. References to the standard of proof do not obscure the procedural nom derived from the established principle that he who alleges must prove. The first question before a court is to say whether, taken at their highest, the allegations of the moving party can satisfy the applicable requirements, that is to say, whether they disclose a prima facie case. Only if the answer is in the affirmative does the court look into the opposing case. If the answer is in the negative, the court dismisses the claim without further inquiry.

7. In *Eckle*, the European Court of Human Rights found that the delay was "undoubtedly inordinate and is, as a general rule, to be regarded as, exceeding the 'reasonable time' referred to in Article 6 para. 1" of the European Convention for the Protection of Human Rights and Fundamental Freedoms; it was only at that point that the court said that in "such circumstances, it falls to the respondent State to come forward with explanations."[3] In *Little*, a national court, interpreting the convention, said that "[t]he period of 11 years and one month – … was *prima facie* unreasonable, and called for some compelling explanation. None had so far been offered by the Crown. …"[4].In effect, the court considered that what called for an explanation was the fact that the accused had succeeded in making out a *prima facie* case of undue delay. Dr Alistair Brown correctly understood MacNab[5] when he cited that case as authority for the proposition that the "correct approach is for the court to consider whether the period involved is *prima facie* unreasonable. Only if it so considers does the onus pass to the prosecutor to explain the delay."[6]

8. The appellant ran his case in the Trial Chamber on the basis that the length of the pre-trial detention penod – of four years – was conclusive evidence of undue delay. As stated by the Trial Chamber in paragraph 2 of its decision –

> The Defence considers that the 4-year period since the arrest of the accused constitutes undue delay as a matter of law.[7] It considers further that there is no excuse for a delay of this length while a presumptively innocent man is confined in pre-trial detention.

The Trial Chamber was not persuaded by the proposition that undue delay fell to be inferred from the passage of time as a matter of law. There is no legal authority

[3] *Eckle, v. Federal Republic of Germany* (A/51) (1983) 5 E.H.R.R. 1.
[4] *HMAdvocate v. Little*, [1999] S.L.T. 1145 at 1149.
[5] *McNab v. HM Advocate*, (200] S.L.T. 99.
[6] Dr Alistair N. Brown, "A Hearing Within a Reasonable Time," in H.R.& UK P. 2001, 2.3 (4), p. 3.
[7] Emphasis added.

for the assertion that after a fixed enod of time undue delay automatically and conclusively arises.

9. The Trial Chamber may certainly hold that, in the circumstances ofa particular case, a long period of time *prima facie* means that there has been undue delay; but, in my view, the correct interpretation of the decision which it made is that such a holding would not be right in the circumstances of this case, as presented by the accused, and I do not see that the Appeals Chamber can hold otherwise. Having, in effect, decided that a *prima facie* case of undue delay had not been made out, the Trial Chamber concluded that there was nothing for the prosecution to explain : the complexities of the legal and factual issues and the associated problems of investigating allegations of gravity and of concern to the international community were apparent and were enough.

10. The right of an accused to have his case heard without undue delay must be vigilantly defended by the Tribunal – on its own initiative, if need be. But, valuable as it is, the idea is not a brooding omnipresence in the sky : a balance needs to be maintaineci between the rights of an accused and those of the international comrnunity, even bearing in mind that the rights of the international community include responsibility to ensure observance of the right of an accused to a hearing within a reasonable time. That balance is struck by the need for an accused to satisfy the Trial Chamber that there is some justification to inquire into the role played by the Prosecutor – i.e., that there is a *prima facie* case of undue delay. Otherwise, the inquiry is gratuitous.

11. In this case, the accused failed to establish a *prima facie* case. As I understand the decision of the Trial Chamber, his allegations, even if true, did not suffice to make out his claim that there was undue delay. Thereupon, the Trial Chamber correctly held that there was no undue delay without needing "to inquire into any role that the Prosecutor might have played about the alleged undue delay".

12. I appreciate the outlook which leads to the view that the established criteria always require inquiry into the conduct of the prosecution before there could be a finding that there was no undue delay. However, in my respectful opinion, more convincing reasons speak for a different conclusion. They persuade me to consider that I should affirm the decision of the Trial Chamber and dismiss the appeal.

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

Dated this 27 February 2004

At The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

Dissenting Opinion of Judge Pocar

The Appeals Chamber in its decision lists five factors which it deems "necessary to consider, inter alia, …when determining whether there has been a violation of the right to be tried without undue delay."[1] These factors are listed in the following manner in the decision :

> (1) The length of the delay;
>
> (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
>
> (3) The conduct of the parties;
>
> (4) The conduct of the relevant authorities; and
>
> (5) The prejudice to the accused, if any[.][2]

In my view, the majority should not have set out such a list. The Appeals Chamber should not attempt to identify *in abstracto* the factors to be assessed in detemining if there has been undue delay in a particular case. This is a question that should be decided on a case by case basis. Moreover, the description of the factors as set out by the majority raises issues of interpretation of their precise scope – for example, who are the "relevant authorities"? What kind of "prejudice" is being referred to, prejudice relating to matters of procedure, or substantive prejudice relating to the personal circumstances of the accused, or both? Indeed, these factors may be misleading.

If the law on the question of undue delay had to be established, one would also have to consider factors not to be taken into account. In this case, the Appeals Chamber should have stated that the gravity of the offenses charged is not to be considered when assessing whether there is a case of undue delay. Indeed, there were good reasons to do so. In paragraph 12 of the Trial Chamber's decision, it is stated :

> The Trial Chamber recalls its position stated previously in the case of *Mugenzi* that the Accused's right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged[3].

In my view, the Trial Chamber improperly considered the gravity of the offences when analyzing whether the delay in this case is undue. The implication of the Trial Chamber's reasoning is that the gravity of the charges permits a prolongation of delays. But it is only if undue delay is found to exist that the gravity of the offenses may become relevant; only at that later stage may this factor be taken into account when considering what remedies are appropriate[4].

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1 Decision, p. 3, para. 1.

2 *Ibid*.

3 Trial Chamber decision, para. 12.

4 See *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000.

But the Appeals Chamber in its decision fails to address this crucial point, which renders its decision incomptete. Instead, it seems to focus primarily on the Trial Chamber's failure to inquire into the conduct of the Prosecution, and States :

> FINDING that the Trial Chamber, by stating, "(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay", has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay[.][5]

In my view, it is the Trial Chamber's improper consideration of the gravity of the crimes charged which vitiates its decision.

For the foregoing reasons, the decision of the Trial Chamber should be quashed. I cannot agree with the decision to remit "the matter to the Trial Chamber for reconsideration in light of the foregoing observations," given my views on the said observations.

Done this 27th day of February 2004,

At The Hague, The Netherlands.

[Signed] : Judge Fausto Pocar

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Decision on Juvénal Kajelijeli's Urgent Motion for Disclosure of Open and Closed Session Testimony and Exhibits of GAP 4 March 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Kajelijeli – closed sessions testimony, open session testimony, exhibits, disclosure to another case – exclusion of testimony, imprecision in the indictment – practice of the Tribunal – prima facie proof, relevance – modification of protective measures decision – party bound mutatis mutandis by the protective measures decision – motion granted

International instruments cited : Statute, art. 19 – Rules of procedure and evidence, Rules 115 and 120

[5] Decision, p. 3, para. 4. (footnote omitted).

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004 (ICTR-99-50-T,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Trial Chamber");

BEING SEIZED of "Juvénal Kajelijeli's Urgent Motion for Disclosure of Open and Closed Session Testimony and Exhibits of GAP" filed on 9 February 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Juvénal Kajelijeli's Urgent Motion for Disclosure of Open and Closed Session Testimony and Exhibits of GAP" filed on 17 February 2004, (the "Response");

NOTING the "Defence's Reply to Prosecutor Response to Appellant Kajelijeli's Urgent Motion for Disclosure of Open and Closed Session Testimony and Exhibits of GAP" filed on 23 February 2004, (the "Reply");

TAKING INTO CONSIDERATION the "Decision on Prosecutor's Motion for Protective Measures for Witnesses" issued on 12 July 2000, (the "Protective Measures Decision");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Juvénal Kajelijeli, Case N° ICTR-98-44A-A, moves the Trial Chamber to order to the Registrar to avail the Defence with the open and closed session testimony and exhibits of Witness GAP.

2. The Defence mentions that the said witness has already testified in the case of *The Prosecutor v. Juvrnal Kajelijeli* on 28 November, 3 December and 4 December 2001. The same Witness GAP also testified in the Case of *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, between 19 and 23 January 2004.

3. On 30 January 2004, the Defence for Juvénal Kajelijeli wrote to the Registry requesting a copy of the transcripts of the testimony of Witness GAP but has not yet received the requested transcripts or exhibits.

4. According to the Defence, disclosure of the open and closed session testimony and exhibits is necessary to assist Juvénal Kajelijeli "in preparing his appeal including but not limited to the filing of motions to allow new evidence pursuant to Rule 115 and 120".

5. The Defence agrees to be bound by the same protective orders that this Trial Chamber has already ordered with respect to the said witness.

Prosecution Submissions

6. In his response dated 17 February 2004, the Prosecutor submits that "he would, in principle, have no objection to the disclosure of certain closed session testimony and exhibits [...] relating to Witness GAP, so long as the protective measures afforded by Trial Chamber II obtain."

7. However, the Prosecutor submits that, as the Trial Chamber's Decision of 23 January 2004[1] excluded all of Witness GAP's testimony from the trial record, "it would not serve any meaningful purpose to disclose the expunged testimony of Witness GAP". Therefore, the Prosecutor argues that the Motion is now rendered moot and should be dismissed in its entirety.

Defence Reply

8. The Defence submits that the Prosecutor's objection to producing Witness GAP's testimony as it relates to the case of *The Prosecutor v. Juvénal Kajelijeli* is misplaced. According to the Defence, "the conflicts, contradictions and omissions that are revealed in the [...] statements of Witness GAP are of such nature that they undermine any factual basis that a reasonable trier of fact could find the witness credible."

9. The Defence for Juvénal Kajelijeli moves the Trial Chamber to disclose the open and closed session testimony and exhibits of Witness GAP in the case of *The Prosecutor v. Casimir Bizimungu*.

DELIBERATIONS

10. The Prosecutor submits that, since the Decision of 23 January 2004 "in essence excluded all of Witness GAP's testimony, it would not serve any meaningful purpose to disclose the transcript of the expunged testimony of Witness GAP."

11. As a preliminary remark, the Trial Chamber considers that there is no impediment for this Trial Chamber to disclose to an accused person in a case before this Tribunal the transcripts of the testimony in open session of a witness in another case. Pursuant to Article 19 of the Statute, "the hearings shall be public unless the Trial Chamber decides to close the proceedings [...]". Therefore, the open session testimony as well as the non confidential exhibits of Witness GAP before this Trial Chamber shall be made available to the Defence for Juvénal Kajelijeli as soon as possible.

12. It is observed that, when a protected witness has given evidence in closed session, the party seeking to obtain a copy of such proceeding should move the Trial Chamber, which granted the protective measures, to vary its order and disclose the closed session testimony.

[1] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004, (the "Decision of 23 January 2004").

13. The Defence for Juvénal Kajelijeli submits that the disclosure of Witness GAP's complete testimony in the case of *The Prosecutor v. Casimir Bizimungu et al.* and the statements of the said witness are necessary to file a motion before the Appeals Chamber based on Rule 115 of the Rules.

14. The Trial Chamber is of the view that, a comparison between the testimony Witness GAP made in the case of *The Prosecutor v. Juvénal Kajelijeli* and the one he made in the case of *The Prosecutor v. Casimir Bizimungu et al*., may be relevant for the Defence of Juvénal Kajelijeli to support his appeal. In this particular case, the fact that the Trial Chamber decided to disregard the testimony of Witness GAP regarding events involving Casimir Bizimungu in Ruhengeri *préfecture* will not affect the Defence of Juvénal Kajelijeli, who is an accused in another case. The Trial Chamber is of the view that Juvénal Kajelijeli's right to utilise the testimony of Witness GAP in support of his appeal will not be affected by the Decision of 23 January 2004 in the case of *The Prosecutor v. Casimir Bizimungu et al.*, which excluded the said testimony due to an imprecision in the Indictment.

15. The Trial Chamber is of the view that the Prosecutor's contention, namely that the testimony of GAP has been expunged from the record and therefore would be meaningless for the Defence of Juvénal Kajelijeli, is not tenable in law, as the evidential value of such testimony is not affected by the exclusion in the case of *The Prosecutor v. Casimir Bizimungu et al*. for the reasons stated in paragraph 14 above.

16. In accordance with past practice, the Trial Chamber finds that it has authority to revise decisions applicable to proceedings before it, including the conditions under which closed testimony and exhibits filed under seal are kept with the Registry. For the reasons stated in paragraphs 13 and 14 above, the Trial Chamber is of the opinion that, the Defence for Juvénal Kajelijeli has proved *prima facie* that the testimony and exhibits are relevant for the proceedings before the Appeals Chamber.

17. The Trial Chamber follows past decisions in finding that its Protective Measures Decision should be modified, only to the extent of permitting the moving party access to the protected material, on condition that its terms shall apply *mutatis mutandis* to that party, *viz* the Defence for Juvénal Kajelijeli in this particular case.

FOR THE ABOVE REASONS, THE TRIBUNAL

DECIDES that the transcripts of the open, and closed session trial testimony of Witness GAP in the case of *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, and exhibits filed therewith shall be immediately disclosed to the Defence of Juvénal Kajelijeli;

ORDERS that the Defence of Juvénal Kajelijeli, on receipt of the said closed session testimony of Witness GAP and exhibits filed under seal therewith, shall be bound *mutatis mutandis* by the Protective Measures Decision of 12 July 2000 (attached as Appendix A);

DIRECTS the Registry to promptly carry out the terms of this decision, and to continue to enforce the terms of the Protective Measures Decision of 12 July 2000.

Arusha, 4 March 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Prosper Mugiraneza's Motion Pursuant to Rules 66 (A) and 68 for Access to all Statements of Jean Kambanda in the Possession of the Prosecutor 4 March 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Zoysa Gunawardana, Presiding; Khalida Rachid Khan; Lee Gacuiga Muthoga

Mugiraneza – witness statement, disclosure by the Prosecutor – documents already disclosed – motion moot – motion denied

International instruments cited : Rules of procedure and evidence, Rules 66 (A), 68

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion Pursuant to Rules 66 (A) and 68 for Access to All Statements of Jean Kambanda in the Possession of the Prosecutor" filed on 26 January 2004, (the "said Motion");

NOTING the "Addendum to Prosper Mugiraneza's Motion Pursuant to Rules 66 (A) and 68 for Access to all Statements of Jean Kambanda in the Possession of the Prosecutor" filed on 3 February 2004, (the "Addendum");

CONSIDERING that the Defence for Prosper Mugiraneza requested, in the said Motion, the disclosure of the diary of Jean Kambanda as well as a manuscript of a book allegedly written by Jean Kambanda;

NOTING the filings of the Prosecutor dated 10 February 2004 and 14 February 2004 disclosing to the Defence the requested documents;

CONSIDERING the letter filed on 1 March 2004 by the Defence for Prosper Mugiraneza acknowledging the reception of the requested documents;

CONSIDERING that the primarily relief sought in the said Motion is to have the Prosecutor disclose the requested documents, the Trial Chamber is of the view that, as the said documents have been disclosed, the said Motion is now rendered moot.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the said Motion in its entirety.

Arusha, 4 March 2004

[Signed] : Asoka de Zoysa Gunawardana; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 5 February 2004 24 March 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Certification to appeal – specificity of the indictment – evidence – participation in the alleged crime – complexity of the crimes – notice to the defence – fair and expeditious conduct of the proceedings – outcome of the trial – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73 (A)

International cases cited : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, dated 5 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004, dated 20 February 2004 (ICTR-99-50,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal a Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ" filed on 12 February 2004, (the "said Motion");

NOTING that no response to the said Motion has been filed by the Defence.

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence (the "Rules") particularly Rule 73 (B) of the Rules which reads :

> 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

Décision relative à la requête du Procureur en certification d'appel contre la décision rendue par la Chambre le 5 février 2004 24 mars 2004 (ICTR-99-50-T)

(Original : Anglais)

Chambre de première instance II

Juge : Khalida Rachid Khan

Certification d'appel – précision de l'acte d'accusation – preuve – participation au crime – complexité des crimes – information de la défense – équité et rapidité du procès – issue du procès – requête accordée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73

Jurisprudence internationale citée : Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts*, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 5 février 2004 (ICTR-99-50,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procureur c. Casimir Bizimungu et consorts*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 février 2004 (ICTR-99-50,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procureur c. Casimir Bizimungu et consorts*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004, 20 février 2004 (ICTR-99-50,* Recueil 2004*, p. X)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II et en la personne du juge Khalida Rachid Khan, juge désigné, en vertu du paragraphe A de l'article 73 du Règlement de procédure et de preuve pour statuer en l'occurrence (la «Chambre»),

SAISI de la requête en certification d'appel du Procureur intitulée «Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal a Decision of 5 Februavy 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX GJW and GJZ», déposée le 12 février 2004 (la «requête»),

RELEVANT que la défense n'a pas déposé de réponse,

VU le Statut du Tribunal, son Règlement de procédure et de preuve (le «Règlement») et en particulier le paragraphe B de l'article 73 dudit Règlement, libellé comme suit :

> «Les décisions concernant de telles requêtes ne pourront pas faire l'objet d'un 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

opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

INTRODUCTION

1. Judge Asoka de Zoysa Gunawardana, Presiding Judge in this case, is temporarily absent from the seat of the Tribunal, for medical reasons. In consequence, although the issues raised in the Motion have been deliberated upon by the Trial Chamber as fully constituted, the Motion has been assigned to Judge Khan to decide pursuant to Rule 73(A),

SUBMISSIONS OF THE PARTIES

Submissions of the Prosecution

2. The Prosecution seeks, pursuant to Rule 73 (B) of the Rules certification by the Trial Chamber for leave to appeal the Trial Chamber's Decision of 5 February 2004[1] (the "Impugned Decision").

3. The Prosecution contends that the Trial Chamber erred in law in holding that the Indictment does not adequately specify certain areas in which the acts committed by the Accused Prosper Mugiraneza which constitute the offences the Accused is charged with, although the acts constituting the said offences were committed throughout the country. Specifically, in holding that evidence implicating the Accused in Kibungo and Cyangugu prefectures for crimes charged in the indictment other than Conspiracy and Complicity in Genocide, the Trial Chamber "erred in law and fact". The Prosecution argues that it was sufficient that the Accused was given notice in the Indictment that the crimes charged were committed "throughout Rwanda", as Kibungo and Cyangugu prefectures lie within that area. Furthermore, it submits that the Trial Chamber failed to consider that "the materiality of evidence to an Indictment, or the degree of specificity required of an Indictment also is dependent, *inter alia*, on the nature or mode of the Accused's participation in the alleged crime(s), the complexity of the crimes and the geographical area and period over which the crimes are committed".

[1] *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief (TC), dated 5 February 2004, filed 6 February 2004

que son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.»

STATUE CI-APRÈS sur la requête.

INTRODUCTION

1. Le juge Asoka de Zoysa Gunawardana, Président de Chambre en l'espèce, étant temporairement absent du siège du Tribunal pour raison de santé, le juge Khan a été désigné en vertu du paragraphe A de l'article 73 du Règlement pour statuer sur la requête, bien que les questions qui y sont soulevées aient été examinées par la Chambre siégeant en formation plénière.

ARGUMENTS DES PARTIES

Arguments du Procureur

2. En vertu du paragraphe B de l'article 73 du Règlement, le Procureur demande à la Chambre l'autorisation d'interjeter appel de la décision qu'elle a rendue le 5 février 2004[1] (la «décision contestée»).

3. Le Procureur affirme que la Chambre a commis une erreur de droit en concluant que l'acte d'accusation ne précisait pas suffisamment certaines des régions dans lesquelles avaient été commis les actes constitutifs des infractions reprochées à Prosper Mugiraneza, alors que ces actes avaient été perpétrés dans le pays tout entier. Plus précisément, le Procureur estime que la Chambre «a commis une erreur de droit et une erreur de fait» en interdisant la production d'éléments de preuve tendant à établir que l'accusé avait commis dans les préfectures de Kibungo et de Cyangugu d'autres crimes retenus dans l'acte d'accusation que l'entente en vue de commettre le génocide et la complicité dans le génocide. Selon le Procureur, le fait d'avoir informé l'accusé dans l'acte d'accusation que les crimes qui lui étaient reprochés avaient été commis «sur toute l'étendue du territoire rwandais» suffisait, puisque ce territoire comprend les préfectures de Kibungo et de Cyangugu. Le Procureur ajoute que la Chambre n'a pas tenu compte du fait que «l'importance de tel ou tel élément de preuve au regard d'un acte d'accusation ou le degré de précision requis d'un acte d'accusation dépendent également de la nature de la participation de l'accusé aux crimes allégués ou de la façon dont il y a participé, ainsi que de la complexité des crimes en question, de la zone géographique qui en a été le théâtre et de la période au cours de laquelle ils ont été commis, pour ne citer que ces facteurs» [citations traduites pour les besoins de la présente décision].

[1] *Le Procureur c. Bizimungu et consorts*, *Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief* (Chambre de première instance), décision rendue le 5 février 2004 et enregistrée le 6 février 2004.

4. The Prosecution further submitted that the Chamber erred in law by failing to consider whether the Prosecution took action to afford the Defence adequate notice of the allegations [as regards charges other than Conspiracy and Complicity in Genocide occurring in Kibungo and Cyangugu prefectures], thus curing any possible generalities in the indictment.

5. The Prosecution submitted that "the issues in the Impugned Decision for which certification is being sought significantly affect the fair and expeditious conduct of the proceedings, the outcome of the trial, and is one that in the Prosecutor's compelling opinion merits the exercise of the Trial Chamber's discretion to certify it for an immediate resolution by the Appeals Chamber in order to materially advance the proceedings".

HAVING DELIBERATED

6. The Trial Chamber recalls its recent Decisions in relation to requests for certification to Appeal pursuant to Rule 73 (B)[2]. The Trial Chamber is satisfied that the requirements of Rule 73 (B) have been met in this case, and, in the exercise of its discretion, certifies the Motion to Appeal.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the said Motion.

Arusha, 24 March 2004

[Signed] : Khalida Rachid Khan

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[2] *Bizimungu et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004 (TC), dated 20 February 2004, filed 23 February 2004; *Bizimungu et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004 (TC), dated 20 February 2004, filed 23 February 2004.

4. Le Procureur estime en outre que la Chambre a commis une erreur de droit en s'abstenant de rechercher si le Procureur avait pris des dispositions pour que la défense soit dûment informée des allégations relatives aux crimes autres que l'entente en vue de commettre le génocide et la complicité dans le génocide commis dans les préfectures de Kibungo et Cyangugu et avait ainsi remédié à tout défaut de précision qui aurait pu entacher l'acte d'accusation.

5. Pour le Procureur, «les questions visées par la requête en certification d'appel dans la décision contestée sont des questions susceptibles de compromettre sensiblement l'équité et la rapidité du procès, de même que son issue, et commandent indiscutablement que la Chambre exerce son pouvoir souverain d'appréciation pour autoriser le recours envisagé, afin d'en assurer le règlement immédiat par la Chambre d'appel et, partant, de faire progresser concrètement la procédure» [traduit pour les besoins de la présente décision].

6. La Chambre rappelle les décisions qu'elle a rendues récemment sur des demandes de certification d'appel formées en application du paragraphe B de l'article 73 du Règlement[2]. Elle se déclare convaincue que les conditions définies par ladite disposition sont remplies en l'occurrence et autorise, en vertu de son pouvoir souverain d'appréciation, l'appel envisagé.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête.

Arusha, le 24 mars 2004

[Signé] : Khalida Rachid Khan

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[2] *Le Procureur c. Bizimungu et consorts*, *Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004* (Chambre de premiere instance), décision rendue le 20 février 2004 et enregistrée le 23 février 2004; *Le Procureur c. Bizimungu et consorts*, *Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004* (Chambre de première instance), décision rendue le 20 février 2004 et enregistrée le 23 février 2004.

Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004 24 March 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Mugiraneza – certification to appeal – evidence – precision of the indictment, factual allegations – principle of stare decisis – like persons should be treated alike – acts not charged in the Indictment as crimes – discretion of the Chamber – motion granted

International instruments cited : Rule of procedure and evidence, Rule 73

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 5 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu*, Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal a Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ, 12 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004, 20 February 2004 (ICTR-99-50,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion Puruant to Rule 73 (C) for Leave to Appeal the Trial Chamber's Decision of 5 February 2004 on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief " filed on 12 February 2004, (the "said Motion");

NOTING the "Prosecutor's Response to a Request by Prosper Mugiraneza Pursuant to Rule 73 (B) for Certification to Appeal a Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ", filed on 18 February 2004, (the "Response").

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence (the "Rules") particularly Rule 73 (B) of the Rules which reads :

> 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.

INTRODUCTION

1. Judge Asoka de Zoysa Gunawardana, Presiding Judge in this case, is temporarily absent from the seat of the Tribunal, for medical reasons. In consequence, although the issues raised in the Motion have been deliberated upon by the Trial Chamber as fully constituted, the Motion has been assigned to Judge Khan to decide pursuant to Rule 73 (A).

SUBMISSIONS OF THE PARTIES

2. The Defence seeks, pursuant to Rule 73 (B) and 73 (C) of the Rules certification by the Trial Chamber for leave to appeal the Trial Chamber's Decision of 5 February 2004[1] (the "Impugned Decision").

3. The Defence contends that the Trial Chamber erred in law by granting dissimilar relief to Accused Prosper Mugiraneza in the Impugned Decision than it did to co-defendant Casimir Bizimungu in a similar Motion (the "*Bizimungu* Decision")[2] rendered in this Trial.

4. At the essence of the Defence submissions is the fact that, in its opinion, the *Bizimungu* Decision excluded all evidence to be led against Casimir Bizimungu where there was insufficient precision as to factual allegations in the indictment, whereas in the Impugned Decision, the Prosecution has been allowed to lead evidence relating to Conspiracy and Complicity in Genocide. The Defence feels that this violates the principle of *stare decisis*, and also the principle that like persons should be treated alike.

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[1] *Bizimungu et al*., Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief (TC), dated 5 February 2004, filed 6 February 2004

[2] *Bizimungu et al*., Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA (TC), dated 23 January 2004, filed 26 January 2004

5. The Defence further submits that the Trial Chamber, in allowing the Prosecution to lead evidence on charges of Conspiracy and Complicity in Genocide in relation to acts of the Accused in Kibungo and Cyangugu prefectures, erred in law, as alleged acts of misconduct not charged in the Indictment as crimes, including a concise statement of fact of the case, are irrelevant and should be excluded.

6. The Prosecution reminds the Trial Chamber of its own pending Motion for certification to appeal the same Decision of the Trial Chamber,[3] wherein it is clear that the Prosecution felt that the evidence should not have been excluded at all.

HAVING DELIBERATED

7. The Trial Chamber recalls its recent Decisions in relation to requests for certification to Appeal pursuant to Rule 73 (B).[4] The Trial Chamber is satisfied that the requirements of Rule 73 (B) have been met in this case, and, in the exercise of its discretion, certifies the Motion to Appeal.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the said Motion.

Arusha, 24 March 2004

[Signed] : Khalida Rachid Khan

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Order of the Presiding Judge to Assign Judges 29 March 2004 (ICTR-99-50-AR73.3)

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Appeals Chamber, composition

International instruments cited : Statute, art. 11 (3) and 13 (4) – Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, 17 November 2003

[3] Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal a Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ, filed on 12 February 2004.

[4] *Bizimungu et al*., Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004 (TC), dated 20 February 2004, filed 23 February 2004; *Bizimungu et al*., Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004 (TC), dated 20 February 2004, filed 23 February 2004.

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 "Prosper Mugiraneza's Motion for Extension of Time," filed by counsel for Prosper Mugiraneza on 26 March 2004;

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;

FOR THE FOREGOING REASONS,

ORDER that, in the case of *Mugiraneza v. Prosecutor*, Case N° ICTR-99-50-AR73.3, the Appeals Chamber be composed as follows :

Judge Theodor Meron
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

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

Done this 29th day of March 2004, at The Hague, The Netherlands

[Signed] : Theodor Meron

***

Decision on Motion for Extension of Time 30 March 2004 (ICTR-99-50-AR73.3)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Mugiraneza – extension of time – interlocutory appeal brief – certification to appeal – jurisprudence of the Tribunal – good cause – no prejudice – motion granted

International instruments cited : Rules of procedure and evidence, Rules 73, 116 (A) – Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Bizimungu et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 (ICTR-99-50-AR50,* Reports 2004*, p. X)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("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 "International Tribunal", respectively),

BEING SEISED OF "Prosper Mugiraneza's Motion for Extension of Time," filed by counsel for Prosper Mugiraneza on 26 March 2004 ("Motion");

NOTING Trial Chamber II's "Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004" dated 24 March 2004 ("Mugiraneza Certification Decision"), which certified for interlocutory appeal the Trial Chamber's "Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony Is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief" dated 5 February 2004 ("Impugned Decision");

CONSIDERING that, pursuant to Rule 73 (C) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), an interlocutory appeal brief must be filed "within seven days of the filing of the decision to certify," meaning that Prosper Mugiraneza's appeal brief is due on 31 March 2004;

NOTING Trial Chamber II's "Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 5 February 2004" dated 24 March 2004 ("Prosecution Certification Decision"), which certified the Impugned Decision for interlocutory appeal by the Prosecution;

CONSIDERING that, pursuant to the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal dated 16 September 2002 ("Practice Direction") and the jurisprudence of the International Tribunal, Prosper Mugiraneza's response to any interlocutory appeal filed by the Prosecution pursuant to the Prosecution Certification Decision is due ten days after the filing of such an appeal;[1]

NOTING that Rule 116 (A) of the Rules permits the Appeals Chamber to grant a motion to extend a time limit "upon a showing of good cause";

1 See, *e.g.*, *Prosecutor v. Bizimungu et al.*, N° ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 9.

CONSIDERING that, according to the Motion, counsel for Prosper Mugiraneza made travel plans, involving airline tickets that are neither changeable nor refundable, based on the timing of the trial session in this case, which was scheduled to conclude on 26 March 2004;

CONSIDERING that the requests for certification of the two interlocutory appeals were pending since 12 February 2004 and that the Mugiraneza Certification Decision and the Prosecution Certification Decision were issued without advance notice on 24 March 2004;

CONSIDERING that requiring counsel for Prosper Mugiraneza to alter his travel plans to meet the deadlines arising from the issuance of the Mugiraneza Certification Decision and the Prosecution Certification Decision on 24 March 2004 would be unnecessarily wasteful;

CONSIDERING that the Prosecution would suffer no prejudice from the granting of an extension;

CONSIDERING that good cause has been shown for granting an extension of time pursuant to Rule 116 (A) of the Rules;

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion;

ORDERS that Prosper Mugiraneza's appeal pursuant to the Mugiraneza Certification Decision may be filed on or before 7 April 2004; and

ORDERS that Prosper Mugiraneza may file a response to any interlocutory appeal filed by the Prosecution pursuant to the Prosecution Certification Decision on or before the seventeenth day following the filing of such appeal.

Done in French and English, the English text being authoritative

Done this 30th day of March 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge

***

Order of the Presiding Judge to Assign Judges 2 April 2004 (ICTR-99-50-AR73.4)

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Appeals Chamber, composition

International instruments cited : Statute, art. 11 (3) and 13 (4) – Document IT/222 of the International Criminal Tribunal for the Former Yugoslavia, 17 November 2003

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,

NOTING "Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ Implicating Prosper Mugiraneza for all Crimes in Kibungo and Cyangugu Prefectures Except for the Crimes of Conspiracy and Complicity in Genocide," filed on 31 March 2004;

NOTING Trial Chamber II's Decision on the Prosecutor's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004, rendered on 24 March 2004, which certified this interlocutory appeal;

CONSIDERING the composition of the Appeals Chamber of the 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 Tribunal;

FOR THE FOREGOING REASONS,

ORDER that, in the case of *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza*, Case N° ICTR-99-50-AR73.4, the Appeals Chamber be composed as follows :

Judge Theodor Meron
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca.

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

Dated this 2d day of April 2004, at The Hague, The Netherlands

[Signed] : Theodor Meron

***

Decision on Motions to Seal Annexure «A» to the Prosecutor's Appeal Brief 16 April 2004 (ICTR-99-50-AR73.4)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge, Mohamed Shahabuddeen, Mehmet Güney, Fausto Pocar, Inés Mónica Weinberg de Roca

Mugiraneza – motion to seal documents, confidential – protected witnesses – urgency – motion granted

International instruments cited :

I.C.T.R. : Prosper Mugiraneza's Emergency Motion to Seal Annexture A to the Prosecutor's Appellate Brief, 13 April 2004 (ICTR-99-50, Reports 2004*, p. X) – Prosecutor's Urgent Motion to Seal Annexture "A" to the "Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004," 14 April 2004 (ICTR-99-50,* Reports 2004*, p. X) – Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004, 31 March 2004 (ICTR-99-50,* Reports 2004*, p. X)*

1. Prosper Mugiraneza, the Respondent in this interlocutory appeal, has filed an urgent motion to seal documents that the Prosecution as Appellant filed with the Appeals Chamber[1]. In response, the Prosecution filed an urgent motion of its own conceding that the documents should have been filed confidentially and therefore should now be sealed[2].

2. The urgency arises from the fact that the Prosecution filed its appeal brief in this matter[3] without designating any part of it confidential, even though Annexture A to that brief ("Annexture A") contained the full names, pseudonyms, and anticipated testimony of sixteen Prosecution witnesses who are subject to protective measures ordered by Trial Chamber II at the request of the Prosecution.

3. The parties agree that the filing of Annexture A as a public document violated the Trial Chamber's protective measures and request the Appeals Chamber to place that document under seal. The Appeals Chamber is satisfied that an order sealing Annexture A is necessary to protect the security of the witnesses concerned and to uphold the order of the Trial Chamber.

[1] Prosper Mugiraneza's Emergency Motion to Seal Annexture A to the Prosecutor's Appellate Brief, 13 April 2004.

[2] Prosecutor's Urgent Motion to Seal Annexture "A" to the "Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004," dated 14 April 2004.

[3] Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004, dated 31 March 2004.

4. For the foregoing reasons, the Appeals Chamber :

GRANTS the motions by Prosper Muginareza and the Prosecution to seal Annexture A;

ORDERS that Annexture A be and hereby is designated confidential;

DIRECTS the Registrar to take all necessary steps to ensure that Annexture A is not publicly disseminated in contravention of the protective measures ordered by the Trial Chamber; and

ORDERS the parties, their employees and agents in receipt of Annexture A to refrain from disclosing or disseminating the contents thereof except as permitted by the Trial Chamber.

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

Done this 16th day of April 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge

***

Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence 23 April 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Bicamumpaka – unredacted information sheets of witnesses, previous and subsequent statements of witnesses, disclosure – Prosecution in a better position to obtain a document – previous efforts of the defence – specificity of the request – interview of witnesses, variation to the Chamber's Order on Protective Measures – exculpatory evidence – protected witnesses – motion granted in part

International instruments cited : Statute, art. 19 (4) – Rules of procedure and evidence, Rule 68, 73 (A)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED of the "Motion of Defendant Bicamumpaka for Disclosure of Exculpatory Evidence" filed on 10 December 2003, (the "said Motion");

NOTING the "Prosecutor's Response to Bicamumpaka's Motion for Disclosure of Exculpatory Evidence" filed on 16 December 2003, (the "Response");

RECALLING the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses", filed on 12 July 2000 (the "Chamber's Order on Protective Measures") and the "Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses" filed on 15 October 2003, (the "Clarification Order");

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence (the "Rules") particularly Rule 68 of the Rules which reads :

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

INTRODUCTION

1. Judge Asoka de Zoysa Gunawardana, Presiding Judge in this case, is temporarily absent from the seat of the Tribunal, for medical reasons. As a consequence, the Motion has been assigned to Judge Khan to decide pursuant to Rule 73 (A).

SUBMISSIONS OF THE PARTIES

Relief Sought by the Defence

2. The Defence requests the Trial Chamber to order the Prosecution to disclose the unredacted information sheets of witnesses GLK, GLN and GLO, which have previously been made available in a redacted format for the purposes of this case. In relation to the same witnesses, the Defence also requests the Trial Chamber to order the Prosecution to obtain and disclose all previous and subsequent statements of these witnesses, and in addition to allow a variation to the Chamber's Order on Protective Measures, in order to be allowed to meet and interview these witnesses. In relation to Witness GAP, the Defence requests the Trial Chamber to order disclosure of the previous testimony before this Tribunal of Witness GAP, and also to order the Prosecution to obtain and disclose other written statements or confessions of Witness GAP.

Disclosure of unredacted information sheets of witnesses GLK, GLN and GLO

3. The Defence submits that the unredacted witness information sheets are in the control and custody of the Prosecutor's Office. The Defence maintains that, considering the importance and exculpatory nature of the information contained in the statements of witnesses GLK, GLN and GLO, the Defence is entitled to receive the unredacted witness information sheets of these witnesses, in order to meet them and evaluate the status of their evidence.

4. The Defence submits that since witnesses GLK, GLN and GLO will not be called by the Prosecution as witnesses in this case, they do not fall under the Chamber's Order on Protective Measures, and thus do not qualify as protected witnesses. Thus, according to the Defence, it is entitled to receive the information sought, and also meet the witnesses without the presence of a representative of the Office of the Prosecutor.

5. The Prosecution submits that it has already fulfilled its disclosure obligations by disclosing to the Defence the unredacted witness statements and the accompanying cover sheet in accordance with the Clarification Order.

Variation of Witness Protection Order

6. The Defence requests that the Trial Chamber allows the Defence to meet and interview Witnesses GLK, GLN and GLO, without the presence of a representative of the Office of the Prosecutor. It also requests however that the Trial Chamber directs the Prosecution to undertake to make all necessary arrangements to facilitate such interview.

7. The Prosecution raises no objection to the Defence requesting to interview Witnesses GLK, GLN and GLO, however, it does stipulate that such an interview should only be allowed after the Registry establishes that the witness is willing to be interviewed by the Defence, and that any such interview should be conducted in the presence of a representative of the Office of the Prosecutor.

Measures requested in relation to Witness GAP

8. The Defence seeks to obtain the transcripts of Witness GAP's testimony before this Tribunal (specifically, testimony given "from July 2001 to April 2002 before the International Criminal Tribunal for Rwanda"), his guilty plea of 12 August 2002 made before the Rwandan Authorities, and also "several statements" that witness GAP admitted during his cross-examination of 3 December 2001 of having made before the Rwandan Authorities.

DELIBERATIONS

Previous Statements of Witnesses before Rwandan Authorities

9. The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such docu-

ments within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, where, as a practical reality, the Prosecution enjoys greater leverage than the Defence.

10. In relation to the specificity required in such a request, the Trial Chamber is of the view that a blanket request for all "previous and subsequent statements" of certain witnesses amounts to fishing for information, and does not meet the requisite standard.

11. The Trial Chamber finds that the Defence has identified with sufficient specificity :

> [GAP's] guilty plea of August 12th 2002, made before the Rwandan authorities, which are mentioned in witness' GAP statement of July 14th and 15th 2003, the whole as appear from such statement, filed herewith as Annex 'B'.

The Trial Chamber finds that such information may be relevant to the Defence in relation to the alibi of the Accused. However, with regard to the Defence request for the "several statements made before the Rwandan Authorities", supposedly identified in Annex C to the Defence Motion, the Chamber finds the materials sought have not been sufficiently specified.

Request for Transcripts

12. The Defence makes a request for the previous testimonies of witnesses GLK, GLN and GLO "before this Tribunal or any other jurisdiction". The Trial Chamber finds this request cannot be considered as it lacks specificity.

13. The Defence requests the transcripts of the previous testimony of Witness GAP before this Tribunal, between July 2001 and April 2002. The Defence is reminded that, in accordance with Article 19 (4) of the Statute, trials are held in public unless otherwise directed by the Trial Chamber. Therefore, there is no need to request from the Trial Chamber open-session testimony of previous trial proceedings before any Chamber of this Tribunal, considering that such records are already in the public domain. In relation to previous closed-session testimony for Witness GAP, the Trial Chamber finds that such a request should if possible be made before the Chamber that initially sealed the record. Furthermore, the Trial Chamber finds that this request lacks the required specificity.

Request for Modification of Witness Protection Order

14. In relation to the Defence request to interview witnesses GLK, GLN and GLO, the Trial Chamber notes that the Prosecution no longer intends to call these persons as witnesses for the Prosecution. The Trial Chamber is therefore of the view that these particular persons can no longer be classified as potential Prosecution Witnesses, and

the Defence is free to conduct its own enquiries and interviews as it deems fit, without further reference to the Prosecution or the Trial Chamber. Correspondingly, the Prosecution is under no obligation to facilitate such interview. However, should it not already have done so, the Trial Chamber requires the Prosecution to immediately inform the former potential Prosecution witnesses that it no longer intends to call them to give testimony in this trial.

15. The Trial Chamber finds that information previously obtained by the Prosecution from these witnesses, which was given under the assurance of the Chamber's Order on Protective Measures, should remain protected by this Order. However, the Trial Chamber finds that the Prosecution should assist the Defence to the extent of disclosing to the Defence of Jerôme Bicamumpaka, if it is so aware, the current address of these persons so as to facilitate their location.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following terms :

MODIFIES the Chamber's Order on Protective Measures as directed in paragraphs 13 and 14 of this Decision.

ORDERS the Prosecution to inform Witnesses GLK, GLN and GLO that it no longer intends to call them to give testimony in this trial, and also to disclose to the Defence of Jérôme Bicamumpaka, if it is so aware, the current addresses of the said witnesses.

ORDERS the Prosecution to request the previous statement of Witness GAP made before the Rwandan Authorities as identified in paragraph 11 of this Decision, and upon receipt of the same, to disclose to the Defence.

DENIES the Motion in all other respects

Arusha, 23 April 2004

[Signed] : Khalida Rachid Khan

***

Decision on Prosper Mugiraneza's Emergency Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKS 29 April 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Oral ruling already issued – motion moot

International instruments cited : Rules of procedure and evidence, Rules 68, 73 (A)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Emergency Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKS" filed on 22 March 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Emergency Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKS" filed on 7 April 2004, (the "Response");

TAKING INTO CONSIDERATION the submissions made by both parties when this matter was taken up in open court on 24 March 2004;

CONSIDERING that the Trial Chamber has already issued an oral ruling regarding the said Motion on 24 March 2004, the Trial Chamber is of the view that this Motion is now moot and should be dismissed.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the said Motion in all respects.

Arusha, 29 April 2004

Khalida Rachid Khan

***

Decision on Prosper Mugiraneza's Emergency Motion to Delay the Testimony of Witness GJX 4 May 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Mugiraneza – non disclosure of information sheet, error of the Prosecutor – postponement of testimony – motion moot

International instruments cited : Rules of procedure and evidence, Rule 73 (A)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Emergency Motion to Delay the Testimony of Witness GJX" filed on 18 March 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Emergency Motion to Delay the Testimony of Witness GJX" filed on 21 March 2004, (the "Response");

RECALLING the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses", filed on 12 July 2000 (the "Chamber's Order on Protective Measures") and the "Clarification Order in Respect of Disclosure of Identifying Information of Protected Witnesses" filed on 15 October 2003, (the "Clarification Order");

NOTING that it is agreed between both Parties that the non-disclosure of the identifying information sheet is an inadvertent error on the part of the Prosecutor.

CONSIDERING that the only relief sought by the Defence is to have Witness GJX called to testify twenty-one days after the effective disclosure of his identifying information sheet in accordance with the Protective Measures Decision and the Clarification order.

CONSIDERING FURTHER that the said information sheet was disclosed to the Defence on 16 March 2004 and that the testimony of Witness GJX has been postponed until the Trial Chamber resumes its sessions, the Trial Chamber is of the view that the Motion is now rendered moot and should be dismissed in its entirety.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the said Motion in all respects.

Arusha, 4 May 2004

[Signed] : Khalida Rachid Khan

***

Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii) 5 May 2004 (ICTR-99-50-I)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Mugiraneza – disclosure of prior statements, obligation of the Prosecutor – witness to testify on the same subject matter – closed session materials – permission of the Trial Chamber, conditions attached – ICTY – motion granted in part

International instruments cited : Rules of procedure and evidence, Rules 66 (A) (ii), 73 (A)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii)", filed on 25 February 2004 (the "Motion");

HAVING RECEIVED :

i) The "Supplement to Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii)", filed on 4 March 2004;

ii) The "Prosecutor's Response to Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii)", filed on 4 March 2004;

iii) "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii)", filed on 9 March 2004;

Décision relative à la requête de Prosper Mugiraneza tendant au strict respect de l'article 66 (A) (ii) du Règlement 5 mai 2004 (ICTR-99-50-T)

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan

Mugiraneza – communication de déclarations antérieures, obligation du Procureur – évocation du même sujet par le témoin – éléments de preuve produits à huit clos – autorisation de la Chambre de première instance, conditions assorties à l'autorisation – TPIY – requête accordée en partie

Instruments internationaux cites : Règlement de procédure et de preuve, art. 66 (A) (ii), 73 (A)

Jurisprudence internationale citée :

I.C.T.Y. : Chambre de première instance, Le Procureur c. Tihomir Blaskic*, Décision sur la production forcée de moyens de preuve d'éléments nouveaux, 27 janvier 1997 (IT-95-14-PT) – Chambre de première instance,* Le Procureur c. Zoran Kupreskic et consorts*, Décision relative à la Requête du Procureur aux fins de permettre la communication, en vertu de l'article 66 du Règlement, d'une déposition à huis clos en application de l'article 79 du Règlement, 29 juillet 1998 (IT-95-16-A)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II (la «Chambre») en la personne du juge Khalida Rachid Khan, désignée pour statuer sur la présente requête conformément à l'article 73 (A) du Règlement de procédure et de preuve,

SAISI de la Requête de Prosper Mugiraneza tendant au strict respect de l'article 66 (A) (ii), déposée le 25 février 2004 (la «requête»),

AYANT REÇU :

i) L'additif à la requête de Prosper Mugiraneza tendant au strict respect de l'article 66 (A) (ii), déposé le 4 mars 2004;

ii) La Réponse du Procureur à la requête de Prosper Mugiraneza tendant au strict respect de l'article 66 (A) (ii), déposée le 4 mars 2004;

iii) La Réplique de Prosper Mugiraneza à la réponse du Procureur à sa requête tendant au strict respect de l'article 66 (A) (ii), déposée le 9 mars 2004.

ARGUMENTS OF THE PARTIES

Defence

1. The Defence seeks an Order from the Trial Chamber requiring the Prosecution to comply with Rule 66 (A) (ii) of the Rules prior to the appearance of witnesses. The Defence asserts that Counsel for the Prosecution failed to determine the number of statements of Witness DY and to furnish them prior to the witness appearance in the case.

2. Furthermore, the Defence argues that the Prosecution refused to provide copies of the transcripts of the Witness DY's prior testimony in the Bagosora trial.

Prosecution

3. The Prosecution asserts that it had disclosed all the prior statements of Witness DY to the Defence. Accordingly, two statements were disclosed in July 2000, and then "re-disclosed" in October 2003 at the close of the proceedings. Subsequent statements were also disclosed to the Defence at a later stage[1].

4. The Prosecution submits that the Defence had misinterpreted its obligations under Rule 66, which in its view does not govern the disclosure of closed sessions materials or transcripts. The Prosecution maintains that, after obtaining open and closed session transcripts of Witness DY, it had disclosed them to the Defence. The Trial Chamber ordered however that the Defence should hand back the transcripts to the Prosecution.

5. The Prosecution argues that the Party wishing to use closed session testimony must apply to the relevant Chamber. Therefore, the Prosecution prays the Chamber not to allow the Defence Motion.

HAVING DELIBERATED

6. The Chamber notes that pursuant to the provisions of Rule 66 (A) (ii), the Prosecution is obliged to disclose to the Defence :

> "(n)o later that 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".

[1] The order of disclosure according to the Prosecution does not appear clearly in its Response. See paras.5-7 of the Response.

ARGUMENTS DES PARTIES

Défense

1. La défense prie la Chambre d'ordonner au Procureur qu'il satisfasse à l'article 66 (A) (ii) du Règlement avant la comparution des témoins. Selon la défense, le Procureur n'a pas précisé le nombre des déclarations faites par le témoin DY et ne les a pas communiquées avant la comparution du témoin en l'espèce.

2. En outre, la défense soutient que le Procureur a refusé de communiquer copies des procès-verbaux de la déposition antérieure du témoin DY à l'occasion du procès Bagasora.

Procureur

3. Le Procureur prétend avoir communiqué à la défense toutes les déclarations antérieures du témoin DY. Ainsi, deux déclarations communiquées en juillet 2000 l'ont été «de nouveau» en octobre 2003 à la clôture des débats. Les déclarations postérieures du témoin ont également été communiquées à la défense[1].

4. Le Procureur fait valoir que la défense a mal interprété les obligations mises à sa charge pour l'article 66 du Règlement, qui, à son avis, ne régit pas la communication des éléments de preuve produits à huis clos ou des procès-verbaux d'audience à huis clos. Le Procureur soutient que lorsqu'il a obtenu les procès-verbaux de la déposition du témoin DY en audience publique ou à huis clos, il les a toutes communiquées à la défense. Toutefois, la Chambre avait ordonné à la défense de rendre ces procès-verbaux au Procureur.

5. Selon le Procureur, la partie désireuse d'utiliser toutes dépositions à huis clos, doit en demander l'autorisation à la Chambre saisie. En conséquence, le Procureur prie la Chambre de rejeter la requête de la défense.

Ayant délibéré

6. La Chambre relève que l'article 66 (A) (ii) du Règlement fait obligation au Procureur de communiquer à la défense :

> «Au plus tard 60 jours avant la date fixée pour le début du procès, copie des dépositions 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 déclaration de témoins à charge supplémentaires soit remises à la défense dans un délai fixé par la Chambre.»

[1] Selon le Procureur, l'ordonnance de communication n'apparaît pas très clairement dans sa réponse. Voir les paras. 5 a 7 de la réponse.

7. The Chamber recalls the *Blaskic* Decision, in which the International Criminal Tribunal for Former Yugoslavia (ICTY) Trial Chamber I observed that all previous statements of all Prosecution witnesses, in whatever form, must be disclosed to the Defence[2].

8. Further, the Chamber recalls that in the *Kupreskic* case, Trial Chamber I of the ICTY held that "the transcript of the testimony of a witness constitutes a statement within the meaning of Sub-Rule 66 (A) (ii) of the Rules; that is therefore appropriate to permit its disclosure to Defence Counsel"[3]. Nevertheless, the Chamber stresses that it is only when the Witness is to testify on the same subject matter as his previous testimony that this previous testimony shall constitute a witness statement within the meaning of Rule 66 (A) (ii) and is therefore subject to disclosure.

9. Should prior sealed transcripts or exhibits of a witness to be called to testify at trial constitute statements within the meaning of Rule 66 (A) (ii) of the Rules, the Prosecution is placed under an obligation to apply to the Trial Chamber that originally sealed the transcript or exhibits for permission to release the same to the Defence. That Trial Chamber will then decide whether to allow the application, and what, if any, conditions would attach to that permission. Should permission be granted, the Prosecution would then be under an obligation to disclose those transcripts or exhibits to the Defence, and the Defence would correspondingly be restricted in its use of those materials in accordance with the orders of the Chamber which allowed it access.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in the following terms only :

REMINDS the Prosecution of its obligations to strictly comply with the provisions of Rule 66 (A) (ii), and to ensure that the correct procedure for disclosure of sealed prior statements or exhibits is followed in good time, as set out above.

DENIES the Motion in all other respects.

Arusha, 5 May 2004

[Signed] : Khalida Rachid Khan

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[2] The Prosecutor v. Tihornir Blaskic, Case No.IT-95-14-PT, "Decision on the Production of Discovery Materials", 27 January 1997, para. 38,

[3] *The Prosecutor v. Zoran Kupreskic et al*., Case No. IT-95-16-A, "Decision on the Prosecutor's Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session under Rule 79 of the Rules", 29 July 1998, p.2.

7. La Chambre rappelle la décision en l'affaire *Blaskic* dans laquelle la Chambre I du Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a déclaré que toutes les déclarations antérieures de témoins à charge, sous quelque forme que ce soit, devaient être communiquées à la défense[2].

8. La Chambre rappelle en outre qu'en l'affaire *Kupreskic*, la Chambre I du TPIY a jugé que «la transcription d'une déposition de témoin constituait une déclaration au sens du sous alinéa (ii) de l'article 66 du Règlement, donc, il convient de permettre sa communication au conseil de la défense»[3]. Néanmoins, la Chambre souligne que ce n'est que dans l'hypothèse où le témoin doit évoquer le même sujet que lors de sa déposition précédente que cette déposition a valeur de déclaration de témoin au sens de l'article 66 (A) (ii) du Règlement et doit donc être communiquée.

9. Dans l'hypothèse où des procès-verbaux ou pièces à conviction antérieures mis sous scellés concernant un témoin appelé à déposer dans un procès seraient qualifiées de déclarations au sens de l'article 66 (A) (ii) du Règlement, le Procureur doit demander à la Chambre qui en a ordonné la mise sous scellés, l'autorisation de les communiquer à la défense. Au cas où elle ferait droit à la demande, la Chambre compétente décidera alors, s'il y a lieu, des conditions à assortir à cette autorisation. S'il y est autorisé, le Procureur devrait alors communiquer ces procès-verbaux ou pièces à conviction à la défense, celle-ci devant se conformer, dans l'utilisation de ces éléments de preuve, aux instructions de la Chambre qui en aurait autorisé l'accès.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête dans les termes suivants uniquement :

RAPPELLE au Procureur l'obligation à lui faite de se conformer strictement aux dispositions de l'article 66 (A) (ii) et de veiller à suivre le moment venu la procédure régissant la communication des déclarations de témoins ou des pièces à conviction antérieures, ainsi qu'il est indiqué plus haut.

REJETTE la requête en toutes ses autres prétentions.

Arusha, le 5 mai 2004

[Signé] : Khalida Rachid Khan

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[2] *Le Procureur c. Tihomir Blaskic*, affaire n° IT-95-14-PT, «Décision sur la production forcée de moyens de preuve d'éléments nouveaux», 27 janvier 1997, para. 38.

[3] *Le Procureur c. Zoran Kupreskic et consorts*, affaire n° IT-95-16-A, «Décision relative à la Requête du Procureur aux fins de permettre la communication, en vertu de l'article 66 du Règlement, d'une déposition à huis clos en application de l'article 79 du Règlement», 29 juillet 1998, p. 2 de l'original.

Decision on Motion of Jean Kambanda (Jérôme Bicamumpaka) for disclosure of Exculpatory Evidence (Rules 68 and 73 of the Rules of Procedure and Evidence) 6 May 2004 (ICTR-99-50-T)

(Original : English)

Chambre de première instance II

Juge : Khalida Rachid Khan

Kambanda – non-disclosure of the transcription of a witness interview, error of the Prosecutor – motion moot

International instruments cited : Rules of procedure and evidence, Rule 73 (A)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED of "Motion of Jean Kambanda for Disclosure of Exculpatory Evidence" (sic) filed on 18 February 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence" (sic) filed on 25 March 2004, (the "Response");

NOTING that the Prosecutor acknowledged that the non-disclosure of the transcription of the interview of Witness XXQ requested by the Defence in the said Motion is an inadvertent error on the part of the Prosecutor.

CONSIDERING that the only relief sought by the Defence is to have the Prosecutor ordered to disclose the integrality of the transcription of the interview of Witness XXQ and that the Prosecutor has agreed to do so as soon as the said transcription is completed and in his possession, the Trial Chamber is of the view that the Motion is now rendered moot and should be dismissed in its entirety.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the said Motion in all respects.

DIRECTS the Prosecutor to provide the Defence with a copy of the integral transcription of the interview of Witness XXQ as soon as it is available to him.

Arusha, 6 May 2004

[Signed] : Khalida Rachid Khan

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Order for the Prosecutor to Indicate to the Trial Chamber Whether Jean Kambanda is a Prosecution witness or not 6 May 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Kambanda – prosecution witness – delay in the response of the Prosecutor – possible removal from the Prosecutor's Witness list

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan assigned by the Chamber to rule on this matter, (the "Trial Chamber");

CONSIDERING that, on 3 February 2004, the Trial Chamber instructed the Prosecutor to contact Jean Kambanda and to inform the Trial Chamber as to whether or not Jean Kambanda will be appearing as witness for the Prosecutor;

CONSIDERING that the Prosecutor has not yet filed any response or notification on this matter and that more than three months have elapsed since the Court instruction;

THE TRIAL CHAMBER HEREBY

ORDERS the Prosecutor to file with the Registry no later than Friday 14 May 2004 a document indicating whether or not Jean Kambanda will appear as a Prosecution Witness;

WARNS the Prosecutor that, in case of failure to comply with the Trial Chamber's Order, the Trial Chamber will deem Jean Kambanda removed from the Prosecutor's Witness list.

Arusha, 6 May 2004

[Signed] : Khalida Rachid Khan

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Ordonnance enjoignant au Procureur d'indiquer à la Chambre de première instance si Jean Kambanda est ou non un témoin à charge 6 mai 2004 (ICTR-99-50-T)

(Original : Anglais)

Chambre de première instance II

[Signé] : Khalida Rachid Khan

Kambanda – témoin à charge – retard dans la réponse du Procureur – retrait éventuel du témoin de la liste des témoins

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la personne de la juge Khalida Rachid Khan désignée par la Chambre de première instance II aux fins de rendre la présente ordonnance (la «Chambre»),

ATTENDU que, le 3 février 2004, la Chambre de première instance a chargé le Procureur de se mettre en rapport avec Jean Kambanda et d'indiquer à la Chambre si celui-ci comparaîtra ou non en qualité de témoin à charge,

ATTENDU que le Procureur n'a pas encore répondu à cette question ou avisé la Chambre de sa décision et que plus de trois mois se sont écoulés depuis qu'il a été chargé de cette diligence,

LA CHAMBRE DE PREMIERE INSTANCE PAR LA PRESENTE

ORDONNE au Procureur de déposer auprès du Greffe au plus tard le vendredi 14 mai 2004, un document indiquant si Jean Kambanda comparaîtra ou non en qualité de témoin à charge;

AVERTIT le Procureur qu'en cas de non-respect de la présente ordonnance, elle considérera que Jean Kambanda est retiré de la liste des témoins à charge.

Fait à Arusha, le 6 mai 2004

[Signé] : Khalida Rachid Khan

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Decision on Prosper Mugiraneza's Motion for an Order Requiring Paul Ng'arua to Show why he Should not be Held in Contempt of the Tribunal 12 May 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Mugiraneza – protected witnesses – violation of anonymity, breach by the Prosecutor of the Protective Measures Decision – safety of witnesses and victims – contempt of the Tribunal – negligence – motion denied

International instruments cited : Rules of procedure and evidence, Rules 73 (A), 77

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Prosper Mugiraneza*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000 (ICTR-99-50-T,* Reports 2004*, p. 462) – Appeals Chamber,* The Prosecutor v. Prosper Mugiraneza*, Decision on Motions to Seal Annexure 'A' to the Prosecutor's Appeal Brief, 16 April 2004 (ICTR-99-50,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion for an Order requiring Paul Ng'arua to show cause why he should not be held in contempt of the Tribunal for violation of the Trial Chamber's Order for protection of Witnesses" filed on 13 April 2004, (the "Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion for an Order requiring Paul Ng'ama to show cause why he should not be held in contempt of the Tribunal for violation of the Trial Chamber's Order for protection of Witnesses" filed on 19 April 2004, (the "Response");

ARGUMENTS OF THE PARTIES

1. The Defence informs the Chamber that Paul Ng'arua, the lead Prosecutor acting for the Prosecution in this trial, signed and caused to be filed as a public document a pleading identifying the true names and pseudonyms of 16 protected witnesses[1].

[1] *Mugiraneza*, Prosecutor's Appellate Brief, filed on 31 March 2004.

These witnesses were protected witnesses pursuant to the Chamber's Decision on the Prosecutor's Motion for Protective Measures for Witnesses of 12 July 2000[2] (the "Protective Measures Decision").

2. The Defence for Prosper Mugiraneza moves the Trial Charnber to issue an Order requiring Paul Ng'arua to show cause why he should not be held in contempt of the Tribunal for knowingly and deliberately violating the Protective Measures Decision. Alternatively, the Defence asks for the appointrnent of an *amicus curiae* to investigate the matter or to conduct an evidentiary hearing pursuant to Rule 77 of the Rules and at the conclusion of that hearing, to enter any orders or judgrnent pursuant to Rule 77 (G) of the Rules as the Chamber deems appropriate.

3. The Prosecution accepts that the breach as described by the Defence in fact occurred; however denies that this breach was knowing and deliberate. The Prosecution represents that the filing of the document in question as a public document was an inadvertent mistake, which the Prosecution regrets. It points out that as soon as the mistake was realised, remedial steps were immediately taken to reclassify the document as "confidential."[3]

DELIBERATONS

4. The Chamber notes with regret the serious breach by the Prosecution of the Protective Measures Decision. The best protection available to witnesses before this Tribunal is anonymity, and when it is promised to witnesses but not adhered to by one of the Parties, the safety of witnesses and victims is put at risk.

5. The Chamber notes that on Motion of the Accused Prosper Mugiraneza, the Appeals Chamber on 16 April 2004 ordered the annex to the Motion disclosing the protected identities to be sealed, and also various other measures to protect the identities of the Prosecution witnesses[4].

6. The Chamber accepts the representations by the Prosecution that the breach was accidental. However the Chamber finds that the error demonstrates a laxity of methodology within the Office of the Prosecutor, verging on negligence.

7. The Chamber does not find it appropriate to order that this matter be investigated further, nor to levy sanctions on the Office of the Prosecutor pursuant to Rule 77 as suggested by the Defence. The Prosecution is undoubtedly aware of the serious nature of its mistake and the Chamber trusts that measures will be put in place to ensure that it does not happen again.

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[2] *Mugiraneza*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 12 July 2000.

[3] In evidence of this fact the Prosecution attaches two documents to the Response : (1) Interoffice Memorandum to the Court Management Section, dated 14 April 2004, requesting immediate reclassification of the document in question as confidential; (2) "Prosecutor's Urgent Motion to Seal Annexure 'A' to the "Prosecutor's Appeal Against the Trial Chamber II Decision of 5 February 2004 Excluding the Testimony of Witness GJV and Sixteen Others", filed before the Appeals Chamber 14 April 2004.

[4] *Mugiraneza*, Decision on Motions to Seal Annexure 'A' to the Prosecutor's Appeal Brief (AC), 16 April 2004.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 12 May 2004

[Signed] : Khalida Rachid Khan

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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 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Mugiraneza – certification to appeal – disclosure of previous statements, obligation of the Prosecutor – testimony in closed session – exceptional nature of matters dealt in Rule 73 (B) – already decided by the Trial Chamber – motion denied

International instruments cited : Rules of procedure and evidence, Rules 73 (A), (B), 66 (A), (C), 68 and 70

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Arsène Shalon Ntahobali and Pauline Nyiramasuhuko*, 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-97-21-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii), 5 May 2004 (ICTR-99-50-T,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion Pursuant to Rule 73 (B) for Certification to Appeal the Trial Chamber's Oral Decision of 20 February 2004" filed on 20 February 2004, (the "said Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 73 (B) for Certification to Appeal the Trial Chamber's Oral Decision of 20 February 2004 filed on 19 March 2004, (the "Response");

RECALLING the oral ruling by this Trial Chamber on 20 February 2004, (the "Oral Decision");

ARGUMENTS OF THE PARTIES

1. The Defence for Prosper Mugiraneza moves the Trial Chamber to grant leave for appeal the Oral Decision of 20 February 2004. According to the Defence, the "appeal urged in this motion seeks a determination from the Appeals Chamber as to which party has the burden of removing legal impediments to disclosure of documents and other information pursuant to the Rules of Procedure and Evidence". In this particular case, the Defence claims that the Prosecutor has the duty, pursuant to Rules 66 (A) and 68 of the Rules, to disclose all previous statements of a Prosecution Witness, including the statements which are subject to a protection order.

2. In the instant case, the Defence argues that the closed session transcript of the testimony of Prosecution Witness DY should have been disclosed to the Defence prior to his testimony and that it was the Prosecutor's duty to request to the Trial Chamber who granted the protective measures to the said witness, namely Trial Chamber I of the Tribunal, the authorization to disclose the said closed session transcripts.

3. The Prosecutor argues that it is the practice of the Tribunal that a party wishing to use materials in closed session to file a request before the Trial Chamber who granted the protective measures and before which the testimony in closed session was heard.

4. Further, according to the Prosecutor, the main issue raised by the said Motion on the basis for certification is legally flawed. The issue contains erroneous interpretation of the law relating to the Prosecutor's disclosure obligation. The Prosecutor claims that his disclosure obligation is not absolute pursuant to Rules 66 (C) and 70.

DELIBERATIONS

5. Rule 73 (B) of the Rules reads 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.

6. The Trial Chamber recalls the reasoning held by Trial Chamber II in a different composition in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.* :

> It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73 (B) must be exceptional indeed. This point is made clear

by the conditions which must be satisfied before the Trial Chamber may consider granting certification[1].

7. The Trial Chamber concurs with the Prosecutor's submission that Rule 73 (B) deals with matters of an exceptional nature, and cannot be used for purposes of gaining access to the Appeals Chamber to resolve issues of a general nature namely, in this particular case, seizing the Appeals Chamber for an advisory opinion. The Trial Chamber is of the view that the Defence has failed to demonstrate that the said motion meets the requirements of Rule 73 (B).

8. Finally, notwithstanding its above-mentioned reasoning pursuant to Rule 73 (B), the Trial Chamber reminds the Defence that the issue at stake in the said Motion has already been decided by the Trial Chamber in its "Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii)" dated 5 may 2004[2].

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the said Motion in its entirety.

Arusha, 12 May 2004

[Signed] : Khalida Rachid Khan

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Decision on the Prosecution's Extremely Urgent Ex Parte Motion for Extension of Time to File a Response 18 May 2004 (ICTR-99-50-I)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan

Extension of time – acquisition of information – Prosecutor – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73 (A)

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

[1] *The Prosecutor v. Arsène Shalon Ntahobali and Pauline Nyiramasuhuko*, Case Nº 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, para. 15.

[2] *The Prosecutor v. Casimir Bizimungu et al*., Case Nº ICTR-99-50-T, "Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii)", 5 May 2004, paras 8-9.

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Chamber");

BEING SEIZED of the "Prosecutor's Extremely Urgent *Ex Parte* Motion for Extension of Time to Enable Him to Respond to Prosper Mugiraneza's Motion to Order the Registrar to Inform Witnesses of Breach of Protective Orders", filed on 17 May 2004 (the "Motion");

SUBMISSIONS

1. The Prosecution requests the Chamber to authorise three days extension to the set time limits for its filing of a response to *Prosper Mugiraneza's Motion to Order the Registrar to Inform Witnesses of Breach of Protective Orders*. The current deadline is due to expire today, 18 May 2004.

2. The Prosecution submits that such extension is justified as it needs to gather information from other sections of the Tribunal in order to respond, and the acquisition of this information will take him beyond the original time frames set by the Chamber.

DELIBERATIONS

3. The Chamber finds that the Prosecution has adequately justified its request for additional time to file a response. In the circumstances, the request for an additional three days is justified. Thus the new deadline for the filing of a response to *Prosper Mugiraneza's Motion to Order the Registrar to Inform Witnesses of Breach of Protective Orders* is 21 May 2004.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion.

DIRECTS the Prosecution to file its response to *Prosper Mugiraneza's Motion to Order the Registrar to Inform Witnesses of Breach of Protective Orders* by close of business on 21 May 2004.

Arusha, 18 May 2004

[Signed] : Khalida Rachid Khan, Presiding Judge

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Decision on the Motions for Variation of the Prosecutor's Initial Witness List 19 May 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan, Presiding

Inconsistencies in the Prosecutor requests – contradictions between the witness lists and the motions filed – diligence and rigour expected from the Prosecutor – motion denied

International instruments cited : Rules of procedure and evidence, Rule 73 (A), 73 bis (E)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Trial Chamber");

BEING SEIZED OF the "Prosecutor's Motion for Leave to Vary his Initial List of Witnesses pursuant to Rule 73 *bis* (E)" filed on 19 December 2003, (the "First Motion");

HAVING RECEIVED the following submissions by the Parties :

(i) The "Clarification and/or Corrigendum to the Prosecutor's Witness List" filed on 19 December 2004;

(ii) The "Response by those Representing Justin Mugenzi to the Prosecutor's Motion for Leave to Vary his Initial List of Witnesses pursuant to Rule 73 *bis* (E)" filed on 20 January 2004;

(iii) The "Motion to Extend Delay to File and Response of Defendant Bicamumpaka to Prosecutor's Motion for Leave to Vary his Initial List of Witnesses pursuant to Rule 73 *bis* (E)" filed on 23 January 2004;

(iv) The "Motion for the Chamber to Include Further Matters in its Consideration of the Prosecutor's Motion of 16 December 2003" filed on 10 March 2004;

(v) The "Prosecutor's Response to Justin Mugenzi's Motion for the Chamber to Include Further Matters in its Consideration of the Prosecutor's Motion of 16 December 2003" filed on 16 March 2004;

(vi) The "Prosecutor's Very Urgent Motion to Vary his Initial List of Witnesses in Response to Status Conference Deliberations and Varying/Modifying his Motion for Leave to Vary his Initial List of Witnesses Dated 16 December 2003 still pending before the Trial Chamber" filed on 4 May 2004, (the "Second Motion");

NOTING the "Prosecutor's List of Witnesses" filed on 21 October 2004 AND the "Prosecutor's List of Witnesses for Next Session" filed on 6 April 2004;

CONSIDERING that the Trial Chamber has noticed many inconsistencies in the requests from the Prosecutor as well as many unexplained and confusing contradictions between the witness lists and the motions filed;

CONSIDERING FURTHER that the Trial Chamber was unable to decipher what exactly the Prosecutor was requesting in his motions;

CONSIDERING FINALLY that the Trial Chamber expects diligence and rigour from the Prosecutor in his filings of such witness lists and motions;

THE TRIAL CHAMBER HEREBY

DENIES the First and Second Motions in all respects, without prejudice to the filing of further applications.

DRAWS the attention of the Prosecutor to the provisions of Rule 73 *bis* (E) AND EXPECTS him to act in accordance therewith.

ORDERS the Prosecutor to file a consolidated and final list of witnesses within three (3) days after the filing of the present decision.

ORDERS the Prosecutor to file within three (3) days a calling order of witnesses for the next session scheduled to start on 7 June 2004.

REMINDS the Prosecutor that strict adherence to the deadlines fixed by the Trial Chamber is essential to facilitate the Registry's task in organizing the timely production of witnesses before the Trial Chamber.

Arusha, 19 May 2004

[Signed] : Khalida Rachid Khan, Presiding Judge

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Decision on Motion to Extend Delay to File a Response of Defendant Bicamumpaka to "Prosecutor's Very Urgent Motion to Vary his Initial List of Witnesses in Response to Status Conference Deliberations of 5 March 2004 and Varying/Modifying his Motion for Leave to Vary his Initial List of Witnesses Still Pending Before the Trial Chamber" 25 May 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan, Presiding

Bicamumpaka – extension of delay – list of witnesses – the Trial Chamber has already issued a decision, motion moot – mention of names of protected Prosecution witnesses in the motion by the defence, serious breach of the Protective Measures Decision, anonymity – motion denied

International instruments cited : Rules of procedure and evidence, Rules 73 (A), 77

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence by the Trial Chamber also composed of Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

BEING SEIZED of "Motion to Extend Delay to File a Response of Defendant Bicamumpaka to Prosecutor's Very Urgent Motion to Vary his Initial List of Witnesses in Response to Status Conference Deliberations of 5 March 2004 and Varying/ Modifying his Motion for Leave to Vary his Initial List of Witnesses Still Pending Before the Trial Chamber" filed on 20 May 2004, (the "Motion");

TAKING INTO CONSIDERATION the "Decision on the Motions for Variation of the Prosecutor's Initial Witness List" filed on 19 May 2004 (the "Decision");

FURTHER TAKING INTO CONSIDERATION the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses" filed on 12 July 2000, (the "Protective Measures Decision");

CONSIDERING that the Trial Chamber has already issued a Decision on the issues raised by the Defence, the Trial Chamber is of the view that the Motion is now rendered moot and should be dismissed in its entirety.

NEVERTHELESS the Trial Chamber noted that the Defence has mentioned names of protected Prosecution Witnesses in the Motion. The Chamber notes with regret the serious breach by the Defence of the Protective Measures Decision. The best protection available to witnesses before this Tribunal is anonymity, and when it is promised to witnesses but not adhered to by one of the Parties, the safety of witnesses and victims is put at risk. The Trial Chamber does not see any need, on this occasion, to apply sanctions to the Defence pursuant to Rule 77 of the Rules, considering that the Defence is undoubtedly aware of the serious nature of its mistake. The Trial Chamber trusts that measures will be put in place to ensure that it does not happen again.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion.

VIEWS the Defence failure to comply with the provisions of the Protective Measures Decision with great concern.

Arusha, 25 May 2004

[Signed] : Khalida Rachid Khan, Presiding Judge

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Decision on Jérôme Bicamumpaka's Motion to Inspect Material Relating to Jean Kambanda 25 May 2004 (ICTR-99-50-T)

(Original : English)

Trail Chamber II

Judge : Khalida Rachid Khan, Presiding

Bicamumpaka, Jean Kambanda – access to material in possession of the Prosecutor, exculpatory – justification of the request – defence should make an explicit request pursuant to the applicable Rules – motion denied

International instruments cited : Rules of procedure and evidence, Rules 66 (A) (ii), 66 (B), 67 (C), 68, 70, 73 (A)

International cases cited :

I.C.T.R. : Trial Chamber II, 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-97-29-T,* Reports 2004*, p. 1982)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence by the Trial Chamber also composed of Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

BEING SEIZED of "Jérôme Bicamumpaka's Motion to Inspect Material Relating to Jean Kambanda" filed on 18 February 2004, (the "Motion");

NOTING the "Prosecutor's Response to Jérôme Bicamumpaka's Motion to Inspect Material Relating to Jean Kambanda filed on 23 March 2004, (the "Response");

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence (the "Rules") particularly Rule 66 (A) (ii) of the Rules which reads :

> "The Prosecutor shall disclose to the Defence :
>
> (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.

SUBMISSIONS OF THE PARTIES

Defence Motion

1. The Defence acknowledges that Jean Kambanda appears in the Prosecutor's Witness list and that the agenda of Jean Kambanda has been disclosed to the Defence.

2. The Defence asserts, however, that the Prosecutor is withholding important material relating to Jean Kambanda. The Defence states that it is entitled to such material under Rule 66 (A) (ii) of the Rules. The Defence argues it should have access to this material in order to establish whether any of the content may be used to exculpate the Defendant in the present case.

3. The Defence lists the documents and material believed to be withheld and requests the Chamber to order the Prosecutor to grant the Defence access to the listed documents and all documents in his possession pertaining to Jean Kambanda.

Prosecutor's Response

4. The Prosecutor maintains that it has complied with the provisions of Rule 66 (A) (ii) of the Rules in respect of Witness Jean Kambanda.

5. The Prosecutor objects to the Defence request in its entirety, states that the applicable rule in this situation is Rule 66 (B) of the Rules and highlights the materiality requirement of this rule. The Prosecutor quotes the Trial Chamber in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al*. which held that the Defence "is required to show that their request is justified under Rule 66 (B) of the Rules and, specifically that the requested documents are material to the preparation of the Defence"[1]. The Prosecutor submits that the basis of the Defence request is too broad and speculative to meet this requirement.

6. The Prosecutor rebuts the Defence claim of entitlement to disclosure in respect of materials which may contain "exculpatory material", stating that the disclosure of exculpatory material is covered by Rule 68 of the Rules by virtue of which different conditions apply.

7. The Prosecutor objects specifically to the inspection of the material requested in paragraph 6 (g), (h), (i) and (l) of the Motion. This material, the Prosecutor claims, consists of working notes of the Office of the Prosecutor and as such their disclosure is excluded under Rule 70 of the Rules.

8. The Prosecutor further objects to the request to inspect material listed in paragraph 6 (a) and (f) of the Motion, stating that it has disclosed the book written by Jean Kambanda and has no knowledge of the existence of another book.

[1] *Prosecutor v. Pauline Nyiramasuhuko et al*., Case No ICTR-97-29-T, "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. 12.

DELIBERATIONS

9. The Trial Chamber agrees with the Prosecutor's submission that Rule 66 (B) of the Rules is applicable in the particular circumstances of this case and not Rule 66 (A) (ii) as stated by the Defence. Rule 66 (B) reads as follows :

> 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.

10. However, according to Rule 67 (C), if the Defence files an application 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.

11. The Trial Chamber is of the view that the Defence should be reminded of the implications of such a request for inspection of documents, and that an explicit request pursuant to the applicable Rules should be made by the Defence, if it deems it appropriate.

12. Therefore, the Trial Chamber is of the view that the Motion shall be denied in its entirety and that there is no need for the Trial Chamber to dilate on the merits of the Motion.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Arusha, 25 May 2004

[Signed] : Khalida Rachid Khan

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Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 For Exculpatory Evidence 25 May 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan, Presiding

Mugiraneza – information, exculpatory evidence, disclosure obligation of the Prosecutor – Prosecutor in a better position than the Defence to obtain a document – not a potential Prosecution Witness, not covered by the Protective Measures Decision – interview of witness – motion granted

International instruments cited : Rules of procedure and evidence, Rules 68, 73 (A)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence by the Trial Chamber also composed of Judge Lee Gacuiga Muthoga and Emile Francis Short, (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence" filed on 26 February 2004, (the "Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence" filed on 25 March 2004, (the "Response");

TAKING INTO CONSIDERATION the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses", filed on 12 July 2000 (the "Protective Measures Decision");

ARGUMENTS OF THE PARTIES

1. The Defence for Prosper Mugiraneza moves the Trial Chamber to order the Prosecutor to disclose information related to Witness CD, who would be in possession of exculpatory material.

2. According to the Defence, the Prosecutor has already disclosed an "investigator's summary of an interview conducted on or about 23 September 1994 in Kibungo Prefecture with CD". The Defence argues that, in making the disclosure, the Prosecutor did not mention the name or other identifying information of Witness CD. Neither did the Prosecutor specify the identity of the investigator who conducted the interview nor "the circumstances leading to the interview".

3. The Defence, therefore, moves the Trial Chamber to order the Prosecutor to provide it with "a full copy of the investigative report related to CD's interview, including but not limited to, the identity of the investigators and their agency; the identity of Witness CD; and the circumstances of the interview". According to the Defence, since the Prosecutor has not designated Witness CD as a Prosecution Witness, this person is not covered by the Protective Measures Decision of 12 July 2000.

4. The Prosecutor responded belatedly that he is not in the possession of the documents requested by the Defence and that therefore the Motion should be denied.

DELIBERATIONS

5. Rule 68 of the Rules reads as follows :

> (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.

6. According to the Defence, the statement of "Witness CD" contains exculpatory evidence. Without assessing the credibility or the nature of the evidence given by the

statement given by "Witness CD", the Trial Chamber is of the opinion that the information provided by the Defence in the Motion can be considered as falling within the scope of Rule 68.

7. The Trial Chamber notes that, according to the Prosecutor, "Witness CD" is not a potential Prosecution Witness[1]. The Trial Chamber is therefore of the view that "Witness CD" is not covered by the Protective Measures Decision. The Defence is free to conduct its own enquiries as it deems fit, without reference to the Prosecutor or to the Trial Chamber.

8. However, it appears that the Prosecutor has only disclosed a report of an interview with "Witness CD". The Trial Chamber notes that this report does not contain any information which will enable the Defence to analyse the content of the statement or to conduct any investigation. The Trial Chamber has no information as to whether "Witness CD" has also given a statement to investigators of the Tribunal and will not speculate on the existence of such statement. Nevertheless the Trial Chamber considers that, as this document was disclosed to the Defence by the Prosecutor, the Prosecutor must be aware of the whereabouts of this person and of the circumstances in which such interview took place.

9. The Prosecutor is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecutor evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecutor should hunt for materials that he has no knowledge of. It does mean, however, that where the Defence has specific knowledge of a document covered by the Rule and which is not currently within the possession or control of the Prosecutor, and requests that document in specific terms, the Prosecutor should attempt to gain control or possession over that document where the circumstances suggest that the Prosecutor is in a better position than the Defence to do so. Once this is successfully done, that document should be disclosed to the Defence. This obligation stems from the Prosecutor's inherent duty to fully investigate a case before this Tribunal.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following terms :

ORDERS the Prosecutor to take all necessary measures to obtain the requested information and to thereafter disclose to the Defence all information related to "Witness CD".

REMAINS seized of the matter.

Arusha, 25 May 2004

[Signed] : Khalida Rachid Khan, Presiding Judge

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1 Confirmation by email from the Office of the Prosecutor to Court Management Section, 22 March 2004.

Decision on Prosper Mugiraneza' Emergency Motion to Seal Paragraphs 14 and 15 of the Prosecutor's Response to Prosper Mugiraneza'S Motion to Order the Registrar to Inform Witnesses of Breach of Protective Order 27 May 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan, Presiding

Mugiraneza – seal of a Prosecutor's response, Trial Chamber already ordered to place under seal – motion moot

International instruments cited : Rules of procedure and evidence, Rule 73 (A)

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence by the Trial Chamber also composed of Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Prosper Mugiraneza's Emergency Motion to Seal Paragraphs 14 and 15 of the Prosecutor's Response to Prosper Mugiraneza's Motion to Order the Registrar to Inform Witnesses of Breach of Protective Order" filed on 24 May 2004, (the "Motion");

CONSIDERING that on 25 May, the Trial Chamber ordered the Registry to place under seal the Prosecutor's Response, the Trial Chamber is of the opinion that the Motion is moot and should be dismissed.

THEREFORE THE TRIAL CHAMBER

DISMISSES the Motion.

Arusha, 27 May 2004

[Signed] : Khalida Rachid Khan, Presiding Judge

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Order for the Transfer of Detained Witnesses from Rwanda (Rule 90 bis*) 27 May 2004 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judge : Khalida Rachid Khan, Presiding

Transfer of detained witnesses – Rwanda – witnesses do not appear on the witness list – presence of the detained witness not required for any criminal proceedings in the requested State, Transfer of the witness does not extend the period of his detention – United Nations Detention Facility – flexibility in the timing – granted

International instruments cited : Rules of procedure and evidence, Rules 73 (A), 90 bis

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, assigned to decide this Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence, (the "Chamber");

BEING SEIZED of the "Prosecutor's Extremely Urgent *ex parte* Motion for an Order for the Transfer of Detained Witnesses Pursuant to rules 90 *bis* and 73 (A) of the Rules of Procedure and Evidence", filed on 1 April 2004 (the "Motion");

NOTING the "Prosecutor's Filings Pursuant to Trial Chamber II Orders of 19 May 2004" containing the Prosecutor's consolidated and final list of witnesses and the calling order of witnesses for the next session scheduled to start on 7 June 2004, filed on 24 May 2004 (the "Prosecutor's Final Witness List"); the "Prosecutor's Very Urgent Motion Pursuant to Rule 73 *bis* (E) for Leave to Vary the Prosecutor's list of Witnesses filed on 20th October 2003", filed on 24 May 2004 (the "Motion to vary Witness List"); the Corrigendum to the Prosecutor's Very Urgent Motion Pursuant to Rule 73 *bis* (E) for Leave to Vary the Prosecutor's list of Witnesses filed on 20th October 2003", filed on 25 May 2004 (the "Prosecutor's Corrigendum");

SUBMISSIONS

1. The Prosecution requests the Trial Chamber, pursuant to Rule 90 *bis*, to order the temporary transfer of witnesses XXQ, GKD, GTD, AMD, ALY, GLW, GKJ (the "witnesses") from the Republic of Rwanda, where they are currently detained. The request further specifies that the witnesses are needed by Tuesday 4 May 2004, ready for the recommencement of proceedings in this case.

2. The Prosecution provides an *affidavit* from a Commander of Investigations working for the Officer of the Prosecutor, which states that an official request has been sent to the Rwandan Government enquiring whether the witnesses are required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal.

DELIBERATIONS

3. The Chamber notes that the Prosecution had initially requested that the witnesses be transferred to Arusha no later than 4 May 2004. However, due to the postponement of the hearing in this case, that date passed without any need to transfer the witnesses. The Trial is now set to recommence on 7 June 2004.

4. The Chamber notes that although in the Motion the Prosecution requests the transfer of Witness XXQ, AMD, ALY and GLW, their pseudonyms do not appear anywhere on the Prosecution Final Witness List. Only the pseudonyms of Witnesses GKD, GTD and GKJ appear both in the Motion and the Prosecution Final Witness List. Thus, the Chamber considers the Motion only in so far as it relates to these three witnesses : GKD, GTD and GKJ.

5. The Trial Chamber notes that pursuant to the provisions of Rule 90 *bis* (A) of the Rules :

> 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.

6. 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 :

> 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;
>
> Transfer of the witness does not extend the period of his detention as foreseen by the requested State;

7. On the basis of representations made by the Prosecution, including the *affidavit* received, the Chamber infers that the presence of Witnesses GKD, GTD and GKJ will not be required for any criminal proceedings in Rwanda during the relevant period of time when they are to be transferred to Arusha to give testimony before the Tribunal, during the trial session scheduled to recommence on 7 June 2004. Similarly, on the basis of the same representations, the Chamber infers that the Government of Rwanda does not foresee that the transfer of the witnesses to Arusha will extend their period of detention.

8. 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 views it as 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 witnesses to be transferred should remain at the United Nations Detention Facility in Arusha for the shortest period practically possible in order to allow for their testimony to be heard, and in any event a period of time 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 GKD, GTD and GKJ to the United Nations Detention Facility in Arusha (UNDF), at an appropriate time prior to their anticipated testimony during the

trial session set to recommence on 7 June 2004. Their return travel should be facilitated as soon as practically possible after their testimony has ended. 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, 27 May 2004

[Signed] : Khalida Rachid Khan, Presiding Judge

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Certification in the Matter of Proceedings under Rule 15 **bis** *(c)*
3 June 2004 (ICTR-99-50-T)

(Original : English

Trial Chamber II

Judge : Emile Francis Short

Judge unable to continue sitting – substitute judge, agreement of the accused

International instruments cited : Rules of procedure and evidence, Rules 15 bis *(C), 84, 85*

I, Judge Emile Francis Short, assigned to Trial Chamber II by the President on 18 May 2004 pursuant to Rule 15 *bis* (C) of the Rules of Procedure and Evidence (the "Rules");

NOTING Rule 15 *bis* (C) of the Rules :

> (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).

NOTING that all four Accused in the case of *The Prosecutor v. Casimir Bizimungu et al.* have agreed, upon consultation by the President of the Tribunal, to continue the proceedings with a substitute Judge.

HEREBY certify that I have familiarised myself with the record of the proceedings in *The Prosecutor v. Casimir Bizimungu et al.*, joint case N° ICTR-99-50-T.

Arusha, 3 June 2004

[Signed] : Emile Francis Short

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Decision on Casimir Bizimungu Urgent Motion Opposing the Testimony of Witness GKD 17 June 2004 (ICTR-99-50-T)

(Original : English)

Trail Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bizimungu – admissibility of witness testimony – exclusion of testimony, wrong interpretation of the Decision – no instruction of the Defence on which witnesses the Prosecutor should call to testify – frivolous motion, no fees – motion denied

International instruments cited : Rules of procedure and evidence, Rule 73 (F)

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 "Casimir Bizimungu's Urgent Motion Opposing the Testimony of Witness GKD" filed on 14 June 2004, (the "Motion");

NOTING the "Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA" of 23 January 2004, (the "Decision of 23 January 2004");

CONSIDERING that the only relief sought by the Defence is to oppose the testimony of Witness GKD as the latter's testimony regarding events involving Casimir Bizimungu in the Ruhengeri *préfecture* was excluded by the Decision of 23 January 2004.

CONSIDERING that the Decision of 23 January 2004 reads as follows :

> In the particular circumstances of the case and taking into consideration the facts alleged in the indictment, which was confirmed in 1999, *the Prosecutor is directed not to lead any evidence in relation to the events involving Casimir Bizimungu in Ruhengeri préfecture* from Witnesses GKC, GKD and GFA[1].

[1] Decision of 23 January 2004, para. 16. (Emphasis added)

CONSIDERING that the Defence allegation that the Trial Chamber has excluded Witness GKD's testimony in whole constitutes a clear misunderstanding and a wrong interpretation of the Decision of 23 January 2004 by the Defence.

CONSIDERING that the Prosecutor is bound by the Decision of 23 January 2004 and that he will conduct the presentation of his case according to the rulings of this Trial Chamber.

CONSIDERING that it is not the Defence's role to instruct the Prosecutor on which witnesses he should call to testify.

CONSIDERING FURTHER that, as long as the Prosecutor does not lead any evidence in relation to the events involving Casimir Bizimungu in Ruhengeri *préfecture*, he will be in absolute conformity with the Trial Chamber's Decision of 23 January 2004 and that there is no reason for the Defence to argue that the Prosecutor will not proceed accordingly.

CONSIDERING that the Trial Chamber does not find any merit in the Motion, the Trial Chamber is of the view that the Motion should be denied in its entirety.

CONSIDERING FINALLY that the Motion is not founded in law and in facts, the Trial Chamber is of the view that the Motion is frivolous and that the fees associated to the Motion should be denied to the Defence pursuant to Rule 73 (F) of the Rules of Procedure and Evidence.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety

DIRECTS the Registrar to deny the fees associated to the Motion pursuant to Rule 73 (F).

Arusha, 17 June 2004

[Signed] : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion to Withdraw Witness Protection from Witness ON and Other Appropriate Relief 17 June 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Judge Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – witness protection, withdrawal – witness waived his right to protection in another case – already granted – motion moot

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 "Prosper Mugiraneza's Motion to Withdraw Witness Protection from Witness on and for Other Appropriate Relief" filed on 7 June 2004, (the "Motion");

CONSIDERING the oral arguments submitted by the Parties when this matter was heard in court on 8 June 2004;

CONSIDERING that the only relief sought by the Defence is to withdraw the witness protection from Witness ON as the latter waived his right to protection in another case before this Tribunal and testified without any protective measure;

CONSIDERING that the Trial Chamber has granted the application by the Defence orally on 8 June 2004, the Trial Chamber is of the view that the Motion is now moot and should be dismissed.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion in its entirety

Arusha, 17 June 2004

[Signed] : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Objection to Portions of the Testimony of Witnesses GJX and ON and Request for Exculpatory Evidence and Motion for Continuance 17 June 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – already ruled orally – motion moot

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 "Prosper Mugiraneza's Objection to Portions of the Testimony of Witnesses GJX and ON and Request for Exculpatory Evidence and Motion for Continuance" filed on 7 June 2004, (the "Motion");

CONSIDERING the oral arguments submitted by the Parties when this matter was heard in court on 8 June 2004;

CONSIDERING that the Trial Chamber has already ruled orally on the application by the Defence on 8 June 2004, the Trial Chamber is of the view that the Motion is now moot and should be dismissed.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion in its entirety

Arusha, 17 June 2004

[Signed] : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Justin Mugenzi and Jérôme Bicamumpaka's Motion to Have the Chamber Inquiring into the Matter of the Testimony of Jean Kambanda Rules 73 and 89 (B) of the Rules of Procedure and Evidence 17 June 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi, Bicamumpaka – Prosecution witness – frivolous motion, no fees – motion denied

International instrument cited : Rules of procedure and evidence, Rules 73 and 89 (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 "Justin Mugenzi and Jérôme Bicamumpaka's Motion to Have the Trial Chamber Inquiring into the Matter of the Testimony of Jean Kambanda" filed on 21 May 2004, (the "Motion");

NOTING the "Prosecutor's Response to Justin Mugenzi and Jérôme Bicamumpaka's Motion to Have the Trial Chamber Inquiring into the Matter of the Testimony of Jean Kambanda" filed on 26 May 2004, (the "Response");

CONSIDERING the "Order for the Prosecutor to Indicate to the Trial Chamber Whether Jean Kambanda is a Prosecution Witness or not" filed on 6 May 2004 AND the "Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber Whether or not he is still a Prosecution Witness" filed on 14 May 2004;

CONSIDERING that the Trial Chamber is of the opinion that the Prosecutor's indication that Jean Kambanda is a Prosecution Witness is sufficient and self-explanatory, the Trial Chamber does not see any reason to strike this witness from the Prosecutor's Witness List. Additionally the Trial Chamber is of the view that the Motion should be considered as frivolous pursuant to Rule 73 (F). Consequently, the Trial Chamber is of the view that the Motion should be denied and that there is no reason for the Trial Chamber to investigate the matter further.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

DIRECTS the Registrar to deny the fees associated to the Motion pursuant to Rule 73 (F).

Arusha, 17 June 2004

[Signed] : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Justin Mugenzi's Motion for Disclosure 17 June 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Judge Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi – transcripts of witness testimony, transcripts of radio broadcasts, disclosure – material already provided by the Prosecutor – motion moot

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 "Justin Mugenzi's Motion for Disclosure" filed on 7 June 2004, (the "Motion");

NOTING the "Prosecutor's Response to Justin Mugenzi's Motion for Disclosure of Transcripts of Testimony of ZF and QI in *Military I* and *Butare* Cases Respectively

and Disclosure of Transcripts of Radio Muhabura" filed on 15 June 2004, (the "Response");

CONSIDERING that the only relief sought by the Defence is to have the Prosecutor disclose to the Defence transcripts of testimony of Witnesses ZF and QI in the cases of *The Prosecutor v. Théoneste Bagosora et al.* and *The Prosecutor v. Pauline Nyiramasuhuko et al.* as well as the transcripts of Radio Muhabura broadcasts in April 1994;

CONSIDERING that the Prosecutor has confirmed, in his Response, that he has provided all the above-mentioned materials to the Defence on 11 June 2004, the Trial Chamber is of the view that the Motion is now moot and should be dismissed;

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion in its entirety

Arusha, 17 June 2004

[Signed] : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Jérôme-Clément Bicamumpaka's Motion for Return of Personal Properties 22 June 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka, Prosecutor – passports, personal effects, in possession of the Commander of the United Nations Detention Facility, release to the Prosecutor – useful for the preparation of the defence – photocopies to the Accused and his Defence – right of the defence to inspect any documents in custody or control of the Prosecutor – motion granted

International instruments cited : Rules of procedure and evidence, Rules 41 and 66 (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 "Jerome Bicamumpaka's Motion for Return of Personal Properties" filed on 21 May 2004, (the "Motion");

NOTING AND BEING ALSO SEIZED of the "Prosecutor's Response and Cross Motion to Jérôme Bicamumpaka's Motion for Return of Personal Properties" filed on 26 May 2004, (the "Cross-Motion");

ARGUMENTS OF THE PARTIES

Submissions by the Defence

1. The Defence seeks an order from the Trial Chamber requiring the Commander of the United Nations Detention Facility ("UNDF") to give to the Defence the passports bearing numbers 006836/94 and 040400/93, which belong to Jérôme-Clément Bicamumpaka and which the Commander has in his possession. The Defence asserts that the passports are necessary for the preparation of the defence case.

Submissions by the Prosecutor

2. The Prosecutor argues that he was not aware of the fact that the Commander of the UNDF was in possession of personal effects belonging to the Accused. Therefore, the Prosecutor also seeks an order from the Trial Chamber requiring the Commander of the UNDF to release the passports, as well as any additional documents, books, papers, and other objects that are in his custody, to the Prosecutor, so that the Prosecutor may fulfil his duties pursuant to Rules 41 and 66 (B) of the Rules of Procedure and Evidence (the "Rules").

3. The Prosecutor has no objection to an order requiring the UNDF Commander to make photocopies of Bicamumpaka's two passports and release said photocopies to Bicamumpaka and his Defence. The Prosecutor therefore seeks an order requiring the UNDF Commander to make photocopies of Jérôme-Clément Bicamumpaka's passports and release the said photocopies to the Accused and his Defence.

HAVING DELIBERATED

5. The Trial Chamber concurs with the Defence and the Prosecutor's argument that the passports in the possession of the Commander of the UNDF may be useful for the Accused in the preparation of his defence. Therefore, the Trial Chamber is of the view that copies of the passports shall be given to the Defence and the Accused without any further delay.

6. The Trial Chamber notes that, pursuant to Rule 41 (A), the Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of its investigation. The Trial Chamber also considers that the Prosecutor should be given all personal effects belonging to Jérôme-Clément Bicamumpaka which are now in the custody of the Commander of the UNDF pursuant to Rule 41 (A). The Trial Chamber further observes that, pursuant to Rule 41 (B) the Prosecutor shall draw up an inventory of the personal effects belonging to

the Accused and return to him without delay any materials that are of no evidentiary value.

7. After the personal items are handed over to the Prosecutor by the Commander of the UNDF, the Trial Chamber reminds the Prosecutor that pursuant to Rule 66 (B) the Prosecutor shall, at the request of the Defence, permit the defence to inspect any documents [books, photographs and tangible objects] in his custody or control, which are material to the preparation of the defence and were obtained from or belonged to the accused.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in the following terms :

ORDERS the Commander of the UNDF to release to Jérôme-Clément Bicamumpaka and his Defence, photocopies of the passports bearing numbers 006836/94 and 040400/93 which belong to the Accused.

GRANTS the Cross-Motion in the following terms :

ORDERS the Commander of the UNDF to release the passports and any other documents, books, papers, and other objects belonging to Jérôme-Clément Bicamumpaka that are in his custody to the Prosecutor.

REMINDS the Prosecutor of his obligations under Rule 41 (B) to draw up an inventory of all materials seized from the Accused, including documents, books, papers and other objects, to accused without delay serve a copy thereof to the accused, and to return to the any materials that are of no evidentiary value.

Arusha, 22 June 2004

[Signed] : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence 25 June 2004 (ICTR-99-50-AR73.2)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Giiney; Fausto Pocar; Inès Monica Weinberg de Roca

Bizimungu – exclusion of evidence outside the scope of the indictment, geographical regions, new allegations – sufficient notice – no remedy – prejudice to the defence, sufficient time to prepare – jurisprudence of the Appeals Chamber – discretionary power of the Trial Chamber, error must be established – degree of specificity required in an indictment – interlocutory appeal – motion denied

International instruments cited : Statute, art. 6 (3), 20 – Rules of procedure and evidence, Rule 89, 95

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Edouard Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October Denying Leave to File an Amended Indictment, 19 December 2003 (ICTR-98-44-AR73,* Reports 2004*, p. 1504) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC. GKD and GFA, 23 January 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI, 3 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004, 20 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu*, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu*, Prosecutor's Appeal Against Trial Chamber II Decision of 23 January 2004 Excluding the Testimony of Witnesses GKB, GAP. GKC, GKD and GFA And Trial Chamber Decision of 3 February 2004 Excluding the Testimony. of Witnesses AEI, GKE, GKF and GKI All Implicating Casmir Bizimungu in Crimes in Ruhengeri Prefecture, 1 March 2004 (ICTR-99-50,* Reports 2004*, p. X)*

1. On 20 February 2004, the Trial Chamber, at the request of the Prosecution, certified two of its decisions for Interlocutory Appeal[1]. Both of the decisions certified concern the Trial Chamber's determination of motions filed by the accused Casimir Bizimungu ("Bizimungu"). In his motions Bizimungu requested the exclusion of evidence of certain prosecution witnesses from his trial on the ground that the evidence went to matters outside the scope of the indictment[2]. In both cases the Trial Chamber granted Bizimungu the relief sought. The Prosecution now appeals against those decisions.

[1] Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004, 20 February 2004; Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 February 2004.

[2] Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC. GKD and GFA, 23 January 2004 ("January Decision"); Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI, 3 February 2004 ("February Decision").

BACKGROUND

2. The indictment against Bizimungu was confirmed in May 1999. In August 2003, the Prosecution filed a motion to amend the indictment and, in October 2003, the Trial Chamber refused that motion. It held that to allow the Prosecution to amend the indictment would cause prejudice to the Accused and also delay the proceedings due to commence on 3 November 2003. Following the request of the Prosecution, the Trial Chamber certified that decision for Interlocutory Appeal. The Appeals Chamber upheld the Trial Chamber's decision dismissing the Prosecution's Appeal[3].

3. Of relevance to the issues in this Appeal is that some of the amendments the Prosecution sought to make to the indictment expanded the case against Bizimungu but also added specificity of names, places, dates and times to broad allegations made. The Appeals Chamber Decision held that :

> "[h]ad the Prosecution solely attempted to add particulars to its general allegations, such amendments might well have been allowable because of their positive impact on the fairness of the trial. However, the Prosecution chose to combine changes that narrowed the indictment with changes that expanded its scope in a manner prejudicial to the Accused. Rather than distinguishing these categories of changes, which might have enabled the Trial Chamber to allow the former without allowing the latter, the Prosecution's Motion and Amended Indictment intertwined the two, such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request."[4]

It is against this backdrop that the decisions of the Trial Chamber in this Appeal need to be considered.

4. In the January Decision the Trial Chamber excluded the evidence of witnesses GKB, GKP, GKC, GKD and GFA that went to events involving Bizimungu in Ruhengeri *Prefecture* on the basis that the Prosecutor had not specifically identified this *Prefecture* in the indictment. In the February Decision the Trial Chamber excluded, on the same basis, the evidence of witnesses AEI, GKE, GKF and GKI that went to events involving Bizimungu also in Ruhengeri *Prefecture*.

5. The Prosecution bases its appeal on two grounds; the first concerns the Trial Chamber's decision to exclude certain evidence, and the second, concerns the degree of specificity required in an indictment. On the first ground, the Prosecution argues that the Trial Chamber committed discernible errors in the exercise of its discretion by excluding the above mentioned evidence of each of the witnesses in relation to events involving Bizimungu in Ruhengeri *Prefecture*[5]. First, the Prosecution says that by excluding the evidence, the Trial Chamber clearly misunderstood and failed to con-

[3] Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 ("Appeals Chamber Decision").

[4] Appeals Chamber Decision, para. 20.

[5] Prosecutor's Appeal Against Trial Chamber II Decision of 23 January 2004 Excluding the Testimony of Witnesses GKB, GAP. GKC, GKD and GFA And Trial Chamber Decision of 3 February 2004 Excluding the Testimony. of Witnesses AEI, GKE, GKF and GKI All Implicating Casmir Bizimungu in Crimes in Ruhengeri Prefecture, 1 March 2004, ("Appeal Brief"), para. 9.

sider the nature of the Prosecution's case. Second, the Prosecution contends that the indictment against Bizimungu charges him with "perpetrating massive and systematic crimes throughout Rwanda" and that this plea does not exclude the Ruhengeri *Prefecture*[6]. Third, the Prosecution identifies several paragraphs of the indictment which contain allegations of criminal conduct to which, the Prosecution argues, the evidence excluded is material and relevant[7]. Fourth, the Prosecution argues that the excluded evidence relates to facts that are sufficiently pleaded and identifies those paragraphs of the indictment to which the evidence is allegedly relevant[8]. The Prosecution points to a decision in the case of *Kamuhanda*, where Defence's complaints of vagueness of the indictment were rejected by the Trial Chamber, which held that a pleading identifying a *Commune* gave the Defence sufficient notice of events that occurred in one of the many *Secteurs*[9]. The Prosecution argues that "[b]y direct analogy, Ruhengeri *Prefecture* was one of the 11 *Prefectures* existing in Rwanda in 1994. In the same vein, the *Bizimungu* Indictment alleges the criminal conduct of the Accused occurred throughout Rwanda."[10] It argues that by charging Bizimungu for crimes committed "throughout Rwanda" and pleading that all crimes were perpetrated by Bizimungu "throughout Rwanda" the indictment sufficiently pleads and gives Bizimungu adequate notice for all crimes committed "throughout Rwanda, including Ruhengeri Prefecture."[11]

7. On the second ground of appeal, by relying upon the Appeals Chamber decision in the *Kupreskic*. Appeal, that the degree of specificity required of an indictment is dependent on the nature of the Prosecution's case, the Prosecution claims that the Trial Chamber committed an error of law and fact in excluding the evidence of the witnesses on the ground that the Prosecution had not specifically identified Rubengeri *Prefecture* in the indictment as a geographical region where crimes were committed[12].

8. The Prosecution further claims that the decisions of the Trial Chamber are inconsistent with an earlier decision of a differently constituted Trial Chamber in the case of *Nyiramasuhuko*[13]. It says that in the *Nyiramasuhuko* case the Defence sought to exclude contents of a witness's statements on the ground that the specific criminal conduct of the accused in a particular location contained in the statement was not pleaded in the indictment[14]. The Trial Chamber refused the Defence's request, finding that paragraphs similar or identical to those in the *Bizimungu* indictment were sufficient, and that the evidence of specific criminal activities of the accused, although not directly pleaded in the indictment, were sufficiently pleaded in paragraphs of the indictment similar or identical to those in the *Bizimungu* indictment[15].

9. In the alternative, the Prosecutor argues the Trial Chamber erred in law by failing to consider whether the excluded evidence was so closely connected to the facts

[6] Appeal Brief, para. 19.
[7] *Ibid*., para. 20.
[8] *Ibid*., para. 21.
[9] *Ibid*, para. 33.
[10] *Ibid*., para. 34.
[11] *Ibid*., paras. 34-35.
[12] *Ibid*., paras. 23-24.
[13] *Ibid*., para. 27.
[14] *Ibid*., para. 28.
[15] *Ibid.*, para. 30.

in issue that it was admissible under Rule 89 of the Rules of Procedure and Evidence. It says that the excluded evidence is relevant and probative of its ease that Bizimungu committed crimes throughout Rwanda[16]. It argues that the exclusion of the evidence "denies the Prosecutor his responsibility to prove the totality of his case."[17] It states that the allegation against Bizimungu is that "[b]efore and during 1994, the accused individually and in concert with others executed an enterprise to destroy the Tutsis population throughout Rwanda. This process of destruction constitutes the grand transaction forming the basis of the Indictment."[18]

10. The Prosecution argues further that in excluding the evidence the Trial Chamber failed to consider all the components of its case, including the allegation that Bizimungu exercised command responsibility pursuant to Article 6 (3) of the Statute over subordinates, including the *Interahamwe* throughout Rwanda. It says that the Trial Chamber failed to consider that to establish command responsibility it is sufficient that the Prosecution establishes examples of such control throughout Rwanda[19].

11. The Prosecution alleges as a second ground of appeal that the Trial Chamber erred by holding that the absence of specific reference in the Indictment to Ruhengeri could not be cured by the references made to that *Prefecture* in the Pre-Trial Brief or from evidence in respect of that *Prefecture* adduced at trial itself[20]. It says that Bizimungu had adequate notice of the allegations of criminal conduct in Ruhengeri and that "the Trial Chamber erred in law by holding that the failure to include in the Indictment facts in the witness's testimony regarding Bizimungu's participation in Ruhengeri cannot be cured by references in the Pre-Trial Brief, the disclosed witness statements, the opening statement, or evidence adduced at trial itself[21]. Further, it says the Trial Chamber erred by failing to consider whether adequate notice had been given to Bizimungu by the disclosure of witness statements and the Prosecution's opening statement[22]. It says that the jurisprudence of the Tribunal is well established in holding that generalities in an Indictment may be cured by providing a clear and consistent disclosure to the Defence of all statements containing the material information as well as by material information in the opening statement, and at trial[23]. It says that the Prosecution provided to Bizimungu the statements excluded long before the start of the trial, the latest statements being disclosed 80 days prior to the trial's commencement[24].

12. In response, Bizimungu says that the issue is whether the Trial Chamber erred in holding that the Indictment was not sufficiently pleaded in relation to alleged criminal activities in Ruhengeri *Prefecture*, thereby warranting the exclusion of prosecution evidence in relation to that *Prefecture* to avoid prejudice to the Defence[25]. He says

[16] *Ibid*., para. 44.
[17] *Ibid*, para. 45.
[18] *Ibid*.
[19] *Ibid*., para. 47.
[20] *Ibid*., paras. 49-58.
[21] *Ibid*., para. 51.
[22] *Ibid*., para. 52.
[23] *Ibid*., para. 52.
[24] *Ibid*., para. 56.
[25] Respondent Casimir Bizimungu's Brief in Response to the Prosecutor's Appeal Against the Decisions of 23 January 2004 and 3 February 2004 ("Response").

that in the Indictment the Prosecution has particularised the charges against him specifically identifying the nature of the crime and the Prefecture where the alleged criminal activity occurred[26]. Moreover, in the general allegations made in the Indictment, the Prosecution refers to specific Prefectures and nowhere does the Prosecution specifically identify Ruhengeri *Prefecture* as a geographical region in which he is alleged to have incurred criminal responsibility[27]. In light of the actual specificity contained in the Indictment Bizimungu argues that he was not adequately informed of the allegations in relation to Ruhengeri *Prefecture* as to enable him to prepare his defence and that admitting the new allegations would render his trial unfair[28]. In these circumstances, the Prosecution has not shown that in excluding the evidence the Trial Chamber erred in the exercise of its discretion[29].

13. Bizimungu argues that, as a matter of principle, the Trial Chamber had the power to either admit or disallow any evidence. However, pursuant to Rule 89 (B) and Rule 95 of the Rules, the Trial Chamber was required to ensure that it was fair to do so[30]. Bizimungu says that in this instance it would not have been fair as the indictment does not charge any criminal conduct to him in Ruhengeri Prefecture[31]. He says that the Trial Chamber noted that the Prosecution was unable to show the specific acts pleaded in the Indictment alleging criminal responsibility of Casimir Bizimtmgu in Ruhengeri *Prefecture*[32]. Further, Bizimungu argues that the proposed Amended Indictment, which the Trial Chamber rejected in a decision that was later upheld on Appeal, contained a considerable number of new allegations regarding criminal conduct of Bizimungu in Ruhengeri Prefecture[33]. Bizimungu says that by introducing the evidence excluded by the Trial Chamber, the Prosecution is attempting to circumvent the Trial Chamber's decision[34].

14. Bizimungu says that, contrary to the assertions made by the Prosecution, the Trial Chamber did take into account the nature of the Prosecution's case in rendering the two impugned decisions, and that on this basis the Chamber found that the Prosecutor was attempting to expand the charges beyond those pleaded in the indictment[35].

15. Bizimungu also refutes the Prosecution's claim that he is charged as a superior for crimes committed in Ruhengeri *Prefecture*. He says that the Prosecution's case is that Joseph Nzirorera was the *Interahamwe* chief for Ruhengeri *Prefecture* and the Indictment does not charge him for the crimes committed by the *Interahamwe* in Ruhengeri *Prefecture*[36]

[26] Response, paras. 52-55.
[27] Response, para. 57.
[28] *Ibid*., para. 31.
[29] Response, para. 29.
[30] *Ibid*., para. 32.
[31] *Ibid*., paras. 33-37.
[32] *Ibid*., para. 38.
[33] *Ibid*., para. 39.
[34] *Ibid*., paras. 42-46.
[35] *Ibid*., para. 47.
[36] *Ibid*., paras. 60-62.

16. Bizimungu challenges the analogy drawn by the Prosecution with the *Nyiramasuhuko* case as inappropriate. He says that Nyiramasuhuko is charged with crimes that occurred within one *Prefecture* and the statements in issue had been disclosed to the defence some 18 months earlier[37]. Bizimungu says that the *Kamuhanda* case is also of little assistance to the Prosecution. In that case the Prosecution was granted leave to call three new witnesses to give evidence in relation to massacres in a parish in Kigali-Rural *Prefecture*, and Kigali-Rural *Prefecture* was pleaded in the Indictment. Further, the Trial Chamber ordered the witnesses to testify only after the defence had been given sufficient time to prepare[38].

ANALYSIS

17. The Prosecution's challenge is to the Trial Chamber's exercise of its discretionary power. The Appeals Chamber will only interfere in a Trial Chamber's exercise of discretion where the party making the challenge shows that the Trial Chamber misdirected itself 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[39]. It is not sufficient for the Appeals Chamber to be merely satisfied that it would have exercised the discretion differently from that of the Trial Chamber; an error on the part of the Trial Chamber must be established.

18. Having considered the arguments of both parties, the Appeals Chamber is not satisfied that the Prosecution has identified any error on the part of the Trial Chamber in the exercise of its discretion to exclude the evidence of the witnesses. The arguments made by the Prosecution on Appeal were arguments largely put to the Trial Chamber and considered by it in both of the Impugned Decisions. In concluding that the evidence should be excluded, the Trial Chamber observed that, when given an opportunity to do so, the Prosecution was unable to identify any specific acts pleaded in the indictment alleging criminal activity on the part of Casimir Bizimungu in relation to Ruhengeri *Prefecture*. This conclusion must be considered in light of the Indictment as a whole, in which, although the Prosecution has in part used the phrase "throughout Rwanda" it does plead with specificity the various geographical regions in which the accused is alleged to have occurred criminal responsibility. The Trial Chamber found that to permit the Prosecutor to lead the evidence excluded would cause prejudice to Bizimungu's defence as he had not been given sufficient notice of the allegations as guaranteed by Article 20 of the Statute because Ruhengeri *Prefecture* had not been specifically identified in contrast to other geographical regions. The fact that the evidence may have been admissible pursuant to Rule 89 does not show any error on the part of the Trial Chamber in concluding that in the interests of ensur-

[37] *Ibid*., paras. 66-67.
[38] *Ibid*., paras. 68-69.
[39] *Prosecutor v. Karemera et al*., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 9 October Denying Leave to File an Amended Indictment, 19 December 2003, para. 9.

ing the fairness of the Trial it should be excluded. 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[40].

19. The proposed amended indictment, which was rejected by the Trial Chamber on the basis of prejudice to the Defence and upheld on appeal, did contain specific allegations in relation to Ruhengeri *Prefecture*. The proposed amended indictment was rejected on the basis that it would cause prejudice to the Defence because, although it added greater specificity to some charges, it also made fresh allegations and pleaded new geographical regions. To admit the evidence excluded by the Trial Chamber in its impugned decisions, which is evidence that relates to what is essentially a newly identified geographical region, would undermine the Trial Chamber's conclusion that to permit the Prosecution to add new allegations at such a late stage in the proceedings would cause prejudice to the Accused. The essential issue in both of the Trial Chamber's decisions – the decision to reject the proposed amended indictment and the decisions to exclude the evidence of the witnesses subject of these appeals – was the same, that is that the Defence had not had the opportunity to prepare to defend against what are essentially fresh allegations and thus would suffer prejudice during trial should the Prosecution be permitted to present those allegations during trial. This conclusion was within the permissible scope of the Trial Chamber's discretion.

20. The other cases relied upon by the Prosecution, in which it says Trial Chambers have reached different conclusions, are inapposite. It is well established that when the exercise of discretion is involved reasonable minds may differ. What the Prosecution must establish is not that a differently constituted Trial Chamber may have reached a different conclusion, but that this Trial Chamber committed a discernible error in the exercise of its discretion in this case. This the Prosecution has failed to do.

21. For the foregoing reasons, the Appeals Chamber DISMISSES the Prosecution's Appeal against the Impugned Decision of 23 January 2004 and the Impugned Decision of 3 February 2004.

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

Done this 25th day of June 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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[40] Impugned Decision 23 January 2004, para. 13; Impugned Decision 3 February 2004, para. 1.

Decision on Urgent and Confidential Motion From Casimir BIZIMUNGU Opposing to the Admissibility of the Testimony of Witnesses GKF, GBN, ADT, GTD 1 July 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

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 "Urgent and Confidential Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKF, GBN, ADT, GTD" filed on 28 April 2004, (the "Motion");

NOTING the "Prosecutor's Response to Urgent and Confidential Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKF, GBN, ADT, GTD" filed on 10 May 2004, (the "Response");

NOTING the "Reply to the Prosecutor's Response to the Confidential Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKF, GBN, ADT, GTD" filed on 10 May 2004, (the "Reply");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence requests the Trial Chamber to "order the Prosecutor to withdraw Witness GTD's name from the list, or alternatively and without prejudice, to order the Prosecutor not to lead evidence from this witness before the Appeal Chamber's decision"[1] on the admissibility of evidence from other witnesses who were relevant to the amended Indictment rejected by the Appeal Chamber.

[1] Reply, para. 1.

2. The Defence asserts that "Casimir Bizimungu is not charged with the acts alleged in Witness GTD's statement"[2], and therefore the testimony is "of no relevance"[3]. According to the Defence, GTD's testimony is about events in Gitarama *préfecture* that were mentioned in the rejected amended Indictment[4], but are not stated in the current Indictment[5]. Defence submits that Witness GTD's testimony would thus "bring a prejudice to the accused" because he "was not served with adequate notice" of Witness GTD's accusations[6].

3. The Defence asserts that with Witness GTD's testimony, the Prosecutor is "still trying to do indirectly what he was not allowed to do directly"[7] namely to expand the charges beyond those in the Indictment and change the theory of the case. The Defence cites the Appeal Chamber's Decision of 12 February 2004 which affirmed the Trial Chamber Decision of 6 October 2003 denying the Prosecutor's request to amend the Indictment on the basis that it included an expansion of the charges that would be prejudicial to the Accused. The Defence also cites a decision of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") in the case of *The Prosecutor v. Kupreskic et al.* setting the principle that a Prosecutor must be precise about the "material facts underpinning the charges against an accused in the Indictment with sufficient detail so that the accused can prepare his defence"[8].

4. The Defence argues that this motion is similar to the Defence's Motion filed on 19 January 2004 opposing the admissibility of testimony of witnesses GKB, GAP, GKC, GKD, GFA and the Defence's Motion filed on 27 January 2004 opposing the admissibility of the testimony of witnesses AEI, GKE, GKF and GKI. These motions were granted by the Trial Chamber, and the Prosecutor has appealed[9]. The Defence argues that the Prosecutor's response to the current motion is nearly identical to its submissions to the Appeal Chamber on the two previous motions[10].

5. The Defence argues that while the jurisprudence on when such objections should be raised "is not precise"[11], it is appropriate to consider this motion now because it is timely and can help conserve judicial resources. The Defence finally argues there is no cure to the Indictment's lack of specificity and that Witness GTD should be allowed to testify[12].

Prosecution submissions

6. The Prosecutor requests the Trial Chamber to dismiss the Defence motion and allow the Prosecutor to call Witness GTD.

[2] Motion, para. 31.
[3] Motion, para. 34.
[4] Reply, para. 19-20.
[5] Motion, para. 32-34.
[6] Motion, para. 37.
[7] Motion, para. 13.
[8] *Prosecutor v. Kupreskic et al.*, Case No IT-95-16-A, Judgment, 23 October 2001, para. 88, (the "Kupreskic Judgment").
[9] Reply, para. 5.
[10] Reply, para. 24.
[11] Motion, para. 41.
[12] Reply, para. 30.

7. The Prosecutor argues that "the witness's testimony clearly falls within the Indictment"[13]. The Prosecutor states that several paragraphs of the Indictment specifically allege that Casimir Bizimungu engaged in activities in Gitarama *préfecture* about which Witness GTD's testimony will provide evidence.

8. The Prosecutor further argues that the case against Casimir Bizimungu concerns crimes committed "throughout Rwanda without excluding any prefecture, including Gitarama *préfecture*"[14]. Witness GTD's testimony about events in Gitarama *préfecture* is relevant to the several paragraphs in the Indictment that allege such crimes throughout the country. The Prosecutor submits that "Gitarama shoul … be considered, understood and construed as falling within the territory [of Rwanda]"[15].

9. The Prosecutor argues that the Indictment meets the relevant tests for specificity of the allegations against Casimir Bizimungu. The Prosecutor submits that "the relevance or materiality of evidence to an indictment and the degree of specificity of an indictment depends on the nature of the Prosecutor's case, the nature or mode of the accused's participation in the alleged crime, the complexity of the crimes, and the geographical area and period over which the crimes are committed"[16]. The Prosecutor argues that the Trial Chamber should apply the jurisprudence of the Appeals Chamber in the *Kupreskic* Judgment, and focus on that judgment's finding that "there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commissions of the crimes"[17]. The Prosecutor argues that in this case, "the massiveness of the crimes, their geographical spread and the period of time within which they were committed … lead to the conclusion that the allegations … are sufficient"[18].

10. The Prosecutor also quotes another decision by this Trial Chamber[19] to support his argument that the Indictment includes the necessary level of specificity. The Prosecutor submits that, in this particular case, the Trial Chamber found that some of the paragraphs similar to those in the Indictment were found to "adequately set out the material facts in relation to the commission of the offences of complicity in genocide and conspiracy to commit genocide"[20]. The Prosecutor submits that on a similar motion in the case of *The Prosecutor v. Pauline Nyiramasuhuko*[21], another Trial Chamber also found several paragraphs similar to those in the current Indictment adequate, although "evidence of specific criminal activities of the accused [was] not

[13] Response, para. 4.
[14] Response, para. 4.
[15] Response, para. 13.
[16] Response, subsection (c) (preceding para. 16).
[17] *Kupreskic* Judgment, para. 89.
[18] Response, para. 30.
[19] *The Prosecutor v. Casimir Bizimungu et al*, Case No ICTR-99-50-T, "Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for other Appropriate Relief", 5 February 2004.
[20] Response, para. 20.
[21] *The Prosecutor v. Pauline Nyiramasuhuko et al*, Case No ICTR-98-42-T, "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 16 February 2004.

directly pleaded in the Indictment"[22]. Finally, the Prosecutor argues that by analogy, the judgment in the case of *The Prosecutor v. Jean de Dieu Kamuhanda* shows that the Indictment's pleading of crimes commitment throughout Rwanda is sufficient "for all crimes committed throughout Rwanda, including *Gitarama* préfecture"[23].

11. "In the alternative…, the Prosecutor submits that the evidence of GTD is so closely connected and linked to the facts in issue, includes as *res gestae,* and thus admissible under Rule 89 of the Rules of Procedure and Evidence"[24]. The Prosecutor submits the Witness GTD's evidence is relevant to proving the perpetration of crimes throughout Rwanda, as well as Article 6 (3)'s accusations about responsibility.

12. The Prosecutor submits that even if the relevant sections of the Indictment did include some generalities, they "were cured by the Prosecutor's consistent notice to the Defence, including by disclosure of witness statements, the pre-trial brief and opening statement"[25]. The Prosecutor cites the *Kupreskic* Judgment and the Trial Chamber decisions in the cases of *The Prosecutor v. Pauline Nyiramasuhuko* and *The Prosecutor v. Elizaphan Ntakirutimana* cases to support this approach.

DELIBERATIONS

13. As a preliminary matter, the Trial Chamber notes that three out of four witnesses mentioned in the Motion, namely Witnesses GKF, GBN and ADT, were removed by the Prosecutor and allowed to be removed by the Trial Chamber in the "Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73 *bis* (E) for leave to Vary the Prosecutor's List of Witnesses Filed on 20 October 2003" filed on 23 June 2004. Therefore the Trial Chamber will only address the specific matter raised in relation to the testimony of Witness GTD.

14. The Trial Chamber observes that the Indictment does not describe in detail the specific events involving Casimir Bizimungu in the Gitarama *préfecture* according to Witness GTD's statements dated 3 and 8 July 2003.

15. However, after a careful review of the said statement, the Trial Chamber notes that the Indictment does allege acts by Casimir Bizimungu in the Gitarama *préfecture* about which the events described by Witness GTD will provide evidence. These acts, as alleged in the Indictments include amongst others monitoring the implementation of Government-issued instructions[26], ordering others to commit, instigate, or assist in massacres[27], and supervising and encouraging the continuation of massacres[28]. The Trial Chamber notes that Gitarama *préfecture* is mentioned within a list of several prefectures in which the acts allegedly happened. Additionally, Casimir Bizimungu is named either directly, or falls under the general category mentioned of ministers or "members of Government."

[22] Response, para. 24.
[23] Response, para. 29.
[24] Response, para. 35.
[25] Response, para. 4.
[26] Paragraph 6.26 of the Indictment.
[27] Paragraph 6.30 of the Indictment.
[28] Paragraph 6.54 of the Indictment.

16. The Trial Chamber is of the view that the specific references to Gitarama *préfecture* and the specific references to Casimir Bizimungu, ministers, or members of government are sufficient to meet the Prosecutor's obligation "to state the material facts underpinning the charges in the Indictment, but not the evidence by which such material facts are to be proven"[29]. The relevant paragraphs, even those that do not specifically mention Casimir Bizimungu by name, are included in Section 7 of the Indictment, as acts or omissions supporting the charges against Casimir Bizimungu.

17. Therefore the Trial Chamber considers that the Indictment alone provided adequate notice to the Defence of the accusations against Casimir Bizimungu regarding events involving the later in the Gitarama *préfecture*. In addition, the Defence has been adequately informed of the evidence supporting these accusations. Witness GTD's statements regarding Casimir Bizimungu was disclosed to the Defence on 18 August 2003.

18. The Trial Chamber has taken note of the Appeals Chamber Decision dated 25 June 2004[30]. Nevertheless, the Trial Chamber stresses that the relationship between Witness GTD's statement and the Indictment differs from the matter considered in this Trial Chamber's decisions on 23 January 2004 and 3 February 2004 granting the Defence's motions opposing the admissibility of witness testimony regarding Casimir Bizimungu's actions in the Ruhengeri *préfecture*. The Indictment does not refer to events involving Casimir Bizimungu in Ruhengeri *préfecture*. The Indictment's only specific reference to Ruhengeri is a mention of its location and its historical distinction as a site of massacres.

19. Following the Appeals Chamber Decision, the Trial Chamber considers that the admission or the exclusion of evidence in relation to the specificity of acts pleaded in the Indictment and the sufficient notice given to the Defence for the preparation of its case fall "within the permissible scope of the Trial Chamber's discretion"[31]. The Trial Chamber notes that the Indictment specifically mentions Gitarama *préfecture* as the site of acts allegedly committed either by Casimir Bizimungu, as named, or by members of Government, mentioned more generally. Therefore the Trial Chamber considers that the testimony of Witness GTD shall be allowed and that the Prosecutor shall be permitted to lead evidence regarding events involving Casimir Bizimungu in the Gitarama *préfecture*.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 1 July 2004

[Signed] : Khalida Rachid Khan, Presiding Judge; Lee Gacuiga Muthoga; Emile Francis Short

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[29] *Kupreskic* Judgment, para. 88.

[30] *The Prosecutor v. Casimir Bizimungu et al*., Case No ICTR-99-50-AR73.2, "Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence", 25 June 2004, (the "Appeals Chamber Decision").

[31] *Ibid*., para. 19.

Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence 15 July 2004 (ICTR-99-50-AR73.3 and AR73.4)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Mugiraneza – exclusion of evidence, appeal – discretion of the Trial Chamber, intervention of the Appeals Chamber, error – sufficient notice to the defence, prejudice – specificity of the indictment – fair trial – jurisprudence of the Tribunal in other cases – conspiracy to commit genocide, complicity in genocide – difference of treatment, co-accused situated in an identical situation, reasonableness of the distinction, reasons – granted

International instruments cited : Statute, art. 6 (1), 6 (3), 20 – Rules of procedure and evidence, Rules 5 (B), 89

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v Edouard Karemera et al., *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 9 October Denying Leave to File an Amended Indictment, 19 December 2003 (ICTR-98-44-AR73,* Reports 2003*, p; 1504) – Appeals Chamber,* The Prosecuror v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony Is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 5 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecuror v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and For Other Appropriate Relief, 6 February 2004 (ICTR-99-50,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecuror v. Casimir Bizimungu et al., *Prosecutor's Appeal Against Trial Chamber II Decision of 23 January 2004 Excluding the Testimony of Witnesses GKB, GAP. GKC, GKD and GFA and Trial Chamber Decision of 3 February 2004 Excluding The Testimony of Witnesses AEI, GKE, GKF and GKI All Implicating Casimir Bizimungu In Crimes in Ruhengeri Prefecture, 1 March 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecuror v. Casimir Bizimungu et al., *Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004, 24 March 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecuror v. Casimir Bizimungu et al., *Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ Implicating Prosper Mugiraneza For All Crimes in Kibungo and Cyangugu Prefec-*

tures Except For The Crimes of Conspiracy And Complicity in Genocide, 31 March 2004 (ICTR-99-50, Reports 2004*, p. X)*

1. The accused Prosper Mugiraneza ("Mugiraneza") appeals a decision of the Trial Chamber[1] rejecting in part his motion for the exclusion of evidence of certain prosecution witnesses at his trial[2]. The Prosecution cross-appeals the Trial Chamber's partial grant of that motion[3].

2. On 23 January 2004, the Trial Chamber ruled that certain prosecution evidence was inadmissible in the trial of Mugiraneza's co-accused, Casimir Bizimungu ("Bizimungu"). Following that decision, Mugiraneza filed a motion seeking the exclusion of that same evidence in relation to the case against him and relied upon the same arguments that had been made by Bizimungu. The Trial Chamber refused to grant Mugiraneza some of the relief sought, and his interlocutory appeal is against that partial refusal.

3. Mugiraneza bases his appeal on three grounds. First, Mugiraneza claims that the Trial Chamber abused the exercise of its discretion in his case by granting him less relief than that granted to his co-accused Bizimungu and in permitting the admission of evidence relating to conspiracy and complicity without considering whether that evidence was relevant to any of the specific allegations made in the indictment. Second, Mugiraneza claims that the Trial Chamber abused its discretion in denying him Rule 5 (B) relief in relation to the evidence of Witness GTE, having granted similar relief to Bizimungu and excluded the evidence of Witness GKB. Third, by treating Mugiraneza differently from Bizimungu as outlined above, Mugiraneza claims that the Trial Chamber failed to treat two identically situated persons in the same way and failed to provide reasons why it rendered different decisions in relation to each[4].

4. The Prosecution's interlocutory appeal, in contrast, relates to the part of Mugiraneza's motion that was granted by the Trial Chamber. It says that the Trial Chamber erred by excluding the evidence of the witnesses in relation to Kibungo and Cyangugu Prefectures on the basis that that evidence fell outside the Indictment, as those Prefectures had not been specifically identified in the Indictment[5]. The Prosecution alleges that in excluding this evidence the Trial Chamber failed to consider the nature of its case; failed to consider the relevance or materiality of that evidence to charges in the Indictment and failed to consider that the degree of specificity to be pleaded in

[1] Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and For Other Appropriate Relief, 6 February 2004.

[2] Prosper Mugiraneza's Appellate Brief, 8 April 2004 ("Appeal Brief").

[3] Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004, 24 March 2004; Prosecutor's Appeal Against Trial Chamber II Decision of 5 February 2004 Excluding the Testimony of Witnesses GJV, GJQ, GJY, GKP, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW and GJZ Implicating Prosper Mugiraneza For All Crimes in Kibungo and Cyangugu Prefectures Except For The Crimes of Conspiracy And Complicity in Genocide, 31 March 2004 ("Prosecution's Appeal Brief").

[4] Appeal Brief, par 5.

[5] Prosecution's Appeal Brief, paras. 8-9.

an Indictment depends on the nature of the Prosecution's case; and erred in finding that the failure of the Prosecution to identify Kibungo and Cyangugu Prefectures in the Indictment could not be cured by references made to those Prefectures in the Pre-Trial Brief or evidence adduced at trial.

PROSECUTION'S CROSS-APPEAL

5. The Prosecution argues that, while the Trial Chamber's Impugned decision considered and understood its case with respect to the crimes of conspiracy and complicity in genocide, it failed to do so with respect to the crimes of genocide, crimes against humanity, and war crimes. It says that that error led the Trial Chamber to erroneously exclude relevant evidence that fell within the scope of the charges made in the Indictment. The Prosecution argues that the Indictment charges Mugiraneza under Articles 6 (1) and 6 (3) for all crimes identified in the Indictment throughout Rwanda. It says that the Trial Chamber misdirected itself by interpreting the charges made as excluding acts or omissions that occurred in Kibungo and Cyangugu Prefectures with respect to Mugiraneza's criminal responsibility for the crimes of genocide, direct and public incitement to commit genocide, crimes against humanity and war crimes[6].

6. With respect to the claim that the Trial Chamber failed to consider the relevance of the excluded evidence to the Prosecution's case against Mugiraneza, the Prosecution says that the Indictment charges Mugiraneza with acts of genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, direct and public incitement to commit genocide and war crimes throughout Rwanda, not excluding Kibungo and Cyangugu Prefectures[7]. The Prosecution contends that in excluding the evidence in relation to these crimes within these Prefectures the Trial Chamber erred by failing to consider the materiality and relevance of the evidence to the charges in the Indictment, as well as the requisite degree of specificity required in light of the nature of the case pleaded by the Prosecution[8]. The Prosecution further asserts that Mugiraneza committed the crimes alleged either individually, as a superior, and as a member of a joint criminal enterprise that perpetrated crimes throughout Rwanda[9]. The Prosecution claims that the Trial Chamber "correctly allowed evidence of the affected witnesses regarding the crimes of conspiracy and complicity in genocide…[but] erred in failing to consider that in cases of massive and widespread crimes spanning over a wide geographical area and taking place over a period of time, the degree of specificity required of an Indictment is not as high as the Trial Chamber placed it…"[10] Further, the Prosecution says, the Trial Chamber failed to consider whether the evidence was relevant as evidence of *res gestae* and thus admissible under Rule 89 of the Rules of Procedure and Evidence[11].

[6] Prosecution's Appeal Brief, paras. 14-22.
[7] Prosecution's Appeal Brief, para. 23.
[8] Prosecution Appeal Brief, paras. 24-27.
[9] Prosecution Appeal Brief, para. 41.
[10] Prosecution Appeal Brief, para. 38.
[11] Prosecution Appeal Brief, para. 44.

7. In support of its arguments, the Prosecution points to a decision by a differently constituted Trial Chamber in the *Nyiramasuhuko* case. In that case, the Trial Chamber found that the evidence of specific criminal conduct of the accused, which was not directly pleaded in the indictment, was sufficiently pleaded in paragraphs of that indictment. The Prosecution relies on similar reasoning in this case[12]. In addition, the Prosecution points to the decision of the Trial Chamber in the *Kamuhanda* case. In that case the Trial Chamber held that, by pleading a *Commune*, the Indictment sufficiently pleaded and gave adequate notice of events that occurred in one of the many *Secteurs*. The Prosecution says that, by analogy, the pleading that the Accused committed crimes throughout Rwanda does not exclude any of the eleven Prefectures; indeed it impliedly includes all of them[13].

8. The Prosecution further claims that the Trial Chamber erred in failing to consider whether the Prosecution had given the Defence adequate notice of the allegations of criminal conduct in relation to Kibungo and Cyangugu Prefectures by references in the Pre-Trial brief, the disclosed witness statements, the opening statement or the evidence adduced at trial[14].

9. In response, Mugiraneza says that the Trial Chamber correctly determined that the evidence was not admissible in relation to alleged criminal activity in Kibungo and Cyangugu Prefectures. He says that nowhere in the indictment does the Prosecution plead that Mugiraneza incurred criminal responsibility for crimes that allegedly occurred in Kibungo and Cyangugu Prefectures. He argues that the Trial Chamber's decision was commensurate with his right to be informed of the nature of the case against him so that he may prepare to defend against it[15].

10. With respect to the arguments of the Prosecution that the Trial Chamber failed to consider the relevance of the excluded evidence to its case, and in fact misunderstood the nature of its case, Mugiraneza says that none of the paragraphs in the indictment identified by the Prosecution satisfies the specificity requirements. Indeed Mugiraneza contends that the Prosecution's position "is that it can write an indictment as broadly as possible without identifying any specific acts done by the accused."[16] Mugiraneza says that the issue is not whether the evidence is relevant to what the Prosecution thinks the indictment charges, but whether the Prosecution omitted to plead material facts in the indictment. Mugiraneza argues that the Trial Chamber correctly found that the indictment was deficient in that it failed to include a concise statement of facts in relation to crimes committed in Kibungo and Cyangugu Prefectures and it was within its discretion to exclude evidence in relation thereto as irrelevant[17]. Further, Mugiraneza says that the Prosecution's reliance on *Kamuhanda* is unhelpful and clearly distinguishable from this case[18].

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[12] Prosecution Appeal Brief, paras. 29-34.
[13] Prosecution Appeal Brief, paras. 35-36.
[14] Prosecution Appeal Brief, pars. 49-58.
[15] Propser Mugiraneza's Reply to the Prosecutor's Appellate Brief, 16 April 2004, ("Reply Brief"), paras. 15-26.
[16] Reply Brief, para. 26.
[17] Reply Brief, paras. 31-32.
[18] Reply Brief, paras. 27-29.

11. Mugiraneza also rejects as erroneous the Prosecution's arguments that the failure to plead material facts in the indictment can be cured by references made to these facts in the Pre-Trial Brief, witness statements and opening statements[19]. He says that the role of the Trial Chamber in this instance was to make sure that the rights of the accused to a fair trial were not violated by the failure of the Prosecution to draft an indictment with the specificity required by the jurisprudence of the Tribunal[20]. Mugiraneza says that the Prosecution should have at a much earlier time brought a motion to amend the indictment, which was confirmed in 1999. The motion that the Prosecution eventually brought to amend the indictment, in August 2003, was rejected on the basis that permitting amendments at that time would prejudice the accused. This decision was affirmed by the Appeals Chamber. Mugiraneza submits that the Prosecution is now asking the Appeals Chamber to force the Trial Chamber to do indirectly that which it has already directly refused to do, that is to say to amend the indictment[21].

ANALYSIS

12. It is well established in the jurisprudence of this Tribunal that the Appeals Chamber will only interfere in the exercise of the discretionary power of a Trial Chamber where the challenging party establishes that the Trial Chamber misdirected itself as to the principle to be applied, or as to the law relevant to that exercise of discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion[22].

13. Having considered the arguments of the parties, the Appeals Chamber is not satisfied that the Prosecution has identified any error in the Trial Chamber's exercise of its discretion in excluding the evidence of the identified witnesses in relation to criminal acts alleged to have occurred in Kibungo and Cyangugu Prefectures. The arguments now made by the Prosecution were largely put before the Trial Chamber and considered by it. The Trial Chamber recalled the decisions it had rendered in relation to Bizimungu, the co-accused, on 23 January and 3 February 2004. Similar to the situation in that case, it noted that when questioned by the Trial Chamber the Prosecution was unable to identify any specific acts alleging criminal responsibility on the part of Mugiraneza in Kibungo and Cyangugu Prefectures[23]. This was in the context where, although the Prosecution has in part used the phrase "throughout Rwanda", it pleaded with specificity the various geographical regions in which Mugiraneza is alleged to have incurred criminal responsibility. The Trial Chamber held that the failure of the Prosecution to plead, as specific material facts, the allegations in relation

[19] Reply Brief, paras. 33-35.
[20] Reply Brief, paras. 36-37.
[21] Reply Brief, paras. 37-40.
[22] *Prosecutor v Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 9 October Denying Leave to File an Amended Indictment, 19 December 2003, par. 9.
[23] Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony Is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 5 February 2004 ("Impugned Decision").

to Kibungo and Cyangugu Prefectures would cause prejudice to Mugiraneza's defence as he had not been given sufficient notice of these allegations as guaranteed by Article 20 of the Statute[24]. The fact that the evidence may have been admissible pursuant to Rule 89 does not show any error on the part of the Trial Chamber in concluding that the fairness of the trial warranted the exclusion of that evidence. This conclusion was within the permissible scope of the Trial Chamber's discretion.

14. Although the Trial Chamber did not directly address the argument that the failure to plead the material facts in the indictment could be cured by references in the Pre-Trial Brief, witness statements and opening statements, it did recall its reasoning in relation to the decisions it rendered with respect to co-accused Bizimungu on 23 January and 3 February 2004, in which it justified this position by specific reference to the jurisprudence of the Appeals Chamber[25].

15. Finally, it is also well established that where the exercise of discretion is involved reasonable minds may differ. In this context the Prosecution's reliance upon decisions reached by other Trial Chambers in other cases is unhelpful. What the Prosecution is required to establish is a discernible error committed by the Trial Chamber in the exercise of its discretion in this case. Having not done so, the Prosecution's cross-appeal must fail.

MUGIRANEZA'S APPEAL

16. The Trial Chamber, while excluding the evidence of the witnesses identified in relation to crimes alleged to have been committed in Kibungo and Cyangugu Prefectures, permitted this evidence to be adduced in support of the charges of conspiracy to commit genocide alleged in Count 1 of the Indictment and complicity in genocide alleged in Count 3 of the Indictment. In concluding that the evidence was admissible in relation to these counts the Trial Chamber identified certain paragraphs in the Indictment as sufficiently setting out the material facts in relation to these offences. The Trial Chamber also refused to exclude the evidence of two witnesses who had already given their evidence, namely Witness GTE and Witness GKP, on the basis that the Defence for Mugiraneza did not take any objection at the time of their evidence. Further, because the Defence was given an opportunity to cross-examine the witnesses, no prejudice accrued to them. The Trial Chamber, therefore, refused to exclude the evidence of these two witnesses in respect to events implicating Mugiraneza in Kibungo Prefecture[26].

17. Mugiraneza identifies his interlocutory appeal as involving three issues :

> "1. Whether the Trial Chamber abused its discretion by giving Mugiraneza less relief than it granted Bizimungu when the two were situated identically ?
>
> 2. Whether the Trial Chamber abused its discretion by allowing admission of evidence of conspiracy and complicity not relevant to the allegations in the

[24] Impugned Decision, paras.6-9.
[25] Impugned Decision, para. 6.
[26] Impugned Decision, para. 10.

indictment while excluding evidence irrelevant to other allegations in the indictment?

3. Whether the Trial Chamber abused its discretion by denying Mugiraneza relief pursuant to Rule 5 (B) when it granted relief to an identically situated co-accused?"[27]

18. Mugiraneza says that it is inconsistent with basic principles of fairness for one accused to be treated in one manner and another accused to be treated in a different manner[28]. He says that Trial Chambers "should not have unbridled discretion to treat one party in one way and another identically situated party differently without articulating some reason as to why they are treated differently."[29] He argues that it cannot be disputed that he and Bizimungu, his co-accused, are identically situated and they had requested identical relief from the Trial Chamber, namely, "exclusion of evidence related to a specific, named prefecture where the indictment alleges no acts by the individual accused in that prefecture."[30] Mugiraneza argues that the Trial Chamber's decision in *Bizimungu* was legally correct and a proper exercise of its discretion. Mugiraneza says that while the Trial Chamber made reference to this decision in its reasoning and applied the same legal reasoning, it abused the exercise of its discretion by holding that the evidence was admissible against him in relation to Count 1, conspiracy, and Count 3, complicity in genocide, when it excluded exactly the same type of evidence as it related to Bizimungu[31]. In essence, Mugiraneza argues that the Trial Chamber abused its discretion by granting him different relief on the same legal principles as that granted to Bizimungu, and as the decision rendered in *Bizimungu*'s case was correct, the Trial Chamber abused its discretion in granting Mugiraneza less relief than that which it granted to Bizimungu[32].

19. In response the Prosecution repeats the arguments made on its cross-appeal and asserts that the Trial Chamber erred in granting Mugiraneza any relief at all. Further the Prosecution contends that the Trial Chamber's decision was correct to allow the evidence to be admissible in relation to Counts 1 and 3 of the Indictment. The Prosecution also contends that the Trial Chamber's refusal to exclude the evidence of Witness GTE and Witness GKP was correct[33].

20. Mugiraneza filed a reply to the Prosecution's response[34]. That reply was filed out of time and no extension of time was sought by Mugiraneza for that reply to be validly received by the Appeals Chamber. Accordingly, the Appeals Chamber will not consider that reply in this Appeal.

[27] Appeal Brief, para. 4.
[28] Appeal Brief, para. 14.
[29] Appeal Brief, para. 15.
[30] Appeal Brief, para.16.
[31] Appeal Brief, para. 18.
[32] Appeal Brief, para. 19.
[33] Prosecutor's Reply to Prosper Mugiraneza's Appeal, 20 April 2004.
[34] Prosper Mugiraneza's Response to the Prosecutor's Appellate Brief, 26 April 2004, filed 27 April 2004.

ANALYSIS

21. Having considered the arguments of the parties, the Appeals Chamber is troubled by the apparent disparity of treatment accorded to the accused Mugiraneza in relation to his co-accused Bizimungu without further explanation being given by the Trial Chamber for that difference of treatment. While the exercise of the discretion of different Trial Chambers in relation to different cases is an unhelpful comparison to make, where the exercise of discretion concerns co-accused situated in an identical situation and results in different treatment being accorded to each of them, then an assessment of the reasonableness of that distinction can only be made if the Trial Chamber provides reasons for that distinction. This is particularly so where the Trial Chamber recalled its reasoning in *Bizimungu* as being applicable to its decision in *Mugiraneza*. Indeed, in its submissions on the appeal in the Bizimungu case, the Prosecution submitted that there was no reasonable basis for the distinction made by the Trial Chamber between the two co-accused. The Prosecution submitted that :

> Indeed, in dealing with a similar motion brought by another person, Prosper Mugiraneza, in the same case, Trial Chamber II found that a number of paragraphs cited in the table above, namely : 6.14, 6.23, 6.25, 6.31 and 6.68, adequately set out the material facts in relation to the commission of the offences of complicity in genocide and conspiracy to commit genocide brought against Casimir Bizimungu. It is erroneous for the case to be borne out in respect of one Accused person on the one hand and refused in respect of another[35].

22. If there is a reasonable basis for the Trial Chamber exercising its discretion differently in relation to the two co-accused, the Trial Chamber failed to articulate that basis in its decision. The Trial Chamber found that Bizimungu would be prejudiced by the admission of the evidence sought to be excluded and, in contrast, that Mugiraneza would not be so prejudiced, in relation to the same counts, by the evidence relating to events in Prefectures not identified in the Indictment. In these circumstances, the Appeals Chamber cannot be satisfied that no such error occurred.

23. The Trial Chamber claims that its decision to not exclude the evidence of Witness GTE, concerning the crimes Mugiraneza is alleged to have committed in Kibungo Prefecture, is based on the notion that no prejudice accrued to Mugiraneza given the Defence's opportunity to cross-examine the witness. In contrast, with respect to Bizimungu, the Trial Chamber excluded the evidence of witnesses in relation to the alleged crimes of which Bizimungu allegedly incurred criminal responsibility in Ruhengeri Prefecture on the basis that that geographical region had not been pleaded in the Indictment. The Trial Chamber failed to render clear reasoning on this issue.

24. For the foregoing reasons, the Appeals Chamber is not satisfied that the Trial Chamber committed no error in the exercise of its discretion in holding that the evidence of the identified witness could be led in relation to Counts 1 and 3 of the Indictment, and by its refusal not to exclude the evidence of GTE. As the Appeals Chamber is unable to identify the basis of the distinction drawn by the Trial Chamber

[35] Prosecutor's Appeal Against Trial Chamber II Decision of 23 Janaury 2004 Excluding the Testimony of Witnesses GKB, GAP. GKC, GKD and GFA and Trial Chamber Decision of 3 February 2004 Excluding The Testimony of Witnesses AEI, GKE, GKF and GKI All Implicating Casimir Bizimungu In Crimes in Ruhengeri Prefecture, 1 March 2004, par 25.

between the two co-accused the decision of the Trial Chamber in relation to Mugiraneza is reversed. The Trial Chamber is directed to re-consider the request of Mugiraneza in light of the guidance above.

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

Done this 15th day of July 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge

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Decision on Prosecutor's Motion for Extension of Time Within which to File a Response to the Defence Motion for Disclosure of Relevant Material 20 August 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Disclosure of materials, extension of time – settlement between the parties – no extension in abstracto, additional submissions of the parties – adequately justified – motion granted

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 "Prosecutor's Motion Moving for Extension of Time within which to File a Response to the Defence Motion for Disclosure of Relevant Material" filed on 8 July 2004, (the "Motion");

NOTING "Justin Mugenzi's Response to the Prosecutor's Motion for Extension of Time in which to File a Response to the Defence Motion for the Disclosure of Relevant Material" filed on 8 July 2004, (the "Response");

NOTING the "Prosecutor's Reply to Justin Mugenzi's Response to the Prosecutor's Motion for Extension of Time in which to File a Response to the Defence Motion for the Disclosure of Relevant Material" filed on 22 July 2004, (the "Reply");

TAKING INTO CONSIDERATION the "Motion of Defendants Bicamumpaka and Mugenzi for Disclosure of Relevant Material" filed on 5 July 2004, (the "Defendants' Motion");

CONSIDERING that the Prosecutor has requested an extension of time to file a Response to the Defendants' Motion as he intends to prioritize an agreement between the Parties to dispose of the Defendants' Motion without specifying the timeframe;

CONSIDERING that the Defence supported the Prosecutor's Motion and prayed the Trial Chamber to grant an extension of time so that the Parties can meet to discuss the matter raised in the Defendants' Motion;

CONSIDERING FINALLY that the Trial Chamber is *a priori* in favour of a settlement between the Parties on issues pertaining to disclosure of material when possible;

CONSIDERING FINALLY that the Prosecutor has adequately justified its request for additional time to file a Response, the Trial Chamber is of the view that an extension of rime shall be granted to the Prosecutor. As regard to the new deadline, the Trial Chamber considers that it cannot decide *in abstracto* and that it shall wait until the Parties report to the Trial Chamber about the outcome of their meeting. Thus the Trial Chamber directs the parties to make additional submissions on the issue no latter than Friday 17 September 2004.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion.

DIRECTS both Parties to make additional submission on the issue at stake no later than Friday 17 September 2004.

Arusha, 20 August 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosecutor's Motion for Extension of Time Within which to File a Reply to the Response of Mugenzi and Bicamumpaka to the Prosecutor's Motion for Judicial Notice 20 August 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi, Bicamumpaka – judicial notice – extension of time – granted to all defence teams, fairness – adequately justified – motion granted

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 "Prosecutor's Motion Moving for Extension of Time within which to File a Reply to the Response of Mugenzi and Bicamumpaka to the Prosecutor's Motion for Judicial Notice" filed on 30 July 2004, (the "Motion");

NOTING the "*Réponse de Casimir Bizimungu à la requête du Procureur visant à obtenir une extension de délai*" filed on 4 August 2004, (the "Response");

CONSIDERING that the Trial Chamber's Oral Decision of 7 July 2004 granted all Defence teams an extension of time to file their submissions regarding the "Prosecutor's Motion to Take Judicial Notice";

CONSIDERING FINALLY that the Prosecutor has adequately justified its request for additional time to file a reply, the Trial Chamber is of the view that, as a matter of fairness, the same relief shall also be granted to the Prosecutor; Thus the new deadline for the filing of a reply to the "Response of Mugenzi and Bicamumpaka to the Prosecutor's Motion for Judicial Notice" is 26 August 2004.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion.

Arusha, 20 August 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 20 October 2003 Related to Access Jean Kambanda 24 August 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – witness removal from the witness list – request to vary a decision – Prosecution witness – interview, consent of the witness, for both Prosecution and Defence witnesses – Prosecutor's representative, attendance to an interview, protection of the integrity of the proceedings, refusal by the witness – fair trial, interest of justice – witness protection considerations – exculpatory evidence – particular circumstances – presence of a neutral and third party, representative of the Registrar – motion granted in part

International instruments cited : Statute, art. 20 and 21 – Rules of procedure and evidence, Rule 68

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu*, et al, Prosper Mugiraneza's Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief, 24 March 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber on Whether or Not He is Still a Prosecution Witness, 12 May 2004 (ICTR-99-50,* Reports 2004*, p. X) –*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Mile Mrksic*, Appeals Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003 (IT-95-13/1)*

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 to Vary Restrictions in the Trial Chamber's Decision of 20 ctober 2003 Related to Access Jean Kambanda" filed on 12 December 2003, (the "Motion");

Décision relative à la requête de Prosper Mugiraneza intitulée **Motion to Vary Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access Jean Kambanda** *24 août 2004 (ICTR-99-50-T)*

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Président de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – retrait de témoin de la liste des témoins – témoin à charge – interrogatoire, consentement du témoin, qu'il témoigne à charge ou à décharge – représentant du Procureur, présence à l'interrogatoire, protection de l'intégration des la procédure, refus du témoin – procès équitable, intérêt de la justice – protection de témoins – éléments de preuve disculpatoires –circonstances particulières – présence d'une tierce partie neutre, représentant du Greffe – requête accordée en partie

Instruments internationaux cités : Statut, art. 20 et 21 – Règlement de procédure et de preuve, art. 68

Jurisprudence internationale citée :

I.C.T.R. : Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts*, Prosper Mugiraneza's Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief, 24 mars 2004 (ICTR-99-50,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procureur c. Casimir Bizimungu et consorts*, Réponse du Procureur intitulée Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber on Whether or not he is Still a Prosecution Witness, 12 mai 2004 (ICTR-99-50,* Recueil 2004*, p. X)*

I.C.T.Y. : Chambre d'appel, Le Procureur c. Mile Mrksic*, Décision relative à l'appel interlocutoire de la défense concernant la communication avec des témoins potentiels de la partie adverse, 30 juillet 2003 (IT-95-13/1)*

LE TRIBUNAL PÉNAL 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 Prosper Mugiraneza intitulée *Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 20 October 2003 Related to Access Jean Kambanda*, déposée le 12 décembre 2003 (la («Requête»),

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 20ctober 2003 Related to Access Jean Kambanda" filed on 26 January 2004, (the "Response");

NOTING "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 20 October 2003 Related to Access Jean Kambanda" filed on 28 January 2004, (the "Reply");

HAVING RECEIVED :

(i) "Prosper Mugiraneza's Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief" filed on 22 March 2004, (the "Renewed Motion");

(ii) "Prosper Mugiraneza's Request for Ruling on His Motion to Vary Its Order of 20ctober 2003 and Request that the Trial Chamber Strike Jean Kambanda from the 'Prosecutor's Witness List'" filed on 20 May 2004, (the "Request");

(iii) the "Prosecutor's Response to Prosper Mugiraneza's Request for Ruling on His Motion to Vary Its Order of 20ctober 2003 and Request that the Trial Chamber Strike Jean Kambanda from the 'Prosecutor's Witness List'" filed on 26 May 2004, (the "Response to the Request");

TAKING INTO CONSIDERATION

(i) the "Decision on Prosper Mugiraneza's Motion to Require the Registrar to Allow Access to a Witness" filed on 20ctober 2003, (the "Decision");

(ii) the "Order for the Prosecutor to Indicate to the Trial Chamber Whether Jean Kambanda is a Prosecution Witness or Not" filed on 6 May 2004, (the "Order");

(iii) the "Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber Whether or Not He Is Still a Prosecution Witness" filed on 14 May 2004, (the "Prosecutor's Indication");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Prosper Mugiraneza seeks to modify the Trial Chamber's Decision of 20 October 2003 stating that the Defence could interview Jean Kambanda "when a representative of the Prosecutor may be present." The Defence interprets the Decision as permitting the Prosecutor to demand that an OTP representative be present at any interview with Jean Kambanda and requests that the Trial Chamber permit such an interview without a representative of the Prosecutor present, if those are the conditions under which Jean Kambanda consents to an interview.

VU la réponse du Procureur intitulée *Prosecutor's Response to Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 20october 2003 Related to Access Jean Kambanda*, déposée le 26 janvier 2004 (la «Réponse»),

VU la réplique de Prosper Mugiraneza intitulée *Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Decision of 20october 2003 Related to Access Jean Kambanda*, déposée le 28 janvier 2004 (la «Réplique»),

AYANT REÇU

i) La nouvelle requête de Prosper Mugiraneza intitulée Prosper Mugiraneza's Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief, déposée le 22 mars 2004 (la «Nouvelle requête»)

ii) La demande de Prosper Mugiraneza intitulée Prosper Mugiraneza's Request for Ruling on his Motion to Vary its Order of 20october 2003 and Request that the Trial Chamber Strike Jean Kambanda from the "Prosecutor's Witness List", déposée le 20 mai 2004 (la «Demande»)

iii) La Réponse du Procureur à la requête de Prosper Mugiraneza intitulée Prosecutor's Response to Prosper Mugiraneza Request for Ruling on his Motion to Vary its Order of 20 October 2003 and Request that the Trial Chamber Strike Jean Kambanda from the «Prosecutor's Witness List», déposée le 26 mai 2004 (la «Réponse à la demande»);

AYANT EXAMINÉ

i) La Décision relative à la requête de Mugiraneza aux fins qu'il soit ordonné au Greffier d'autoriser la défense à rencontrer un témoin, déposée le 2 octobre 2003 (la «Décision»)

ii) L'Ordonnance enjoignant au Procureur d'indiquer à la Chambre de première instance si Jean Kambanda est ou non un témoin à charge, déposée le 6 mai 2004 (l'«Ordonnance»)

iii) La Réponse du Procureur intitulée «*Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber Whether or not he is Still a Prosecution Witness*», déposée le 14 mai 2004 (la «Réponse du Procureur à l'ordonnance»);

ARGUMENTS DES PARTIES

Arguments de la défense

1. La défense de Prosper Mugiraneza sollicite une modification de la décision de la Chambre de première instance du 2 octobre 2003 qui l'a autorisée à interroger Jean Kambanda, sous la condition «qu'un représentant du Procureur devra pouvoir être présent». La défense interprète la décision comme autorisant le Procureur à exiger la présence d'un de ses représentants toutes les fois que Jean Kambanda sera interrogé. La défense demande que la Chambre permette la tenue de ces interrogatoires hors la présence d'un représentant du Procureur si Jean Kambanda y consent.

2. The Defence for Prosper Mugiraneza also seeks to have the Trial Chamber strike Jean Kambanda from the Prosecutor's witness list because of the Prosecutor's lack of compliance with the Presiding Judge's Request of 3 February 2004 and the Trial Chamber's Order of 6 May 2004 to inform the Trial Chamber whether Jean Kambanda is still a Prosecution Wimess.

3. Based on the 3 December 2003 Letter from Jean Kambanda[1], Defence Counsel for Prosper Mugiraneza submits that Jean Kambanda has agreed to meet with him, but only without a representative of the Prosecutor present. Therefore, the Defence argues, it is impossible for the Defence to interview Jean Kambanda under the conditions set out by the Trial Chamber in its Decision.

4. The Defence for Prosper Mugiraneza gives two reasons why it should be permitted to interview Jean Kambanda under the conditions stipulated by him in his Letter.

a. The Defence for Prosper Mugiraneza states that "no party has a property interest in a witness."[2] The Defence submits that the Rules of Procedure and Evidence of the Tribunal (the "Rules") do not prevent a party from interviewing any willing witness, absent a protection order. Thus, the Defence argues that meeting with Jean Kambanda should be possible as Jean Kambanda is hot a protected witness, is in the constructive custody of the Registrar, and is willing to meet with the Defence under the conditions specified in his Letter.

b. The Defence for Prosper Mugiraneza argues that denying the Defence of the right to interview Jean Kambanda, when he consented to the interview, would deprive Prosper Mugiraneza of his right to a fair trial, his right to present a defence, and his right to effective assistance of Counsel.

5. The Defence for Prosper Mugiraneza challenges the assertation that Jean Kambanda will appear as a Prosecution witness. According to the Defence, if Jean Kambanda is not a Prosecution witness, a representative of the Prosecutor is not needed in a Defence interview of Jean Kambanda in order to protect the Trial Chamber's concerns over the integrity and transparency of the proceedings. Further, the Defence submits that if Jean Kambanda will not appear as a Prosecution Witness, the Prosecutor should have no interest in whether or not the Defence interviews him.

6. Alternatively, the Defence for Prosper Mugiraneza submits that even if Jean Kambanda does appear voluntarily as a Prosecution witness, it should be allowed to interview Jean Kambanda because he possesses exculpatory information and remains a potential Defence witness. The Defence argues that the Prosecutor is contesting the Defence's access to Jean Kambanda as one of many attempts to deny the Defence

[1] Letter from Jean Kambanda to *Monsieur Jean-Pelé Fomété, Conseiller juridique de la Section de l'administration des Chambres*, 3 December 2003, (the "Letter"), attached to the Motion.

[2] *The Prosecutor v. Casimir Bizimungu, et al*, "Prosper Mugiraneza's Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief", 24 March 2004, para. 4.

2. La défense de Prosper Mugiraneza demande également à la Chambre de première instance d'ordonner la radiation de Jean Kambanda de la liste des témoins à charge en raison du non-respect par le Procureur de l'ordonnance du Président de Chambre du 3 février 2004 et de l'ordonnance de la Chambre de première instance du 6 mai 2004 lui enjoignant d'indiquer à la Chambre si Jean Kambanda demeure un témoin à charge.

3. Se fondant sur la lettre de Jean Kambanda en date du 3 décembre 2003[1], le conseil de la défense représentant Prosper Mugiraneza fait valoir que Jean Kambanda a accepté de le rencontrer, mais uniquement hors la présence d'un représentant du Bureau du Procureur. Par conséquent, la défense soutient qu'il lui est impossible d'interroger Jean Kambanda si elle doit s'en tenir aux conditions énoncées dans la décision de la Chambre de première instance.

4. La défense de Prosper Mugiraneza avance deux raisons pour lesquelles elle devrait être autorisée à interroger Jean Kambanda sous les conditions que celui-ci énonce dans sa lettre.

a. La défense de Prosper Mugiraneza soutient qu'«un témoin n'appartient à aucune des parties»[2]. Elle fait valoir que le Règlement de procédure et de preuve du Tribunal (le «Règlement») n'empêche pas une partie d'interroger tout témoin qui, ne faisant pas l'objet de mesures de protection, accepte d'être entendu. Ainsi, la défense maintient qu'elle devrait pouvoir rencontrer Jean Kambanda étant donné qu'il n'est pas un témoin protégé, qu'il est de manière implicite sous la garde du Greffe et qu'il est disposé à rencontrer la défense sous les conditions stipulées dans sa lettre.

b. La défense de Prosper Mugiraneza soutient qu'en la privant de son droit d'interroger Jean Kambanda, alors que celui-ci a consenti à l'interrogatoire, le droit de Prosper Mugiraneza à un procès équitable sera bafoué, ainsi que son droit de présenter une défense et d'être efficacement assisté par un défenseur.

5. La défense de Prosper Mugiraneza récuse l'affirmation selon laquelle Jean Kambanda comparaîtra comme témoin à charge. Selon la défense, si Jean Kambanda n'est pas un témoin à charge, pendant l'interrogatoire qu'elle va mener, la présence d'un représentant du Procureur n'est pas nécessaire pour protéger l'intégrité et la transparence de la procédure, éléments auxquels la Chambre de première instance attache de l'importance. Elle soutient en outre que si Jean Kambanda ne sera pas cité comme témoin à charge, le fait qu'elle choisisse ou non de l'interroger ne devrait pas importer au Procureur.

6. À titre subsidiaire, la défense de Prosper Mugiraneza fait valoir que, même si Jean Kambanda témoigne à charge de son plein gré, elle devrait être autorisée à l'interroger car il détient des informations de nature à disculper l'accusé, et il reste un témoin à décharge potentiel. La défense soutient que l'opposition que manifeste le Procureur à ce qu'elle entre en contact avec Jean Kambanda s'explique par les

[1] Lettre de Jean Karnbanda adressée à Monsieur Jean-Pelé Fomété, Conseiller juridique de la Section de l'administration des chambres, 3 décembre 2003, (la «Lettre») jointe en annexe à la requête.

[2] Affaire *Le Procureur c. Casimir Bizimungu et consorts*, *Prosper Mugiraneza's Renewed Motion for Access to Jean Kambanda and for Other Appropriate Relief*, 24 mars 2004, para. 4.

access to exculpatory information, and this attempt would be considered improper in other jurisdictions.

7. The Defence submits that it should be entitled to a presumption of ethical conduct that permits them to interview Jean Kambanda without a representative of the Prosecutor present. However, the Defence for Prosper Mugiraneza states that although it considers such measures unnecessary, in order to ensure the lack of improper influence on Jean Kambanda, it will accept "reasonable conditions"[3] on an interview with Jean Kambanda, other than the required presence of a representative of the Prosecutor.

8. The measures suggested by the Defence for Prosper Mugiraneza include recording the interview, permitting the presence of a neutral party such as a member of the Registry or of Chambers, permitting an official translator to report improper actions to the Trial Chamber, or ordering a recording of the interview to be filed under seal with the Trial Chamber or other neutral party.

9. The Defence for Prosper Mugiraneza submits that the Prosecutor's Response to the Trial Chamber Order[4] was not sufficient as it relied on statements from Jean Kambanda's Counsel, not Jean Kambanda himself. The Defence argues that the Prosecutor has intentionally delayed compliance to deny the Defence access to Jean Kambanda and questions whether the administrative arrangements noted by the Prosecutor are needed for Jean Kambanda to appear in court, since he is already a prisoner in the Registrar's custody.

Prosecutor's Submissions

10. The Prosecutor admits that Jean Kambanda's Letter stated that he was willing to meet with the Defence for Prosper Mugiraneza without any representative of the Prosecutor present.

11. However, in response to the Trial Chamber's Order, the Prosecutor submits that Jean Kambanda is a Prosecution Witness and has reconfirmed his willingness to testify through his attorney's contact with Prosecutor Hassan Bubacar Jallow. The Prosecutor previously submitted that the Defence arguments on this matter were based only on inference from Jean Kambanda's letter, and no clear showing of Jean Kambanda's refusal to appear as a Prosecution Witness. The Prosecutor submitted that unless the Defence could make a stronger argument, it lacked a legal basis to request the Trial Chamber to vary its Decision.

[3] Renewed Motion, para. 5.

[4] *Prosecutor v. Casimir Bizimungu et al.*, "Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber on Whether or Not He is Still a Prosecution Witness", 12 May 2004.

efforts qu'il déploie pour l'empêcher d'avoir accès à des éléments de preuve de nature à disculper son client. Une telle attitude serait d'ailleurs jugée inappropriée devant d'autres juridictions.

7. La défense avance qu'il devrait être présumé qu'elle observera un comportement conforme à l'éthique qui lui permettrait d'interroger Jean Kambanda hors la présence d'un représentant du Procureur. Elle se déclare cependant disposée, afin de s'assurer que Jean Kambanda ne sera pas indûment influencé – bien qu'elle l'estime inutile – , à accepter que l'on assortisse de «conditions raisonnables»[3] l'interrogatoire qu'elle entend mener de ce témoin, hors le fait de la présence obligatoire d'un représentant du Bureau du Procureur.

8. La défense propose notamment les mesures suivantes : l'enregistrement de l'interrogatoire, la présence d'une partie neutre telle qu'un représentant du Greffe ou des Chambres, la remise d'un rapport par un traducteur officiel portant à la connaissance de la Chambre de première instance toute action inappropriée ou le dépôt sous scellée de l'enregistrement de l'interrogatoire auprès de la Chambre de première instance ou d'une partie neutre.

9. La défense fait observer que la réponse du Procureur à l'ordonnance de la Chambre de première instance[4] ne constitue pas une justification suffisante de sa position car elle se fonde sur des déclarations émanant du conseil de Jean Kambanda et non de Jean Kambanda lui-même. La défense soutient que le Procureur a délibérément retardé le moment où il allait se conformer aux instructions données dans le but d'empêcher la défense de rencontrer Jean Kambanda; la défense se demande par ailleurs si les dispositions administratives que le Procureur indique sont bien nécessaires pour que Jean Kambanda comparaisse en justice, étant donné qu'il est déjà placé sous la garde du Greffe.

Arguments du Procureur

10. Le Procureur reconnaît que, dans sa lettre, Jean Kambanda a indiqué qu'il était disposé à rencontrer la défense de Prosper Mugiraneza hors la présence d'un représentant du Bureau du Procureur.

11. Cependant, dans sa réponse à l'ordonnance de la Chambre de première instance, le Procureur fait valoir que Jean Kambanda est un témoin à charge et qu'il a reconfirmé son intention de témoigner à son avocat qui a contacté le Procureur Hassan Bubacar Jallow. Le Procureur avait auparavant relevé que les arguments de la défense sur ce point avaient pour seul fondement la déduction que celle-ci tirait de la lettre de Jean Kambanda et que rien ne permettait de conclure clairement que Jean Kambanda refusait de comparaître comme témoin à charge. Le Procureur soutient que la défense, à moins qu'elle ne fasse valoir des moyens plus solides, n'est pas juridiquement fondée à demander à la Chambre de première instance de modifier sa décision.

[3] Voir la nouvelle requête de la défense, para. 5.

[4] Affaire *Le Procureur c. Casimir Bizimungu et consorts*, Réponse du Procureur intitulée *Prosecutor's Response to the Trial Chamber's Instruction to the Prosecutor to Contact Jean Kambanda and Inform the Trial Chamber on Whether or not he is Still a Prosecution Witness*, 12 mai 2004.

12. The Prosecutor argues that by contacting Jean Kambanda through his lawyer, rather than directly, he has complied with the terms of the Trial Chamber's Order. The Prosecutor submits that any information from Jean Kambanda's lawyer should be considered from Jean Kambanda.

13. The Prosecutor also submits that the Prosecutor of the Tribunal, Mr. Jallow, has prioritized the arrangements for Jean Kambanda's testimony, and he expects they will be finalized soon. The Prosecutor asserts that such arrangements require "meticulous administrative arrangements"[5] and must take into account not only transportation, but also, among other things, Jean Kambanda's concerns about legal counsel and security.

14. The Prosecutor states that if the Trial Chamber deems it necessary, he will make oral submissions in closed session to explain in detail the progress of these arrangements.

15. The Prosecutor states that he has left the Defence for Prosper Mugiraneza further time to carry out any interviews or other investigations because on 12 December 2002 he disclosed to the Defence interviews of Jean Kambanda, and anticipates calling Jean Kambanda to testify near the end of the case.

DELIBERATIONS

16. As a preliminary matter, the Trial Chamber considers that the Prosecutor has complied with the Trial Chamber's Order of 6 May 2004 by contacting Jean Kambanda through his lawyer and is satisfied that Jean Kambanda will appear as a Prosecution witness.

17. The Trial Chamber recalls its Decision that Prosper Mugiraneza's Defence team has the right to interview Jean Kambanda, with his consent. The Trial Chamber is of the view that this right exists whether or not Jean Kambanda is to testify for the Prosecution or for the Defence.

18. This Decision is consistent with the Appeals Chamber's finding that "[w]itnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to interview them... [T]he mere fact that the person has agreed to testify for the Defence does not preclude the Prosecutor from interviewing him provided of course that there is no interference with the course of justice."[6]

19. The Trial Chamber permitted in its Decision of 20 October 2003 that a Prosecutor's representative "may" and not shall[7] attend any Defence team's interview

[5] *Prosecutor v. Casimir Bizimungu, et al*, "Prosecutor's Response to Prosper Mugiraneza's Request for Ruling on His Motion To Vary the Order of 20october 2003 and Request that the Trial Chamber Strike Jean Kambanda from the Prosecutor's Witness List", 26 May 2004, para. 10.

[6] *Prosecutor v. Mile Mrksic*, Case N° IT-95-13/1, "Appeals Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party," 30 July 2003.

[7] (Emphasis added).

12. Le Procureur avance qu'en choisissant de contacter Jean Kambanda, non pas directement mais par l'entremise de son avocat, il s'est conformé aux modalités de l'ordonnance de la Chambre de première instance. Le Procureur fait valoir que toute information provenant de l'avocat de Jean Kambanda devrait être considérée comme émanant de Jean Kambanda.

13. Le Procureur soutient également que M. Jallow, Procureur du Tribunal, a accordé toute la priorité voulue aux mesures à prendre pour la déposition de Jean Kambanda, et il espère les arrêter définitivement bientôt. Le Procureur affirme que cela nécessite l'adoption de «dispositions administratives ... minutieuses»[5] qui doivent, non seulement régler la question du transport, mais aussi tenir compte notamment des préoccupations de Jean Kambanda en matière de représentation juridique et de sécurité.

14. Le Procureur indique que si la Chambre de première instance le juge nécessaire, il pourra lors d'une audience à huis clos expliquer dans le détail à quel état d'avancement se trouvent les dispositions prises.

15. Le Procureur affirme aussi avoir accordé plus de temps à la défense de Prosper Mugiraneza pour lui permettre de mener des interrogatoires ou d'autres enquêtes car le 12 décembre 2002, il lui a communiqué des déclarations de Jean Kambanda et il prévoit par ailleurs de l'appeler à la barre vers la fin de la présentation de ses moyens.

DÉLIBÉRATIONS

16. La Chambre de première instance estime tout d'abord que le Procureur s'est conformé à son ordonnance du 6 mai 2004 en contactant Jean Kambanda par l'entremise de son avocat et elle est convaincue que Jean Kambanda témoignera à charge.

17. La Chambre de première instance rappelle sa décision dans laquelle elle reconnaît à la défense de Prosper Mugiraneza le droit d'interroger Jean Kambanda, avec son consentement. La Chambre de première instance est d'avis que ce droit s'applique, que Jean Kambanda témoigne à charge ou à décharge.

18. La présente décision est dans le droit fil d'une observation formulée par la Chambre d'appel, selon laquelle «les témoins d'un crime ne sont des témoins ni de l'accusation ni de la défense; les deux parties disposent du même droit à les interroger ... [L]e simple fait que cette personne accepte de témoigner en faveur de la défense n'empêche pas l'accusation de l'interroger, sous réserve, bien entendu, que cela ne perturbe pas le fonctionnement de la justice.»[6]

19. Dans sa décision du 2 octobre 2003, la Chambre de première instance a autorisé la présence d'un représentant du Procureur qui «devrait pouvoir» et non pas doit[7]

[5] Affaire *Le Procureur c. Casimir Bizimungu et consorts*, requête intitulée *Prosecutor's Response to Prosper Mugiraneza's Request for Ruling on his Motion to Vary the Order of 20october 2003 and Request that the Trial Chamber Strike Jean Kambanda from the Prosecutor's Witness List*, 26 mai 2004, para. 10.

[6] Affaire *Le Procureur c. Mile Mrksi*c, affaire n° IT-95-13/1, Décision relative à l'appel interlocutoire de la défense concernant la communication avec des témoins potentiels de la partie adverse, 30 juillet 2003.

[7] Non souligné dans l'original.

of Jean Kambanda, in order to "protect the integrity of the proceedings."[8] If the Prosecutor's attendance would damage the Accused's right to a fair trial[9], such discretionary attendance must be abandoned in the interests of justice. Given that Jean Kambanda is not a protected witness, the Trial Chamber is of the view that any fair trial considerations are not subject to any special witness protection considerations[10].

20. As it is clear from Jean Kambanda's letter that he only consents to be interviewed by the Defence for Prosper Mugiraneza without a Prosecutor's representative present, the Trial Chamber is of the view that insistence by the Chamber on such presence could render the interview impossible which in turn might prejudice Prosper Mugiraneza's right to a fair trial. Such a requirement could deny the Accused access to exculpatory evidence[11] or prevent him from examining a witness against him as fully as those for him[12].

21. The Trial Chamber therefore concludes that, in the particular circumstances of this application, the Defence may interview Jean Kambanda in the absence of a representative of the Prosecutor. However, as suggested by the Defence and in order to avoid any possible allegation of improper conduct against any party involved in this process, the Trial Chamber is of the view that this interview shall take place in the presence of a neutral and third party, namely a representative of the Registrar.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Defence request to have Jean Kambanda removed from the Prosecutor's witness list.

GRANTS the Defence request to vary its Decision of 20october 2003 in the following terms :

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.

Arusha, 24 August 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[8] Decision of 20 October 2003, para. 26.
[9] Article 20 of the Statute.
[10] Articles 20 and 21 of the Statute.
[11] Rule 68 of the Rules.
[12] Article 20 of the Statute.

assister à tout interrogatoire de Jean Kambanda mené par l'équipe de la défense, en vue de «protéger l'intégrité de la procédure»[8]. Si la participation du Procureur devait porter atteinte au droit de l'accusé à un procès équitable[9], il faudrait renoncer, dans l'intérêt de la justice, à cette participation laissée à la discrétion de l'accusation. Compte tenu du fait que Jean Kambanda n'est pas un témoin protégé, la Chambre de première instance est d'avis que les considérations liées à l'exigence d'un procès équitable ne sont pas subordonnées à celles qui commandent la prise de mesures spéciales pour la protection de témoin[10].

20. Comme la lettre de Jean Kambanda indique clairement qu'il ne consent à être interrogé par la défense de Prosper Mugiraneza que hors la présence d'un représentant du Procureur, la Chambre de première instance estime que si elle insistait sur une telle présence, l'interrogatoire sollicité risque de ne pas avoir lieu. Maintenir cette condition pourrait porter atteinte au droit de Prosper Mugiraneza à un procès équitable, le priver d'éléments de preuve de nature à le disculper[11] ou encore l'empêcher d'interroger de manière approfondie un témoin à charge dans les mêmes conditions qu'un témoin à décharge[12].

21. Par conséquent, la Chambre de première instance conclut que, compte tenu des circonstances particulières de la requête formulée, la défense pourra interroger Jean Kambanda hors la présence d'un représentant du Procureur. Cependant, comme le propose la défense et afin d'éviter toute éventuelle allégation de comportement inapproprié de la part d'une partie quelconque impliquée dans la procédure, la Chambre de première instance est d'avis que cet interrogatoire devra se dérouler en présence d'une tierce partie neutre, à savoir un représentant du Greffe.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la demande de la défense aux fins de radiation de Jean Kambanda de la liste des témoins à charge;

FAIT DROIT à la demande de la défense en modification de sa décision du 2 octobre 2003 ainsi qu'il est indiqué ci-après :

ORDONNE que la défense de Prosper Mugiraneza soit autorisée à interroger Jean Kambanda hors la présence d'un représentant du Bureau du Procureur;

CHARGE le Greffier de prendre toutes les dispositions nécessaires pour l'interrogatoire de Jean Kambanda par la défense de Prosper Mugiraneza et de désigner un représentant du Greffe qui assistera à l'interrogatoire.

Fait à Arusha, le 24 août 2004.

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[8] Décision du 2 octobre 2003, para. 26.
[9] Article 20 du Statut.
[10] Articles 20 et 21 du Statut.
[11] Article 68 du Règlement de procédure et de preuve.
[12] Article 20 du Statut.

Order for the Transfer of a Detained Witness from Rwanda (Rule 90 bis*)*
3 September 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Transfer of detained witness – Rwanda, Tanzania – presence of the witness not required for any criminal proceedings in the requested State, transfer of the witness will not extend the period of his detention – Registry – advance notice, flexibility in the timing – United Nations Detention Facility – granted

International instruments cited : Rules of procedure and evidence, Rules 90 bis *and 73 (A)*

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 Detained Witness Pursuant to rules 90 *bis* and 73 (A) of the Rules of Procedure and Evidence", filed on 30 August 2004 (the "Motion");

NOTING the "Prosecutor's Extremely Urgent *Ex Parte* Motion for an Order for the Transfer of Detained Witnesses Pursuant to rules 90 *bis* and 73 (A) of the Rules of Procedure and Evidence – Letter from the Rwandan Authorities", filed on 2 September 2004 (the "Annex");

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 GKJ from the Republic of Rwanda, where he is currently detained. The request further specifies that the witness is needed for transfer on or before Monday 13 September 2004, ready for the recommencement of proceedings in this case.

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 the period of his detention as foreseen by the Republic of Rwanda.

3. The Prosecution provides as an Annex a letter from the Ministry of Justice in Rwanda addressed to the Prosecutor of the Tribunal confirming that Witness GKJ (amongst others contained on a list) is available to give testimony before the Tribunal[1].

1 Confidential letter dated 31 August 2004.

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;

6. 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 views it as 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 witnesses to be transferred should remain at the United Nations Detention Facility in Arusha (the "UNDF") for the shortest period practically possible in order to allow for their testimony to be heard, and in any event a period of time 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 Witness GKJ to the UNDF, at an appropriate time prior to his anticipated testimony during the trial session set to recommence on 13 September 2004. His return travel should be facilitated as soon as practically possible after his testimony has ended. 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, 3 September 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion for Adjournment of 13 September Trial Session 3 September 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – reimbursement of expenses of Counsel, Registrar – recourse to the Trial Chamber, prior procedures, exceptional circumstances – right to a trial without undue delay – equality of arms – unjustifiable refusal – duties of Counsel towards client and Tribunal – motion denied

International instruments cited : Rules of procedure and evidence, Rule 33 (B) – Directive on the Assignment of Defence Counsel, art. 17 (A), 17 (D), 27 (A) and 30 – Tribunal's Code of Professional Conduct for Defence Counsel, art. 6 and 9 (1)

National instruments cited : Texas Disciplinary Rules of Professional Conduct (1989), Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995) (State Bar Rules art X [[section]] 9)

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 Emergency Motion for Continuance of 13 September 2004 Trial Session" filed on 23 August 2004, (the "Motion");

NOTING "Confidential exhibits E and F to Prosper Mugiraneza's Emergency Motion for Continuance of 13 September 2004 Trial Session" filed on 23 August 2004;

NOTING the Facsimile Transmission ICTR-JUD-11-2-5-2543 of 20 August 2004 sent by Ms Aminatta L.R. N'Gum, Deputy Chief and OIC Defence Counsel and Detention Management Section (DCDMS) to Mr Tom Moran concerning reimbursement of air fares and Daily Subsistence Allowance (DSA);

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Emergency Motion for Continuance of 13 September 2004 Trial Session" filed on 27 August 2004;

NOTING Counsel's letter to the Registry filed on 1 September 2004 in which Counsel indicates that due to an unexpected payment of a fee by a client, Counsel has been able to purchase a return ticket to Arusha and therefore the Motion can be dismissed as moot;

NOTING the "Registrar's Representation Pursuant to Rule 33 (B) of the Rules of Procedure and Evidence Regarding Prosper Mugiraneza's Emergency Motion for Continuance of 13 September 2004 Trial Session" filed on 2 September 2004;

WHEREAS the Defence moves the Tribunal to adjourn the trial session set to begin on 13 September 2004 due to "Counsel's inability to advance travel expenses to Arusha" because of the failure of the Registry to reimburse the following : past airline tickets and DSA for Counsel's Legal Assistant;

WHEREAS Counsel stipulates that he will be able to appear "if the Registry purchases a pre-paid airline ticket" under the same conditions as United Nations staff members;

WHEREAS Counsel recalls correspondence to the Registry since June 2004 in which the issues of payment of previously purchased tickets had been raised and in which Counsel had indicated that he would not pay for further tickets to Arusha unless the Tribunal reimbursed him for the cost of those used tickets;

WHEREAS Counsel indicates that the Motion should not be interpreted as a refusal to attend trial or refusal to purchase a ticket but is based on Counsel's inability to purchase the ticket until reimbursement is done as Counsel is in no position to advance funds for travel expenses;

WHEREAS Counsel argues that this problem directly impacts the right of the Accused to a trial without undue delay and adds that equality of arms requires that Defence and Prosecutor be treated the same in this regard;

WHEREAS Counsel argues that if the Registry prepays a ticket or reimburses him the Motion will become moot and should be dismissed;

WHEREAS the DCDMS answered some of Counsel's queries on 20 August 2004 stating that some documents were missing for the reimbursement of part of an air fare and for the DSA pursuant to the Directive on the Assignment of Defence Counsel (the "Directive"). In that correspondence, the Section also informed Counsel that the Finance Section had processed fee payment and travel claims for a total sum amounting to US$ 25,244.87 to be paid onto his account the following week;

WHEREAS in the same correspondence, the DCDMS reminded Counsel that matters relating to reimbursement of expenses and payment of fees were within the Registrar's jurisdiction and that in the event of a dispute, Counsel should initially take up the matter with the Deputy Registrar and then the Registrar pursuant to Article 30 of the Directive;

WHEREAS the Prosecution submits that the matter raised by Counsel is administrative and falls within the mandate of the Registrar; that the Trial Chamber should direct Counsel and the Registrar to resolve the matter in a timely manner; that the matter should be resolved before 6 September for the trial to proceed as scheduled.

WHEREAS the Registrar submits that in view of the facts listed in his submissions, and having quoted Articles 17 (A), 17 (D) and 27 (A) of the Directive, the Motion is "not only moot, but frivolous, vexatious and without substance or merit and should be dismissed." In essence, the Registrar notes that Counsel's inability to comply with the relevant rules for reimbursement of travel expenses caused delays in processing the reimbursement. It notes that most missing documents necessary for the processing of the reimbursement were received by the registry after the filing of the Motion. Moreover the Registrar notes that by the time the Motion was filed on 23 August 2004, Counsel for Mugiraneza had already received adequate funds (payment and reimbursement of other expenses) to pay for a return ticket to Arusha.

DELIBERATION

1. The Chamber is mindful of the difficulties Counsel has indicated. However, the Chamber recalls that settlement of disputes relating to the payment of remuneration or the reimbursement of expenses of Counsel is under the jurisdiction of the Registrar who may make a decision after consulting the President and if necessary, the Advisory Panel, pursuant to Article 30 of the Directive. This procedure must be followed. Recourse to the Trial Chamber in fees dispute issues should only be had in exceptional circumstances. It should be resorted to only when Counsel has utilised all other available channels without results, and Counsel can demonstrate that the Registry is acting unreasonably and that the dispute directly affects the conduct of the trial. The present Motion does not show that Counsel has exhausted such prior procedures to obtain a remedy. Consequently, the Trial Chamber rejects the Motion as being improperly filed before it.

2. With respect to this procedural aspect, the Chamber notes the comment in the Texas Disciplinary Rules of Professional Conduct[1], which applies to Counsel for Mugiraneza in his national jurisdiction, and notes the following regarding client-lawyer relationship in relation to 'Fee Disputes and Determinations' (section 1.04 Fees) :

> 12. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by a bar association, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyers fee, for example, in representation of an executor or administrator, or when a class or a person is entitled to recover a reasonable attorneys fee as part of the measure of damages. All involved lawyers should comply with any prescribed procedures.

3. Counsel asserts in paragraph 9 of his Motion paper that 'Nothing in this motion should be interpreted as a *refusal* to attend the trial session set to begin on 13 September 2004. Nor should anything be interpreted as a refusal to purchase a ticket to Arusha for the trial session. Rather, this motion is based on counsel's *inability* to purchase airline tickets to travel to Arusha until such time as the Registry reimburses him for previous travel. The Chamber is not persuaded that the object of this submission is borne out on the record. Rather, the wording and tenor of the Motion and that of the supporting Annexes clearly portray an unjustifiable *refusal* by Counsel to be present for the trial session.

4. In this context, the Chamber wishes to remind Counsel of his duties towards his client and towards the Tribunal. The Chamber recalls that pursuant to the Tribunal's Code of Professional Conduct for Defence Counsel, "Counsel must represent a client diligently in order to protect the client's best interests" (Article 6) and that Counsel must put the interests of the client before his own interests or of those of any other person (Article 9 (1)).

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

1 Tex. Disciplinary R. Prof. Conduct, (1989) reprinted in Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995)(State Bar Rules art X [[section]]9). See also Commentary 9 to Rule 1.5 of the 2003 Version of the American Bar Association Model Rules of Professional Conduct.

REJECTS the Motion;

DENIES payment of fees and costs associated to the filing of the Motion and ORDERS the Registrar not to pay the costs and fees associated with the filing of the Motion.

Arusha, 3 September 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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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 3 September 2004 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Prosecutor's witness list, adding – materiality of the testimony, complexity of the case, prejudice to the Defence – flexible approach of the Tribunal – late disclosure – probative value – facts sufficiently pleaded in the indictment – credibility of witness, cross-examination – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73 bis (E)

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Alfred Musema*, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses, 20 April 1999 (ICTR-96-13-T,* Reports 1999*, p. 1244) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana et al.*, Decision on the Prosecutor's Oral Motion to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52-T,* Reports 2001*, p. 1172) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E), 26 June 2003 (ICTR-98-41-T,* Reports 2003*, p. 84) – Trial Chamber,* The Prosecutor v. André Ntagerura et al*, Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 ter (E), 4 June 2002 (ICTR-99-46-T,* Reports 2002*, p. X) – Trial Chamber II,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003 (ICTR-99-50-I,* Reports 2003*, p. 1168) – Appeals Chamber,* The Prosecutor v. Casimir Bizimungu*, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 (ICTR-99-50,* Reports 2004*,*

p. X) – Trial Chamber, The Prosecutor v. André Ntagerura et al.*, Judgement, 25 February 2004 (ICTR-96-10-A,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E), 21 May 2004 (ICTR-98-41-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosecutor's Interlocutory Appeals against Decision of the Trial Chamber on Exclusion of Evidence, 25 June 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Mugiraneza Interlocutory Appeal against Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004 (ICTR-99-50,* Reports 2004*, p. X)*

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 Very Urgent Motion Pursuant to Rule 73 *bis* (E) to Vary the Prosecutor's List of Witnesses Filed on 25 May 2004", filed on 12 August 2004 (the "Motion");

NOTING

1) The "*Réponse de Casimir Bizimungu à la requête du Procureur visant à obtenir la permission d'ajouter le témoin GTC sur la liste finale de témoins*", filed on 17 August 2004 (the "Response");

2) The "*Réponse amendée et confidentielle de Casimir Bizimungu à la requête urgente du Procureur visant à obtenir la permission d'ajouter le témoin GTC sur la liste consolidée et finale de témoins*", filed on 23 August 2004 (the "Amended Response");

3) The "*Fait additionnel à la réponse amendée et confidentielle de Casimir Bizimungu à la requête urgente du Procureur visant à obtenir la permission d'ajouter le témoin GTC*", filed on 25 August 2004;

TAKING INTO CONSIDERATION

1) The list of witnesses filed by the Prosecutor with his Pre-Trial Brief on 20 October 2003 (the "Initial Witness List");

2) The "Final List of Prosecution Witnesses Pursuant to Status Conference of 4 June 2004", filed on 9 June 2004 (the "Final Witness List");

ARGUMENTS OF THE PARTIES

Prosecution Submissions

1. The Prosecutor seeks leave, pursuant to Rule 73 *bis* (E), to reinstate Witness GTC in the Prosecutor's witness list. This witness was in the Prosecutor's witness list filed on 20 October 2003.

2. The Prosecutor submits that in construing Rule 73 *bis* (E), the Tribunal has adopted a flexible approach in the exercise of its discretion. In the case of *The Prosecutor v. Ntagerura et al.*, the Trial Chamber held that "the adding of a witness to

the witness list is a matter for which the Chamber should adopt a flexible approach in the exercise of its discretion."[1]

3. According to the Prosecutor, it is in the interest of justice that the list of witnesses be varied by the addition of Witness GTC. The Prosecutor argues that he has had to review his case in view of the exclusion of nine witnesses[2] who would have testified to crimes committed by Casimir Bizimungu. The Prosecutor has identified Witness GTC as a witness who will testify to relevant facts implicating Casimir Bizimungu and which will affect the determination of the case. Witness GTC was an eyewitness to events implicating Casimir Bizimungu; this material fact should be taken into account in allowing the Motion[3].

4. The Prosecutor contends that he has disclosed to the Defence all the statements of Witness GTC and therefore submits that the instant application will not prejudice the Defence in the preparation of its case. The Defence will not suffer from any surprise and the application will not cause undue delay in the trial of the Accused.

5. The Prosecutor intends to call Witness GTC in October 2004, to give the Defence adequate time to carry out further investigations and prepare for cross-examination. The Prosecutor notes that such an arrangement has been taken into account in the past to allow variation of a party's list of witnesses[4].

6. The Prosecutor anticipates that the length of the examination-in-chief of Witness GTC will be about four hours. The Prosecutor undertakes to limit his examination-in-chief bearing in mind the principles of relevance and brevity.

7. The Prosecutor attaches a "Summary of Anticipated Testimony of Witness GTC" and a list of witnesses for the session beginning 13 September 2004. This list includes Witness GTC. According to that summary, Witness GTC will testify that he was a member of the youth wing of the CDR political party and that he was trained in the use of weapons in the house of Hassan Ngeze and at the premises of CDR, both located in Gisenyi. He will also testify about a speech given by Casimir Bizimungu at the Umuganda Stadium in mid-May 1994 and about the subsequent killing of Tutsi in Gisenyi using some of the arms distributed at the stadium. The Witness should also testify to the criminal activities of Casimir Bizimungu's accomplices like Hassan Ngeze and Bikindi.

Defence Submissions

8. The Defence objects to the addition of Witness GTC to the Prosecutor's witness list, arguing that such a variation of the witness list is not in the interest of justice as it does not meet the requirements necessary to decide whether a witness list may

[1] *The Prosecutor v. André Ntagerura et al*, Case N° ICTR-99-46-T, "Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73ter (E)", 4 June 2002, para 10.

[2] "Decision on Prosecutor's Interlocutory Appeals against Decision of the Trial Chamber on Exclusion of Evidence", 25 June 2004.

[3] *The Prosecutor v. Musema*, "Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", 20 April 1999, para. 11; *The Prosecutor v. Nahimana et al*., "Decision on the Prosecutor's Oral Motion to Amend the List of Selected Witnesses", 26 June 2001, para. 20.

[4] *The Prosecutor v. Nahimana et al*., "Decision on the Prosecutor's Oral Motion to Amend the List of Selected Witnesses", 26 June 2001, para. 32, 37.

be varied pursuant to Rule 73 *bis* (E) of the Rules. These requirements were stated in the Decision rendered by the Trial Chamber on 23 June 2004.

9. The Defence asserts that the composition of the Prosecutor's witness list has been discussed many times by the Parties and that the Trial Chamber has already rendered several decisions on Prosecutor's motions for leave to vary witness list. On 19 May 2004, the Chamber ordered the Prosecutor to file a consolidated and final list of witnesses. On 9 June 2004, the Prosecutor filed a "Final List of Prosecution Witnesses Pursuant to Status Conference of 4 June 2004". The Defence underscores that Witness GTC was not in this final list. Accordingly, the Motion does not comply with the Decision of 19 May 2004.

10. The Defence further claims that the Motion was knowingly filed late without good cause being shown. According to the Defence, the Prosecutor's decision to add Witness GTC arises from the exclusion of nine witnesses decided by the Appeals Chamber on 25 June 2004[5]. This exclusion was decided on the basis of two decisions rendered on 19 January 2004 and 3 February 2004 by this Chamber. The Prosecutor should therefore have considered the addition of Witness GTC since those decisions, or at least before the adjournment of trial on 9 July 2004.

11. The Defence submits that, if granted, this late Motion would cause an important prejudice for the Defence as the Prosecutor requested an addition and not merely a substitution of witnesses. It would be extremely difficult for Counsel to leave Arusha during the next trial session to conduct investigations on the meeting held at Umuganda Stadium in Gisenyi. The Defence also claims that such a variation of the witness list could delay the presentation of the Defence case scheduled for January 2005. This variation would challenge the Accused's right provided under Article 20 (4) (b) and (e) of the Statute, namely the right to have adequate time and facilities for the preparation of his defence and the right to examine the witnesses against him.

12. The Defence argues that, according to the decisions previously rendered by the Trial Chamber and the Appeals Chamber, the burden of proving the factors to be considered to decide whether the variation of witness list may be granted lies with the Prosecutor[6]. The Prosecutor has notably failed to prove the materiality of the testimony of Witness GTC. The fact that Witness GTC was an eyewitness to events implicating Casimir Bizimungu is not relevant since these events are not specifically pleaded in the indictment. The Defence recalls that the Prosecutor had sought an amendment of the indictment regarding the implication of Casimir Bizimungu in the distribution of weapons in the *Préfecture* of Gisenyi. The leave to file an amended indictment was denied by the Trial Chamber considering that the proposed amendments contained an expansion of the charges beyond the scope of the current indictment and involved substantial changes which would cause an incurable prejudice to the Accused[7].

[5] "Decision on Prosecutor's Interlocutory Appeals against Decision of the Trial Chamber on Exclusion of Evidence", 25 June 2004.

[6] "Decision on Mugiraneza Interlocutory Appeal against Decision of the Trial Chamber on Exclusion of Evidence", 15 July 2004, para. 13.

[7] "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003. This decision of the Trial Chamber was upheld by the Appeals Chamber, See : "Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment", AC, 12 February 2004.

13. The Defence challenges the credibility of Witness GTC and the probative value of his testimony, arguing that the Witness did not implicate Casimir Bizimungu in his first statements. The Defence adds that Witness GTC has testified before the Tribunal in the *Media* case in September 2001, notably on the distribution of weapons in the *Préfecture* of Gisenyi and that his testimony did not implicate Casimir Bizimungu. The Defence points out that since he was convicted in Rwanda, Witness GTC cooperates with the Rwandan judicial authorities and that the fact that Witness GTC is currently detained in Rwanda challenges the probative value of his testimony[8].

14. In its Amended Response, the Defence notes that several documents relating to Witness GTC, filed on 10 August 2004, were disclosed on 17 August 2004, that is after the Defence had filed its Response to the Motion. This disclosure includes notably : the English version of the statements of Witness GTC, dated 17 April 2002 and 11 September 2003; a Judgement of the *Tribunal de première instance de Gisenyi*, dated 25 May 2001; an incomplete document called Criminal Investigation Report; a document called Appeal*,* available only in Kinyarwanda; a document called Record of Confession, Plea of Guilty and Request for Pardon*,* which does not concern Witness GTC. As these documents are not recent, the Defence contends that this disclosure is manifestly late, incomplete and might contain exculpatory evidence that should have been disclosed at an earlier stage of the proceedings.

DELIBERATIONS

15. Rule 73 *bis* (E) of the Rules of Procedure and Evidence reads as follows :

> (E) After commencement of Trial, the Prosecutor, 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.

16. In previous decisions, this Tribunal has held that the Prosecutor should be allowed to reinstate its list of witnesses, after a consideration of several factors[9]. These factors include the materiality of the testimony, the complexity of the case, the prejudice to the Defence (including the element of surprise), on-going investigations, replacements and corroborations of evidence[10]. In addition, in the case of *The Prosecutor v. Bagosora et al.,* the Trial Chamber expanded on these factors, and considered that Rule 73 *bis* (E) requires a "close analysis" of each witness, including the :

> sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; and the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors;

[8] *The Prosecutor v. Ntagerura et al*., Judgement, 25 February 2004

[9] *The Prosecutor v. Théoneste Bagosora et al*, Case N° ICTR-98-41-T, "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)", 21 May 2004, para. 8-12.

[10] *Ibid*. at para. 8 (quoting *The Prosecutor v. Ferdinand Nahimana et al*., Case N° ICTR-99-52-T, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses", 26 June 2001, para. 19-20).

and the justification offered by the Prosecution for the addition of the witnesses[11].

17. The Trial Chamber concurs with the reasoning of the Trial Chamber in the case of *The Prosecutor v. André Ntagerura et al.*, which held that the Tribunal should adopt a flexible approach in the exercise of its discretion relating to the matter of adding witnesses to a witness list[12].

18. The Chamber notes that the Defence has objected to the Motion on the basis of lateness of the addition of Witness GTC in the Prosecutor's list and on the basis of the lack of probative value of the Witness' testimony, particularly, the fact that the events witnessed by GTC are not specifically covered by the indictment. The Chamber has further noted that the Defence submits that the disclosure of several documents relating to the testimony of Witness GTC was manifestly late.

19. Regarding the time and facilities for the preparation of the Defence and the ability to conduct an effective cross-examination of the proposed testimony, the Trial Chamber recalls that Witness GTC was included in the initial witness list filed by the Prosecutor on 20 October 2003 and that he was only withdrawn from this list on 25 May 2004. Consequently, the Trial Chamber is of the view that the addition of this Witness does not constitute an addition *per se* but is to be considered as a reinstatement. In addition, the Chamber notes that according to the Prosecution and uncontested by the Defence, the unredacted statements of Witness GTC dated 16 April 2003, February/March 2001, 17 April 2002 and 11 September 2003 were disclosed on 8 October 2003. Therefore, the Chamber finds that the Defence has had enough time and sufficient notice of the content of his prospective testimony to prepare an effective cross-examination of Witness GTC, and will not be prejudiced by his reinstatement in the Prosecutor's witness list. However, the Trial Chamber finds that in view of the time factor, Witness GTC should be called towards the end of the Prosecution case.

20. Regarding the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment, the Chamber notes that Witness GTC is expected to testify notably to a speech allegedly given by Casimir Bizimungu and to a distribution of weapons which allegedly took place in his presence at the Umuganda Stadium around mid-May 1994. The Chamber recalls that these specific facts were included in the amended indictment proposed by the Prosecutor and rejected in its entirety by the Chamber in the Decision of 6 October 2003. The Appeals Chamber upheld this Decision on 12 February 2004, considering that some of the proposed amendments contained an expansion of the charges beyond the scope of the indictment[13].

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[11] *Ibid*. at para. 9 (quoting *The Prosecutor v. Théoneste Bagosora et al*., Case N° ICTR-98-41-T, "Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E)", 26 June 2003, para. 14).

[12] *The Prosecutor v. André Ntagerura et al*, Case N° ICTR-99-46T, "Decision on Defence for Ntagerura's Motion to Amend Its Witness List Pursuant to Rule 73 *ter* (E)", 4 June 2002, para 10.

[13] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme Bicamumpaka, Prosper Mugiraneza*, Case N° ICTR-99-50-I : "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003; "Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment", AC, 12 February 2004.

21. The Trial Chamber recalls that the addition of a witness cannot be used as an opportunity to modify substantially the charges against the Accused. However, the Trial Chamber considers that the proposed testimony of Witness GTC could supply relevant information on certain facts which are sufficiently pleaded in the current indictment, particularly the power structure of the Youth Wings, the training of the militias, the meetings organized by Cabinet Members throughout Rwanda, the distribution of weapons by civilian and military authorities, the instigation and assistance in committing massacres of the Tutsi population in several *Préfectures*, including Gisenyi, before and during the events referred to in the indictment, notably in paragraphs 5.3, 5.19, 5.22 and 6.30.

22. Regarding the credibility of Witness GTC, the Trial Chamber finds that at this stage, to wit during the determination of whether a witness may be reinstated or added to the Prosecutor's witness list pursuant to Rule 73 *bis* (E), the credibility of a witness is not a factor to be considered. The Defence will have the opportunity to challenge the credibility of Witness GTC in cross-examination. Therefore, the Chamber rejects the Defence's arguments in that respect.

23. Accordingly, the Trial Chamber finds that the prospective testimony of Witness GTC meets the requirements stated in the case of *The Prosecutor v. Bagosora et al.* regarding the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment as well as the ability of the Defence to conduct an effective cross-examination of the proposed testimony. Therefore, the Trial Chamber considers that the Defence will not be prejudiced by the reinstatement of Witness GTC in the Prosecutor's witness list.

FOR THE ABOVE REASONS, THE TRIBUNAL :

GRANTS the Motion and

ALLOWS the Prosecutor to reinstate Witness GTC in the Prosecutor's witness list :

Arusha, 3 September 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI 14 September 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – disclosure of material – Prosecutor in a better position than the Defence to obtain an information, specific knowledge of the defence – duty of the Prosecutor to fully investigate a case – exculpatory evidence – motion denied

International instruments cited : Rules of procedure and evidence, Rule 68

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 Apri1 2004 (ICTR-99-50-T,* Reports 2004*, p. X)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Radislav Krstic*, Judgment, 19 April 2004 (IT-98-33-A)*

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 Exculpatory Evidence pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 13 February 2004, (the "Motion");

NOTING the "Prosecutor's Response to a Motion by Prosper Mugiraneza pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 18 February 2004, (the "Response");

NOTING "Prosper Mugiraneza's Reply to the Prosecutor's Response to his Motion pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 24 February 2004, (the "Reply") AND the "Supplement to Prosper Mugiraneza's Reply the Prosecutor's Response to his Motion pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI" filed on 26 September 2004 (the "Supplement");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence seeks exculpatory evidence in possession of the Registrar and/or the Prosecutor related to Witness GKI. The purpose of this evidence is to attack the credibility of the witness by showing that Witness GKI had met with members of the Office of the Prosecutor in preparation of his testimony though he denied such an allegation before the Trial Chamber.

2. According to the Defence, on 7 February 2004, two attorneys of the Office of the Prosecutor (the "OTP"), namely Mr. Babajide and Mr. Bazawule, were seen by the Defence at the United Nation Detention Facility (the "UNDF"). The Defence believes that the attorneys were at the UNDF to meet with detained witnesses and asserts that either the Prosecution or the UNDF (or both) has records that show the identities detainees with whom the attorneys met.

3. The Defence submits that if such records show that the attorneys met with witness GKI, they are exculpatory according to Rule 68 of the Rules of Procedure and Evidence of the Tribunal, (the "Rules"). Therefore, the Trial Chamber may order for *in camera* inspection all records of visits by members of the OTP to persons detained in the UNDF. If the Trial Chamber finds that the documents are exculpatory, it should order the disclosure to the Defence.

4. According to the Prosecutor, the Motion lacks foundation and should be denied. The Prosecutor submits that if there was a belief by the Defence that the witness had a meeting with Attorneys from the Office of the Prosecutor, he should have confronted the witness during cross-examination. The witness must be afforded the opportunity to explain himself during trial whether he had a meeting with attorneys and investigators based both in Kigali and Arusha or to those only based in Kigali.

Defence Reply

5. The Defence argues that the witness was asked whether or not he had met with representatives of the Office of the Prosecutor during cross examination. According to the Defence, the Prosecution did not deny that such a meeting took place; the response does not address the factual issue presented.

6. The Defence contends that the Prosecutor has a continuing duty to provide exculpatory evidence. According to the Defence, the exculpatory evidence sought by the Defence, if it exists, would be relevant to the Trial Chamber's determination of the weight to be given to Witness GKI's testimony.

DELIBERATIONS

7. Rule 68 (A) oft he Rules reads as follows :

> 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.

8. The Trial Chamber is of the view that Rule 68 does not distinguish the type and nature of the material which has to be disclosed by the Prosecutor to the Defence. In addition, there is no time limit as to when the Prosecutor should disclose the information so the obligation under this rule is of a continuous nature. Therefore, the Prosecutor is under an obligation to disclose to the Defence any material known to him and which is favourable to the Accused in the preparation of his defence, regardless of the type and the nature of the material.

9. In line with this broad interpretation of Rule 68, the Trial Chamber concurs with the Appeals Chamber reasoning in the case of *The Prosecutor v. Radislav Krstic* :

> "[the] Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. Given the fundamental

importance of disclosing exculpatory evidence, however, it would be against the interests of a fair trial to limit the Rule's scope..."[1]

10. However, the Trial Chamber considers that Rule 68 (A) does not impose obligation on the Prosecutor to search for materials which he does not admit having knowledge of nor does it entitle the defence to embark on a fishing expedition to obtain exculpatory material. It does, however, mean that where the Defence has specific knowledge of any information covered by the Rule and which is not currently within the possession or control of the Prosecutor, and the Defence requests that information in specific terms, the Prosecutor should attempt to obtain that information where the Prosecutor is in a better position than the Defence to do so. Once this is successfully done, that material should be disclosed to the Defence. This obligation stems from the Prosecutor's inherent and ongoing duty to fully investigate a case before this Tribunal[2].

11. The Trial Chamber is of the opinion that the purpose of Rule 68 is not to facilitate the conduct of a fishing expedition on the sole basis of an unsworn assertion that someone saw two members of the Prosecution on a certain date at the UNDF. The Trial Chamber recalls that as the Defence stated in its Motion, it has "no specific proof that the witness actually met with the attorneys" nor can it say "without doubt that the attorneys from the OTP met with GKI as [he] believes." Therefore, the Trial Chamber is of the view that the record of all persons who visited the UNDF on this particular day cannot be considered as falling within the scope of Rule 68 but should be considered as mere speculation by the Defence Counsel that it could be exculpatory.

12. The Trial Chamber considers that the Defence has not demonstrated sufficient grounds under Rule 68 or any other rule for the Trial Chamber to order the production of the records of meetings between OTP attorneys and Witness GKI at the United Nations Detention Facility on or around 7 February 2004.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[1] *The Prosecutor v. Radislav Krstic*, Case N° IT-98-33-A, Judgment, 19 April 2004, para. 180.

[2] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, "Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidenee", 23 April 2004, para. 9.

Decision fon Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe 28 September 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi – witness testimony – disclosure of a report – fact witness, expert – credibility, objectivity of a witness – factors fir the relevance of an expert opinion – direct and public incitement using the media, RTLM, Kangura – material disclosure – evidence – equality of arms – ICTY – premature – motion denied

International instruments cited : Statute, art. 40 (4) – Rules of procedure and evidence, Rules 68 (B), 89 (C), 95

International case cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu*, Decision on a Defence motion for the Appearance of an Accused as an Expert witness, 9 March 1998 (ICTR-96-4-T,* Reports 1998*, p. 32)*

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, (the "Trial Chamber");

BEING SEIZED of the "Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe" filed on 23 June 2004, (the "Motion");

NOTING the "Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe" filed on 29 June 2004, (the "Response");

HAVING RECEIVED :

(i) the "Requête au soutien de Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe" filed on 28 June 2004;

(ii) the "Prosper Mugiraneza's Memorandum in support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Joseph Ngarambe" filed on 30 June 2004;

(iii) the "Mugenzi's Rejoinder to the Prosecutor's Response to a Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe" filed on 5 July 2004;

Décision relative à la requête de Justin Mugenzi au sujet du rapport et de la déposition envisagée de Joseph Ngarambe 28 septembre 2004 (ICTR-99-50-T)

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Président de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi – témoignage – communication de rapport - témoin de faits, expert – crédibilité, objectivité du témoin – facteurs pour décider de la pertinence de l'opinion donnée par un expert – utilisation des médias dans le cadre de l'incitation directe et publique à commettre le génocide, RTLM, Kangura – communication de documents – preuve – égalité des armes – TPIY – prématuré – requête rejetée

Instruments internationaux cités : Statut, art. 40 (4) – Règlement de procédure et de preuve, art. 68 (B), 89 (C), 95

Jurisprudence internationale citée :

Chambre de première instance I, Le Procureur c. Jean-Paul Akayesu*, Décision faisant suite à une requête de la défense aux fins de comparution d'un accusé en tant que témoin expert, 9 mars 1998 (ICTR-96-4-T,* Recueil 1998*, p. 33)*

LE TRIBUNAL PÉNAL 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 Justin Mugenzi intitulée *Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*, déposée le 23 juin 2004, (la «requête»),

PRENANT ACTE de la réponse du Procureur, intitulée *Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*, déposée le 29 juin 2004 (la «réponse»),

AYANT REÇU

i) La requête au soutien de *Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*, déposée le 28 juin 2004;

ii) Le mémorandum de Mugiraneza, intitulé *Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*, déposé le 30 juin 2004;

iii) La réplique de Mugenzi, intitulée *Mugenzi's Rejoinder to the Prosecutor's Response to a Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*, déposée le 5 juillet 2004;

(iv) the "Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngarambe" filed on 5 July 2004;

(v) the "Reply of Defendant Bicamumpaka to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe" filed on 12 July 2004;

(vi) the "Prosecutor's Response to Prosper Prosper Mugiraneza's Memorandum in support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Joseph Ngarambe" filed on 12 July 2004;

(vii) the "Prosecutor's Response to Defendant Bicamumpaka's Reply to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe filed on 19 July 2004;

(viii) the "Prosecutor's Response to *Requête au soutien de Justin Mugenzi*'s Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and *Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngarambe*" filed on 23 July 2004;

ARGUMENTS OF THE PARTIES

Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe

1. The Defence for Justin Mugenzi objects to the introduction into evidence of the document entitled, "Report on the anti-tutsi propaganda 1990-1994" and to Prosecution Witness Joseph Ngarambe on three grounds: (1) Joseph Ngarambe is not qualified to testify about the Report, and the Report itself is neither objective nor necessary; (2) the materials relied upon in the making of the Report were not disclosed to the defence; and (3) the Report attributes guilt for the events which are the subject of this trial.

2. According to the Defence, the Prosecutor has served on the Defence the "Report on the anti-tutsi propaganda 1990-1994" ("the Report"), which was commissioned by the International Criminal Tribunal for Rwanda (the "ICTR"). Joseph Ngarambe is identified as one of the authors of this report. According to the Defence, the witness summary submitted in relation to Joseph Ngarambe, does not mention the Report or his qualifications regarding the subject of the Report, but is concerned entirely with Joseph Ngarambe's direct personal experiences before and after 6 April 1994. The Defence submits that Joseph Ngarambe does not appear on a list of expert witnesses disclosed by the Prosecution. As such, the Defence objects to Joseph Ngarambe being called to testify about the Report.

3. The Defence additionally argues that the authors express numerous personal interpretations and opinions. Moreover, the Defence argues that the Report did not rely on a sufficiently broad array of material and is therefore not objective.

iv) La Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngararnbe, déposée le 5 juillet 2004;

v) La réplique de Bicamumpaka, intitulée *Reply of Defendant Bicamumpaka to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe*, déposée le 12 juillet 2004;

vi) La réponse du Procureur, intitulée *Prosecutor's Response to Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*, déposée le 12 juillet 2004;

vii) La duplique du Procureur, intitulée *Prosecutor's Response to Defendant Bicamumpaka's Reply to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe*, déposée le 19 juillet 2004;

viii) La réponse du Procureur, intitulée *Prosecutor's Response to* Requête au soutien de Justin Mugenzi*'s Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and* Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngarambe, déposée le 23 juillet 2004.

ARGUMENTS DES PARTIES

Requête de Justin Mugenzi au sujet du rapport et de la déposition envisagée de Joseph Ngarambe

1. La défense de Justin Mugenzi s'oppose à ce que soit admis en preuve le document intitulé Étude de la propagande anti-tutsie, période 1990- 1994 et entendu le témoin à charge Joseph Ngarambe. Elle fonde son refus sur les trois motifs suivants : 1) Joseph Ngarambe n'est pas qualifié pour déposer sur le rapport, et celui-ci n'est ni objectif ni nécessaire; 2) Les pièces sur lesquelles le rapport se fonde n'ont pas été communiquées à la défense; 3) Le rapport impute à l'accusé la responsabilité d'événements qui font l'objet du présent procès.

2. Selon la défense, le Procureur lui a communiqué le document intitulé Étude de la propagande anti-tutsie, période 1990-1994 (l'«Étude») commandé par le Tribunal pénal international pour le Rwanda (le «TPIR»). Joseph Ngarambe est identifié comme l'un des auteurs de l'étude. Selon la défense, le résumé des témoignages présenté en ce qui concerne Joseph Ngarambe ne mentionne pas cette étude. Il ne fait pas état non plus des connaissances particulières que celui-ci aurait sur le sujet de l'étude et traite exclusivement des faits qu'il a directement et personnellement vécus avant et après le 6 avril 1994. La défense soutient que Joseph Ngarambe ne figure pas sur la liste des témoins experts communiquée par le Procureur. En conséquence, elle s'oppose à ce que celui-ci dépose au sujet de l'étude.

3. La défense affirme en outre que les auteurs ont exprimé un nombre important d'opinions et d'interprétations personnelles. De plus, elle estime que l'étude manque d'objectivité les auteurs s'étant fondés sur une gamme insuffisamment large de matériaux.

4. In light of the above, the Defence requests that the Prosecutor be debarred from introducing the Report into evidence, and that Joseph Ngarambe's testimony be limited to that of his "2000 witness statement."

5. Further, the Defence argues that it is a breach of the principle of the equality of arms that the bulk of the sources used in preparing the Report were not made available to the Defence, and that the Prosecutor will be culling from these materials to prove the case against the defendants.

6. Finally, the Defence submits that the Report in question expresses an unsubstantiated and unqualified opinion as to the persons who were criminally liable for the genocide. The Defence contends that neither an expert or non-expert witness is permitted to testify to such matters, and therefore the Report should be barred and Joseph Ngarambe's testimony thus limited to the matters of which he has factual knowledge.

Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe

7. The Prosecutor moves the Trial Chamber to dismiss the Motion in its entirety, and to admit Joseph Ngarambe's Report without delay.

8. The Prosecutor argues that in the *Media* case the Trial Chamber admitted into evidence a similar report that was co-authored by Joseph Ngarambe, in conjunction with the testimony of expert witnesses Jean-Pierre Chrétien and Marcel Kabanda. Therefore, Joseph Ngarambe should be allowed to give evidence on another report which he authored himself.

9. The Prosecutor further submits, quoting *Prosecutor v. Simic, et al*., before the International Criminal Tribunal for the former Yugoslavia (the "ICTY"), that the Rules establish a wide and liberal regime for the admission of evidence and that the contents of the Report, and methodology utilised in compiling it, can be challenged during cross-examination by the Defence. The decision to admit a piece of evidence does not influence the weight the Trial Chamber will eventually give to the evidence at the conclusion of trial. For this reason it is premature for the Defence to raise doubt about the witness at this stage.

10. The Prosecutor points out that this Trial Chamber followed a similar procedure in regards to the testimony of Prosper Higiro when it dismissed the Defence motion to exclude portions of his evidence. The Trial Chamber held that the fact that certain areas of Higiro's testimony were not alluded to in his prior statement or "will-say" statements was not sufficient to merit the exclusion of the new material.

11. The Prosecutor asserts that Joseph Ngarambe has over 21 years of experience with Rwandan social issues, including personal experience with political and media relations in Rwanda. Further, as an investigator of the Office of the Prosecutor, Joseph Ngarambe participated in the compilation of several reports on the role of the media in Rwanda, including one which was relied upon in the Media case.

4. Aussi la défense demande-t-elle à la Chambre de ne pas autoriser le Procureur à verser l'étude au dossier et de limiter la déposition de Joseph Ngarambe à sa «déclaration de témoin» recueillie en 2000.

5. La Défense fait encore valoir que le principe de l'égalité des armes est violé, la masse de pièces utilisée pour établir l'étude ne lui ayant pas été communiquée et le Procureur s'apprêtant à en sélectionner des extraits à l'appui de ses accusations.

6. Enfin, la défense soutient que les auteurs de l'étude expriment une opinion non fondée et non qualifiée en ce qui concerne les personnes pénalement responsables du génocide. Selon elle, un expert ou un témoin non expert n'étant pas autorisé à déposer sur de telles questions, l'étude ne devrait pas pouvoir être versée au dossier et la déposition de Joseph Ngarambe devrait donc se limiter aux questions dont il a une connaissance factuelle.

Réponse du Procureur, intitulée «Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe»

7. Le Procureur demande à la Chambre de rejeter la requête dans son intégralité et d'admettre sans retard l'étude de Joseph Ngarambe.

8. Le Procureur fait valoir que dans l'affaire *des Médias*, la Chambre avait admis en preuve un rapport similaire dont Joseph Ngarambe était coauteur, ainsi que la déposition des témoins experts Jean-Pierre Chrétien et Marcel Kabanda. Joseph Ngarambe devrait donc être autorisé à déposer au sujet d'un autre rapport dont il est lui-même l'auteur.

9. De plus, se référant à l'affaire *Le Procureur c. Simic et consorts* dont le Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») avait été saisi, le Procureur soutient que le Règlement de procédure et de preuve (le «Règlement») établit un régime général et souple d'admission des éléments de preuve et que la teneur de l'étude et la méthodologie utilisée pour l'établir peuvent être attaquées lors du contre-interrogatoire de la défense. Selon le Procureur, la décision d'admettre un élément de preuve n'influe pas sur le poids que la Chambre accordera en fin de compte audit élément de preuve à l'issue du procès. Il estime donc prématuré, au stade actuel de la procédure, que la défense émette des doutes sur la crédibilité du témoin.

10. Le Procureur souligne que la Chambre a agi de façon similaire en ce qui concerne la déposition de Prosper Higiro, en rejetant la requête de la défense qui demandait l'exclusion de certaines parties de la déposition de celui-ci. La Chambre a estimé que le fait qu'aucune allusion à certaines parties de la déposition de Higiro ne figurait dans la déclaration antérieure du témoin ou dans le résumé de la déclaration qu'il devait faire à l'audience ne suffisait pas pour justifier l'exclusion du nouvel élément de preuve.

11. Le Procureur affirme qu'une expérience de plus de 21 ans a permis à Joseph Ngarambe de se familiariser avec les questions sociales du Rwanda, notamment l'expérience personnelle qu'il a des relations politiques et des médias au Rwanda. Il ajoute qu'en sa qualité d'enquêteur au Bureau du Procureur, Joseph Ngarambe a participé à l'établissement de plusieurs rapports sur le rôle des médias au Rwanda, dont un qui a été utilisé dans l'affaire *des Médias*.

12. The Prosecutor argues that absolute objectivity is not the correct test for admissibility of evidence and that it is the position of the Tribunal that a witness must testify before their testimony can be attacked.

13. The Prosecutor contends that Joseph Ngarambe has demonstrated in his Report the roles the various news media in Rwanda played in the genocide. Further, the Prosecutor alleges that the Report is relevant to the charges against Justin Mugenzi of direct and public incitement using the media. The Report contains several paragraphs on RTLM and the Prosecutor has already notified the Defence for Justin Mugenzi in "Prosecutor's Exhibit List A", the Pre-Trial Brief, and witness statements that it will demonstrate that Justin Mugenzi used RTLM to incite killings.

14. The Prosecutor asserts that Joseph Ngarambe should not be limited to the summary of anticipated testimony contained in the Pre-Trial Brief. Instead, the Prosecutor submits that, as a general principle, prior witness statements should be used to challenge credibility, since the evidence should be heard directly before the Trial Chamber.

15. The Prosecutor submits that it has already disclosed all the source material in his possession in his final exhibits list in a CD-ROM disclosed on 15 August 2002 and re-disclosed on 13 December 2002. The additional sources relied upon for the Report are newspapers, magazines and recordings which are available in the public domain for the Defence.

16. The Prosecutor alleges that the Defence request for access to the material used in the report in possession of the Prosecutor is moot since the Prosecutor has already disclosed all the material in his possession. Furthermore, the Prosecutor submits that the Defence has had the opportunity to inspect the Prosecutor's materials since 2002. Since the witness will testify in the middle of the next session, the Defence has ample time to prepare for cross-examination.

Justin Mugenzi's Rejoinder to the Prosecutor's Response to a Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe

17. The Defence reiterates its request to bar the Prosecutor from adducing evidence from Joseph Ngarambe beyond what is contained in his witness statements; to order the Prosecutor to give the Defence access to the material relied upon in the making of the Report; and to fix a time limit for the preparation of a joint exhibit by the Prosecutor and the Defence containing all the published and broadcast material on which they seek to rely.

18. The Defence argues that it is a contradiction to present Joseph Ngarambe as both a fact and expert witness. The Defence submits that, pursuant to the case law in *Akayesu*, an expert witness must be impartial, even if absolute objectivity is not required of a fact witness. As such, the Defence contends that, by definition, a victim cannot also serve as an expert witness.

12. Le Procureur affirme que l'objectivité absolue n'est pas le critère correct en matière d'admissibilité de preuve et qu'il est établi au Tribunal qu'on ne peut attaquer la déposition d'un témoin avant qu'elle n'ait été faite.

13. Le Procureur soutient que Joseph Ngarambe a établi dans son étude le rôle joué par les divers médias rwandais dans le génocide. De plus, il affirme que l'étude est pertinente quant aux accusations portées contre Justin Mugenzi en ce qui concerne l'utilisation des médias dans le cadre de l'incitation directe et publique à commettre le génocide. L'étude comporte plusieurs paragraphes concernant la RTLM, et le Procureur a déjà indiqué à la défense de Justin Mugenzi dans la «Liste A des pièces à conviction du Procureur», dans le mémoire préalable au procès et dans les déclarations de témoin que l'étude permettra d'établir que Justin Mugenzi s'est servi de la RTLM pour inciter à commettre les tueries.

14. Le Procureur affirme que le témoignage de Joseph Ngarambe ne devrait pas être confiné au résumé de la déposition attendue de lui figurant dans le mémoire préalable au procès. Il estime au contraire qu'en principe, les déclarations antérieures d'un témoin offrent la possibilité d'attaquer la crédibilité de celui-ci, puisqu'il devra déposer directement devant la Chambre.

15. Le Procureur soutient avoir déjà communiqué tous les documents de base en sa possession dans sa liste définitive de pièces à conviction sur CD-ROM, une première fois le 15 août 2002 et à nouveau le 13 décembre 2002. Les autres documents sur lesquels l'étude s'est appuyée sont des journaux, revues et enregistrements relevant du domaine public et donc consultables par la défense.

16. Le Procureur affirme que la demande de la défense, qui voudrait avoir accès aux documents en possession du Procureur qui ont servi à établir l'étude, est sans objet, vu qu'il a déjà communiqué tous les documents en sa possession. De plus, il soutient que la défense a eu l'occasion d'examiner les documents du Procureur depuis 2002. La déposition du témoin étant prévue pour le milieu de la prochaine session, la défense aura largement le temps de se préparer pour le contre-interrogatoire.

Réplique de Mugenzi, intitulée *Mugenzi's Rejoinder to the Prosecutor's Response to a Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe*

17. La défense demande à nouveau qu'il soit fait interdiction au Procureur de produire des éléments de preuve provenant de Joseph Ngarambe autres que ses déclarations de témoin, qu'il soit ordonné au Procureur de permettre à la défense d'avoir accès aux pièces ayant servi à établir l'étude, et qu'il soit fixé un délai au Procureur et à la défense pour élaborer une pièce à conviction conjointe qui contiendrait toutes les publications et émissions diffusées sur lesquelles chacun d'eux entend fonder son argumentation.

18. La défense voit une contradiction dans le fait de présenter Joseph Ngarambe à la fois comme un témoin de faits et un témoin expert. Elle soutient que, conformément à la jurisprudence établie dans l'affaire *Akayesu*, un témoin expert doit être impartial, alors même que l'objectivité absolue n'est pas exigée d'un témoin de faits. Elle affirme par conséquent que, par définition, une victime ne peut être citée comme témoin expert.

19. Moreover, the Defence asserts that the Prosecutor has failed to show that Joseph Ngarambe's testimony concerns "specific issues of a technical nature, requiring special knowledge in a specific field", which was required in *Akayesu*[1].

20. The Defence argues that the *Media* trial decision cited by the Prosecutor stands for nothing more than the admissibility of a translation of RTLM Broadcasts and *Kangura* articles, in conformity with an earlier oral decision. Notably, there is no mention of any report or the persons named in the Response.

21. The Defence contends that the Prosecutor's discussion of Rule 89 (C), the right cross-examine, the *Higiro* Decision and the significance of written statements are irrelevant. The Defence emphasises that nowhere in the Report is it suggested that Justin Mugenzi authored inflammatory statements inciting massacres. The Defence submits that the source material may be relevant to the outcome of the trial, but the unobjective, inexpert handling of this material within the Report is not.

22. The Defence outlines the disclosures made to him by the Prosecutor and compares them with the sources used by Joseph Ngarambe. The Defence contends that it has only had access to a fraction of Joseph Ngarambe's sources, in violation of the principle of equality of arms and Article 20 (4) of the Statute of the Tribunal.

23. The Defence further argues that it is irrelevant for the Prosecutor to contend that any sources within its possession which were not provided to Justin Mugenzi are also in the public domain. Rule 68 (B) requires the Prosecutor to "make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor."

Requête au soutien de Justin Mugenzi*'s Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and *Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngarambe

24. The Defence for Casimir Bizimungu concurs with the reasoning outlined in the Motion and argues that Joseph Ngarambe is only a fact witness and not an expert witness. According to the Defence, the Report cannot be admitted into evidence pursuant to Rule 89 of the Rules as it has no probative value and only includes "triple or quadruple hearsays."

[1] *The Prosecutor v. Jean-Paul Akayesu*, Case n° ICTR-96-4-T, Decision on a Defence motion for the Appearance of an Accused as an Expert witness (TC), 9 March 1998.

19. De plus, la défense fait valoir que le Procureur n'a pas établi que la déposition de Joseph Ngarambe portait sur des «problèmes spécifiques d'ordre technique, requérant des connaissances particulières dans un domaine déterminé», comme la Chambre de première instance l'avait exigé dans une décision rendue en l'affaire *Akayesu*[1].

20. La défense affirme que la décision rendue dans le procès *des Médias* et invoquée par le Procureur vise uniquement l'admissibilité d'une version traduite d'émissions de la RTLM et d'articles de Kangura, conformément à une décision orale antérieure. En particulier, elle ne contient aucune mention d'un quelconque rapport ou de personnes citées nommément dans la réponse.

21. La défense affirme que les arguments du Procureur concernant l'article 89 (C) du Règlement, le droit de contre-interroger un témoin, la décision *Higiro* et l'importance des déclarations écrites sont hors de propos. Elle fait valoir qu'il ne ressort nullement de l'étude que Justin Mugenzi a fait des déclarations incendiaires pour inciter à commettre les massacres. Elle soutient que les documents de base peuvent être pertinents quant à l'issue du procès, ce qui n'est pas le cas du traitement «profane» et partial que l'étude a réservé à ces documents.

22. La défense dresse la liste des pièces qui lui ont été communiquées par le Procureur et compare celles-ci aux documents utilisés par Joseph Ngarambe. Elle affirme n'avoir eu accès qu'à une partie de ces documents, et ce, au mépris du principe de l'égalité des armes, et de l'article 20 (4) du Statut du Tribunal.

23. La défense considère encore comme hors de propos l'argument du Procureur selon lequel tous les documents en sa possession qui n'avaient pas été communiqués à Justin Mugenzi sont également dans le domaine public. L'article 68 (B) du Règlement exige du Procureur qu'il «met[te] à la disposition de la défense, sous forme électronique, les collections de documents pertinents qu'il détient».

Requête au soutien de la requête de Justin Mugenzi, intitulée *Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe* et Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngarambe

24. La défense de Casimir Bizimungu souscrit à l'argumentation de la requête et affirme que Joseph Ngarambe est un simple témoin de faits et non un témoin expert. Selon elle, l'étude ne peut être versée au dossier en vertu de l'article 89 du Règlement, vu qu'elle n'a aucune valeur probante et qu'elle ne comporte que «du ouï-dire de troisième ou de quatrième main».

[1] *Le Procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Décision faisant suite à une requête de la défense aux fins de comparution d'un accusé en tant que témoin expert, rendue le 9 mars 1998, par la Chambre de première instance.

Prosecutor's Response to *Requête au soutien de Justin Mugenzi*'s Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and *Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngarambe*

25. The Prosecutor submits that the Bizimungu Motion raises the same issues as those raised by Justin Mugenzi and Prosper Mugiraneza. Therefore the Prosecutor refers the Trial Chamber to his Responses filed in respect to the Mugenzi Motion and the Mugiraneza Memorandum.

Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Joseph Ngarambe

26. The Defence for Prosper Mugiraneza moves the Trial Chamber to exclude the expert report and opinion testimony of Joseph Ngarambe, and to limit Joseph Ngarambe to his actual knowledge of events as a fact witness.

27. The Defence argues that, pursuant to Rule 89 (C), the Trial Chamber should look at several factors to determine if expert opinion evidence is relevant. These factors include, but are not limited to : (a) the use of accepted scientific principles, or some other knowledge, based on skill or expertise ; (b) whether the expert properly applied the accepted principles ; (c) whether the expert has the necessary expertise.

Prosecutor's Response to Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Mr. Joseph Ngarambe

28. The Prosecutor prays that the Trial Chamber dismisses the Memorandum in its entirety. The Prosecutor notes that the Memorandum was not filed pursuant to any Rules, and that it is a burden to the judicial process because it merely underlines issues already submitted and answered.

29. Without prejudice to the above, the Prosecutor responds to the Memorandum by adopting and incorporating his response to the Motion.

Reply of Defendant Bicamumpaka to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe

30. The Defence for Jérôme-Clément Bicamumpaka moves the Trial Chamber to bar the Prosecutor from introducing Joseph Ngarambe's Report into evidence ; to order the Prosecutor not to adduce any evidence involving Jérôme-Clément Bicamumpaka

Réponse du Procureur, intitulée «*Prosecutor's Response to* Requête au soutien de Justin Mugenzi's *Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe and* Réplique de Casimir Bizimungu à la réponse du Procureur concernant la déposition et le «rapport» du témoin Joseph Ngarambe»

25. Le Procureur soutient que dans sa requête, Bizimungu soulève les mêmes questions que Justin Mugenzi et Prosper Mugiraneza. En conséquence, il renvoie la Chambre aux réponses qu'il a déposées relativement à la requête de Mugenzi et au mémorandum de Mugiraneza.

Mémorandum de Mugiraneza, intitulé «Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe»

26. La défense de Prosper Mugiraneza demande à la Chambre de refuser d'admettre le rapport d'expert de Joseph Ngarambe et les opinions qu'il a émises en guise de témoignage et de l'obliger à se limiter aux faits dont il a réellement connaissance en tant que témoin.

27. La défense affirme qu'en vertu de l'article 89 (C) du Règlement, la Chambre doit prendre en compte plusieurs facteurs pour décider de la pertinence de l'opinion donnée par un expert. Il s'agit des facteurs ci-après, notamment : (a) L'utilisation de principes scientifiques admis ou d'autres connaissances fondées sur une compétence ou un savoir spécialisé; (b) Le point de savoir si l'expert a appliqué correctement les principes admis; (c) Le point de savoir si l'expert est dûment qualifié.

Réponse du Procureur, intitulée «Prosecutor's Response to Prosper Mugiraneza's Memorandum in Support of Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe»

28. Le Procureur demande à la Chambre de rejeter le mémorandum dans son intégralité. Il fait observer que le mémorandum n'est fondé sur aucun article du Règlement et qu'il alourdit la procédure, car il ne fait que souligner des questions déjà posées et auxquelles des réponses ont été apportées.

29. Sans préjudice de ce qui précède, le Procureur répond au mémorandum en reprenant et en insérant les arguments qu'il a avancés dans sa réponse à la requête. Réplique de Bicarnumpaka, intitulée «Reply of Defendant Bicamumpaka to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe».

30. La défense de Jérôme-Clément Bicamumpaka demande à la Chambre de faire interdiction au Procureur de verser l'étude de Joseph Ngarambe au dossier, et de présenter tout élément de preuve relatif à Jérôme-Clément Bicamumpaka provenant de

from Joseph Ngarambe; or to prevent Joseph Ngarambe from offering any analysis of speeches made by Jérôme-Clément Bicamumpaka.

31. The Defence argues that there can be no "probative value in the evidence offered by a witness with 8 years of professional ties with the Office of the Prosecutor." In support of its contention, the Defence questions the credibility of a witness who gives some evidence of fact, before, during or after he gives evidence relating to anti-Tutsi propaganda for which he is paid. The Defence argues that the Prosecutor has hidden Joseph Ngarambe's Report from the Defence since the disclosure of Joseph Ngarambe's statement in 2000.

32. The Defence invokes Article 95 and asks the Trial Chamber to order the Prosecutor not to adduce evidence relating to Jérôme-Clément Bicamumpaka from Joseph Ngarambe. The Defence further submits that the methods Joseph Ngarambe used to obtain evidence against Jérôme-Clément Bicamumpaka would cast substantial doubts on its reliability and could damage the integrity of these proceedings.

Prosecutor's Response to Bicamumpaka's Reply to Prosecutor's Response to Justin Mugenzi's Motion in Respect to the Report and Proposed Evidence of Mr. Joseph Ngarambe

33. The Prosecutor notes that the issues raised by the Defence for Jérôme-Clément Bicamumpaka regarding Joseph Ngarambe's expertise, the capacity of his testimony, the factual content of his statement, and disclosure have already been raised in the Motion and Memorandum and have been addressed by the Prosecutor in his Response.

34. The Prosecutor asserts that Joseph Ngarambe was not employed by the OTP when his statement was taken and that Joseph Ngarambe has only worked for the OTP cumulatively for 628 days, thus the contention that he was in the employ of the OTP when he made his statement and Report are without factual basis.

35. The Prosecutor opposes the motion because the Defence for Jérôme-Clément Bicamumpaka cannot discredit the Report by invoking Rule 95 when the report has not yet been tendered into evidence and Joseph Ngarambe has not yet appeared to testify about it.

36. The Prosecutor further argues that Joseph Ngarambe's Report is based on independent sources "and not necessarily based on information in possession of the OTP to which he may have had access during the course of his employment with the OTP." Therefore the Defence for Jérôme-Clément Bicamumpaka has failed to cast substantial doubts on the reliability of the report, or to show how its admission would damage the integrity of the proceedings, pursuant to Rule 95 of the Rules.

37. The Prosecutor contends that the Defence for Jérôme-Clément Bicamumpaka will have the opportunity to cross-examine Joseph Ngarambe as to facts he relied upon and methods he used. Because the Report has not been tendered before the Trial

Joseph Ngarambe, ou de faire interdiction à Joseph Ngarambe de présenter une quelconque analyse des discours prononcés par Jérôme-Clément Bicamumpaka.

31. La défense affirme qu'il ne peut y avoir «de valeur probante dans la déposition d'un témoin ayant des liens professionnels vieux de huit ans avec le Bureau du Procureur». Pour étayer son affirmation, elle conteste la crédibilité d'un témoin qui rapporte des éléments de preuve factuels avant, pendant ou après sa déposition, pour laquelle il est rémunéré, relativement à la propagande anti-tutsie. Elle affirme que le Procureur lui a caché l'étude de Joseph Ngarambe depuis qu'il lui a communiqué la déclaration faite par celui-ci en 2000.

32. Invoquant l'article 95 du Règlement, la défense demande à la Chambre de faire interdiction au Procureur de produire contre Jérôme-Clément Bicamumpaka des éléments de preuve provenant de Joseph Ngarambe. Elle fait valoir, en outre, que les procédés par lesquels Joseph Ngarambe a obtenu les moyens de preuve contre Jérôme-Clément Bicamumpaka sont de nature à entamer fortement leur fiabilité et à porter atteinte à l'intégrité de la procédure.

Duplique du Procureur, intitulée *Prosecutor's Response to Defendant Bicamumpaka 's Reply to Prosecutor's Response to Justin Mugenzi's Motion in Respect of the Report and Proposed Testimony of Mr. Joseph Ngarambe*

33. Le Procureur fait observer que les questions soulevées par la défense de Jérôme-Clément Bicamumpaka en ce qui concerne la qualité d'expert de Joseph Ngarambe, la valeur de son témoignage, le contenu factuel de sa déclaration, ainsi que la communication des pièces ont déjà été soulevées dans la requête et dans le mémorandum et ont été traitées par le Procureur dans sa réponse.

34. Le Procureur affirme que Joseph Ngarambe n'était pas employé par le Bureau du Procureur quand sa déclaration a été recueillie, qu'il n'y a travaillé au total que pendant 628 jours et que, de ce fait, l'allégation selon laquelle il a fait sa déclaration et établi son étude au moment où il travaillait au Bureau du Procureur est sans fondement factuel.

35. Le Procureur s'oppose à la requête au motif que la défense de Jérôme-Clément Bicamumpaka ne peut attaquer la crédibilité de l'étude en invoquant l'article 95 du Règlement, alors que cette étude n'a pas encore été déposée en preuve et que Joseph Ngarambe n'a pas encore déposé à ce sujet.

36. Le Procureur affirme encore que l'étude de Joseph Ngarambe s'appuie sur des éléments obtenus de sources indépendantes «et n'est pas nécessairement fondée sur des informations en possession du Procureur, auxquelles il aurait eu accès pendant qu'il était employé par le Bureau du Procureur». La défense de Jérôme-Clément Bicamumpaka n'a donc pas été en mesure de mettre vraiment en doute la fiabilité de l'étude ni de montrer en quoi son admission en preuve porterait atteinte à l'intégrité de la procédure, au sens de l'article 95 du Règlement.

37. Le Procureur soutient que la défense de Jérôme-Clément Bicamumpaka aura l'occasion de contre-interroger Joseph Ngarambe au sujet des faits sur lesquels il s'est fondé et des méthodes qu'il a utilisées. La Chambre n'ayant pas été saisie de l'étude

Chamber for consideration as to its relevancy, probative value, and admissibility the Defence motion lacks merit.

38. The Prosecutor further submits that another Trial Chamber of this Tribunal, in the *Simba* case, recently held that objections to an expert witness's methodology are arguments to be made when the Prosecution seeks to enter a report into evidence and the Defence can cross-examine.

39. The Prosecutor notes the new issues raised and asserts that the practice of filing replies by other Defence counsel may result in time consuming litigation that is an abuse of the judicial process. The Prosecutor contends that the Trial Chamber should discourage such a practice. Finally, the Prosecutor seeks to join issues and respond to the reply by adopting and incorporating his Response.

DELIBERATIONS

40. It appears from the Prosecutor's submissions that Joseph Ngarambe is a fact witness and was never intended to be called as an expert. It is clear that this witness has not yet testified and the Prosecutor has only disclosed this Report to the Defence in conformity with the Rules. Although it does not seem very clear to the Trial Chamber what the Prosecutor intends to do with this Report, the Trial Chamber is of the view that such a report cannot be considered as an expert report and that therefore there is no legal basis for the Defence to object to its disclosure.

The Trial Chamber takes note of the objections of the Defence but considers that any assessment of the Report, the credibility or the objectivity of his author is premature at this stage of the proceedings.

41. Therefore the Trial Chamber considers that Joseph Ngarambe shall be allowed to testify for the Prosecutor and that any objection regarding his testimony and the documents presented in support of his testimony shall be made during his testimony.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion in its entirety.

Arusha, 28 September 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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pour en examiner la pertinence, la valeur probante et l'admissibilité, la requête de la défense est sans intérêt.

38. Le Procureur affirme encore qu'une autre Chambre du Tribunal de céans a récemment estimé dans l'affaire *Simba* que les objections portant sur les méthodes utilisées par un témoin expert doivent être soulevées au moment où le Procureur demande à faire admettre en preuve un rapport et où la défense peut procéder à un contre-interrogatoire.

39. Le Procureur prend acte des nouvelles questions soulevées et affirme que la pratique consistant à déposer des réponses à des requêtes formées par d'autres conseils pourrait conduire à un enlisement des débats constitutif d'un abus de procédure. Il estime que la Chambre devrait décourager une telle pratique. Pour terminer, le Procureur marque son opposition à la requête et répond à la réplique en réitérant les arguments déjà avancés dans sa réponse.

DELIBERATIONS

40. Il ressort des arguments du Procureur que Joseph Ngarambe est un témoin de faits et que le Procureur n'a jamais entendu le citer comme expert. Il est manifeste que ce témoin n'a pas encore déposé et que le Procureur a simplement communiqué cette étude à la défense pour se conformer au Règlement. La Chambre ne voit pas très bien ce que le Procureur entend faire de ladite étude, mais elle est d'avis qu'un tel rapport ne saurait être considéré comme un rapport d'expert et que la défense n'est donc pas fondée en droit à s'opposer à sa communication.

La Chambre prend acte des objections de la défense, tout en estimant qu'il est prématuré, en l'état actuel de la procédure, de se prononcer de quelque manière que ce soit sur l'étude, ou sur la crédibilité ou l'objectivité de son auteur.

41. En conséquence, la Chambre estime que Joseph Ngarambe doit être autorisé à témoigner à charge et que toute objection relative à sa déposition et aux documents présentés à l'appui de celle-ci pourra être formulée à ce moment-là.

PAR CES MOTIFS, LA CHAMBRE DE PREMIÈRE INSTANCE

REJETTE la requête dans son intégralité.

Arusha, le 28 septembre 2004

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Justin Mugenzi's Motion for the Chamber to Exclude the Prosecutor's will say Statement Concerning Witness GKJ of 20 September 2004 28 September 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Impugned will-say statement already withdrawed, initiative of the Prosecutor – motion moot

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 "Motion for the Chamber to Exclude the Prosecutor's Will Say Statement Concerning Witness GKJ of the 20th September 2004" filed on 22 September 2004, (the "Motion");

CONSIDERING that when this matter was taken up in court on 23 September 2004, the Prosecutor decided on his own initiative to withdraw the impugned will-say statement, the Trial Chamber is of the view that the Motion is now moot and should be dismissed.

THEREFORE THE TRIAL CHAMBER

DISMISSES the Motion.

Arusha, 28 September 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion Pursuant to Rule 73 (B) for Leave to Appeal the Trial Chamber's Oral Rulings of 17 June 2004 30 September 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – certification to appeal – fair and expeditious conduct of the proceedings, outcome of the trial – exceptional situations, not issues of a general nature such as opinion on a point of law – evidence, out-of-court statement, hearsay statement – individual opinion – motion denied

International instruments cited : Rules of procedure and evidence, Rules 73 (B), 90 (G), 115

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 Pursuant to Rule 73 (B) for Leave Appeal the Trial Chamber's Oral Rulings of 17 June 2004" filed on 24 June 2004, (the "Motion");

NOTING the "Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 73 (B) for Leave to Appeal the Trial Chamber's Oral Rulings of 17 June 2004" filed on June 2004, (the "Response");

NOTING "Prosper Mugiraneza's Reply to the Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 73 (B) for Leave to Appeal the Trial Chamber's Oral Rulings of 17 June 2004" filed on 2 July 2004, (the "Reply");

ARGUMENTS OF THE PARTIES

Defence Submission

1. The Defence for Prosper Mugiraneza seeks certification of an interlocutory appeal pursuant to Rule 73 (B). The Defence seeks to appeal the Trial Chamber's Oral Ruling prohibiting the Defence from impeaching an out-of-court statement purportedly made by Jean Kambanda to Witness D with other statements made by Jean Kambanda to the Office of the Prosecutor (the "OTP"). The Defence sought to introduce these statements through the witness to demonstrate the possibility that Jean Kambanda, who bas not yet testified in this case, had made inconsistent and contradictory statements.

2. The Defence for Prosper Mugiraneza submits that evidence admitted indirectly through hearsay statements must be open to a similarly indirect attack. Cross-examination of a witness alone is insufficient because a witness may be truthfully and accurately relating the declarant's statement. The Defence for Prosper Mugiraneza argues, therefore, that if cross-examination is limited to the testifying witness the Trial Chamber will not have the necessary information to weigh the evidentiary value of the hearsay statements themselves.

3. According to the Defence, it is irrelevant that Jean Kambanda himself is scheduled to appear before the Trial Chamber considering that a party challenging the credibility of a declarant should be allowed to do so as soon as the hearsay statement is offered and accepted.

4. The Defence further notes its scepticism that Jean Kambanda will ever testify for the Prosecutor. Thus, it submits that its ability to challenge statements attributed to Jean Kambanda should not be subject to Jean Kambanda's "whims" regarding his appearance before this Tribunal.

5. The Defence for Prosper Mugiraneza seeks to appeal the Trial Chamber's subsequent oral decision to refuse to include the proffered evidence, after the Trial Chamber denied its admission.

6. The Defence argues that there must be a mechanism allowing the Appeals Chamber to perform its review functions when an objection has been sustained and evidence excluded. According to the Defence, the evidence must be included so that the Appeals Chamber may determine if the Trial Chamber erred in its decision to refuse to admit Jean Kambanda's allegedly inconsistent statements, and/or whether any error was harmful.

5. The Defence for Prosper Mugiraneza asserts that the Prosecutor's argument that Rule 115 is the vehicle through which such review functions should be performed is without merit. Rule 115 (B) requires that additional evidence admitted before the Appeals Chamber must have been unavailable at trial, credible, and relevant. By definition, evidence offered at trial and excluded by the Trial Chamber was available at trial. Further, the Defence submits, that impeachment evidence does hot meet the criteria for credibility. According to the Defence, "the proponent of such evidence offers it only to shed doubt on the statement admitted for the truth. It creates doubt simply by showing that the declarant told more than one Story."

7. The Defence for Prosper Mugiraneza also argues that including the excluded evidence ensures that the Trial Chamber has been given all necessary information and legal argument, and that the Appeal Chamber cannot find that the proponent of the excluded evidence failed to present the evidence properly and thereby waived any error committed by the Trial Chamber.

8. In conclusion, the Defence argues that this issue is likely to recur in this trial and other trials before the Tribunal and therefore is important to the jurisprudence of the Tribunal and an interlocutory appeal should be granted.

Prosecutor's Response

9. The Prosecutor argues that the Defence has failed to make a case warranting certification under Rule 73 (B). The Prosecutor asserts that the situations that warrant interlocutory appeal must be very exceptional.

10. The Prosecutor further submits that the Trial Chamber's ruling was appropriate. The Prosecutor asserts that the Defence may not be allowed to impeach Kambanda by putting his statement to Witness D since Witness D is not the author of the statement. Moreover, as Kambanda is listed to testify later, he is the proper witness who should be confronted with his own statement. The Prosecutor argues that the Defence is limited to asking the witness leading questions or impeach the witness's own credibility.

Defence Reply

11. The Defence re-asserts that since Jean Kambanda's statement was admitted, an inconsistent prior statement is admissible to impeach the credibility of the statement

previously admitted for the truth of the matters asserted. The Defence further argues that unless the declarant himself takes the stand, the Trial Chamber will have an unimpeached hearsay statement as the basis for its fact findings, even though if the Chamber had all of the facts it might be less likely to accept the credibility of the statement.

12. According to the Defence, the admissibility of Jean Kambanda's statement for the limited purpose of impeachment is proper under Federal Rule of Evidence 806, adopted by the United States Supreme Court. F.R. 806 provides that the credibility of the declarant of a hearsay statement may be attacked by any evidence which would be admissible if the declarant had testified as a witness.

13. The Defence contends that the Prosecutor's assertion that Jean Kambanda will testify himself is both irrelevant and disingenuous. First, the Defence argues that the Accused should have the right to impeach any out-of-court statements contemporaneously with their admission, just as they have the right to impeach the testifying witness. Second, the Defence submits that the Prosecutor has made inconsistent statements regarding the existence of any agreement with Kambanda that he will testify. Moreover, the Defence argues that even if Jean Kambanda did testify the Prosecutor might object to cross-examination on the statement under Rule 90 (G).

14. Finally, the Defence argues that the denial of the right to impeach out-of-court declarants is a deprivation of the right to a fair trial, and thus is important to the jurisprudence of the Tribunal and is worthy of an interlocutory appeal.

DELIBERATIONS

15. Rule 73 (B) of the Rules reads 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.

16. The Trial Chamber recalls the reasoning held by Trial Chamber II in a different composition in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.* : It should be emphasized that the situations which may warrant interlocutory appeals under Rule 73 (B) must be exceptional indeed. This point is made clear by the conditions which must be satisfied before the Trial Chamber may consider granting certification.

17. The Trial Chamber considers that Rule 73 (B) deals with matters of an exceptional nature, and cannot be used for purposes of gaining access to the Appeals Chamber to resolve issues of a general nature namely, in this particular case, seizing the Appeals Chamber for an opinion on a point of law. The Trial Chamber is of the view that the Defence has failed to adequately demonstrate the existence of the conditions allowing for certification. The Trial Chamber therefore denies the Defence an interlocutory appeal on this issue.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion.

Judge Short appends an Individual Opinion.

Arusha, 30 September 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

Individual Opinion of Judge Emile Francis Short

I am in agreement with the Decision of the Trial Chamber inasmuch as the criteria for certification are not met in this case. The Trial Chamber rightly decided that it was not the appropriate rime to introduce the allegedly contrary or inconsistent statements made by Jean Kambanda in the past. Put differently, the statements cannot be introduced through the witness who cannot say whether in fact Jean Kambanda made those contrary statements or not. The attempt to impeach the credibility of a declarant who has been listed as a prosecution witness but has not yet testified is premature and raises serious concerns about the usefulness of such a procedure.

Moreover, the admission of the allegedly contradictory statements would not assist the court in determining the reliability of the witness's evidence as to what Jean Kambanda told him. Their admission, therefore, through this particular witness, would have served no useful purpose.

On the second submission of Defence Counsel, however, I am of the view that the Trial Chamber should have placed on the record the excluded evidence for the consideration of the Appeals Chamber, in the event that the matter is taken up on appeal. It is only through this method that the Appeals Chamber would have an opportunity to determine whether the Trial Chamber erred in rejecting the statements and, if so, whether the error was prejudicial to the accused. I share the Defence Counsel's submission that Rule 115 (b) not the appropriate method for bringing to the attention of the Appeals Chamber documentary evidence rejected during the trial. That Rule deals specifically with additional evidence that was not available at the trial. That is not the case here.

Another compelling reason for the Trial Chamber to place and mark the rejected document at the time it is offered for admission is the possibility that the document or its contents may be tampered with between the time it is offered for admission and the time the Appeals Chambers becomes seized of the matter. Therefore, in my view, the documents should have been accepted for record purposes and marked differently from the regular exhibits as, for example, as Reject Exhibit D/4-X or given an Identification Number.

Arusha, 30 September 2004

[Signed] : Emile Francis Short

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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 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Accused in an identical situation, different decisions, reasonable basis – error of the Trial Chamber – exclusion of evidence, exclusion of testimony of witnesses who had not yet testified – adequate notice of the testimony, in a clear and timely manner – complicity in genocide, conspiracy to commit genocide, specificity of the indictment – material facts in the indictment, sufficient detail, remedy at trial – relevance of the testimony – jurisprudence, United States Supreme Court – prejudice caused – motion granted in part

International instruments cited : Rules of procedure and evidence, Rule 89 (C) – ICTY Statute, art. 4 (a), 4 (b), 18 (4), 21 (2)

International cases cited :

I.C.T.R. : The Prosecutor v. Casimir Bizimungu et al.*, Confirmation of the Indictment, 12 May 1999 (ICTR-99-50-T,* Reports 1999*, p. 334) – Trial Chamber II,* The Prosecutor v. Bizimungu et al.*, Prosecutor's Request for Leave to File an Amended Indictment, 26 August 2003 (ICTR-99-50-T) – Trial Chamber II,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 (ICTR-99-50-T,* Reports 2003*, p. 1168) – Trial Chamber II,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment, 29 October 2003 (ICTR-99-50-T,* Reports 2003*, p. 1202) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Motion from Casimir Bizimungu Opposing to the Admissibilty of the Testimony of Witnesses GKB, GAP, GKC, GKD et GFA, 19 January 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF et GKI, 27 January 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 29 January 2004 (ICTR-99-50-T, Reports 2004, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI, February 2004 (ICTR-99-50-T,*

Reports 2004, *p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 5 February 2004 (ICTR-99-50-T,* Reports 2004, *p. X) – Appeals Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 (ICTR-99-50-T,* Reports 2004, *p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004, 24 March 2004 (ICTR-99-50-T,* Reports 2004, *p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 5 February 2004, 24 March 2004 (ICTR-99-50,* Reports 2004, *p. X) – Appeals Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004 (ICTR-99-50-T,* Reports 2004, *p. X) – Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko, *Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42-AR73,* Reports 2004, *p. X) – Appeals Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Prosecutor's Appeal Against Trial Chamber II Decision of 6 October Denying Leave to File an Amended Indictment, 3 November 2004 (ICTR-99-50-T,* Reports 2004, *p. X)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreskic et al., *Appeal Judgement, 23 Octobre 2001 (IT-95-16)*

National cases cited : John Newton Williamson, Plff. In Err., v. United States, *207 U.S. 425, 28 S.Ct. 163* – Wong Tai v. U.S., *Supreme Court, 273 U.S. 77* – United States v. Westbrook et al., *114 F.Supp. 192*

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");

SEISED of the Appeals Chamber's "Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence", handed down and filed on 15 July 2004 (the "Appeals Chamber's Decision");

NOTING the findings and the directions made in the Appeals Chamber's Decision, remitting a Decision of the Trial Chamber[1] (the "Remitted Decision") on interlocutory appeal;

RECALLING that pursuant to the Appeals Chamber's Decision, on 1 September 2004 the Trial Chamber invited submissions from the Parties[2];

[1] *The Prosecutor v. Bizimungu et a*l., Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief (TC), 5 February 2004.

[2] Memorandum from Court Management Services Section, 1 September 2004.

HAVING RECEIVED

(1) "Prosper Mugiraneza's Memorandum on Remand of Appeal of the Trial Chamber's Order of 6 February 2004 and Motion for Additional Relief" filed on 3 September 2004 ("Mugiraneza's Memorandum");

(2) The "Prosecutor's Response to Prosper Mugiraneza's Memorandum on Remand of Appeal of the Trial Chamber's Order of 6 February 2004 and Motion for Additional Relief", filed on 13 September 2004 (the "Response to Mugiraneza's Memorandum");

SUMMARY OF THE PROCEDURAL BACKGROUND

The Indictment

1. The Indictment against all four Accused in this case was confirmed by Judge Navanethem Pillay on 12 May 1999[3]. On 26 August 2003, the Prosecution filed a Motion to amend the Indictment[4]. On 6 October 2003, a differently composed Trial Chamber[5] denied the motion[6]. On 29 October 2003, the Trial Chamber certified the Prosecution's request for leave to appeal that Decision of the Trial Chamber[7], and on 3 November 2003, the Prosecution appealed the Decision denying it leave to amend the Indictment[8].On 12 February 2004, the Appeals Chamber dismissed the Appeal, holding that the Trial Chamber acted within its discretion by refusing the requested amendment[9]. In the meantime, the trial of the case had commenced in earnest on 6 November 2003[10].

The Decisions to Declare Testimony Inadmissible

Accused Casimir Bizimungu

2. On 19 January 2004, Casimir Bizimungu filed a Motion requesting the Trial Chamber to declare inadmissible the testimony of rive witnesses, to the extent that

[3] *The Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-T, Confirmation of the Indictment, 12 May 1999.

[4] *The Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-T, Prosecutor's Request for Leave to File an Amended Indictment (TC), 26 August 2003.

[5] At that time, the bench was composed of Judge William H. Sekule (Presiding), Judge Asoka de Zoysa Gunawardana, and Judge Ariette Ramaroson.

[6] *The Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 6 October 2003.

[7] *The Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on the Prosecutor's Request Pursuant to Rule 73 (B) for Certification to Appeal an Order Denying Leave to File an Amended Indictment (TC), 29 October 2003.

[8] *The Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-T, Prosecutor's Appeal Against Trial Chamber II Decision of 6 October Denying Leave to File an Amended Indictment, 3 November 2004.

[9] *The Prosecutor v. Bizimungu et al.*, Case N° 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 (AC), 12 February 2004.

[10] T. 6 November 2003.

the anticipated testimony of four of them would exceed the scope of the Indictment. The fifth witness had already testified. In respect of this witness, the Motion requested that the portion of this testimony that exceeded the scope of the Indictment should be struck out retrospectively[11].The Chamber heard the Parties on the matter on 22 January 2004[12], and, on 23 January 2004, the Trial Chamber issued its Decision, granting the Defence Motion (the "Bizimungu Decision")[13]. On 27 January 2004, Casimir Bizimungu filed a Motion requesting the Trial Chamber to declare inadmissible the testimony of four additional witnesses, insofar as their testimony would haven taken the evidence outside the scope of the Indictment[14]. On 3 February 2004, the Trial Chamber issued a Decision granting the Motion, recalling its reasoning in the *Bizimungu* Decision of 23 January 2004 (the "Second Bizimungu Decision")[15].

Accused Prosper Mugiraneza

3. On 29 January 2004, Prosper Mugiraneza filed a Motion requesting the Trial Chamber to declare inadmissible the anticipated testimony of seventeen witnesses, on the ground that such testimony did not relate to factual allegations contained in the Indictment[16]. The *Mugiraneza* Motion also contained a request, similar to the *Bizimungu* Motion, seeking a retrospective exclusion of the testimony of two witnesses who had already testified. The Chamber heard the Parties on 5 February 2004[17], and issued its Decision on the same day[18].

4. The Trial Chamber decided the Defence Motion in the following terms :

> The Trial Chamber observes that the Prosecutor has failed to mention as material facts in the Indictment the involvement of Prosper Mugiraneza in the events that took place in Kibungo and Cyangugu *préfectures*. Hence, the evidence sought to be adduced from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ and LY will not be relevant or admissible against Prosper Mugiraneza, in so far as it implicates him in

[11] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Motion from Casimir Bizimungu Opposing to the Admissibilty of the Testimony of Witnesses GKB, GAP, GKC, GKD et GFA, 19 January 2004.

[12] T. 22 January 2004, pp. 1-47.

[13] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA (TC), 23 January 2004.

[14] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF et GKI, 27 January 2004.

[15] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI (TC), February 2004.

[16] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief, 29 January 2004.

[17] T. 5 February 2004, pp. 1-27; T. 5 February 2004, pp. 28-46.

[18] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony is Inadmissible in View of the Trial Chamber's Decision of 23 January 2004 and for Other Appropriate Relief (TC), 5 February 2004.

Kibungo and Cyangugu *préfectures*. Therefore, the Trial Chamber is of the view that the Prosecutor shall not be permitted to lead any evidence, relating to events implicating Prosper Mugiraneza in Kibungo and Cyangugu *prefectures* from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR GJU, GJN, GJO, GKT, GJX, GJW, GJZ and LY.

However, the Trial Chamber notes that the Indictment charges the Accused with Conspiracy to Commit Genocide as alleged in Count 1 of the Indictment and Complicity in Genocide as alleged in Count 3 of the Indictment. The Trial Chamber considers that in certain paragraphs of the Indictment, for example paragraphs 6.14, 6.23, 6.25, 6.31 and 6.68, adequately set out the material facts in relation to the commission of those offences. Therefore, the Trial Chamber is of the view that evidence from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ can be adduced in support of those charges.

5. Furthermore, regarding Mugiraneza's request for the retrospective exclusion of evidence already received, the Trial Chamber made the following finding :

Finally, the Trial Chamber notes that Witness GTE and Witness GKP have already testified before this Chamber on 1 and 2 December 2003 and on 5 and 8 December 2003 respectively. The Trial Chamber is of the view that the appropriate time to raise an objection seeking to exclude the evidence of the said witnesses was before the commencement of the evidence of the disputed witnesses or at least during the testimony of these witnesses. Furthermore, the Defence for Prosper Mugiraneza did not take the objection at the appropriate time, and since it had the opportunity to cross-examine the said witnesses, the Trial Chamber considers that no prejudice has been caused to the Accused. Therefore the Trial Chamber does not find any reason to exclude the evidence of these two witnesses in respect of events implicating Prosper Mugiraneza in Kibungo *préfecture*.

6. Both Parties requested leave to appeal. On 24 Match 2004, the Trial Chamber certified both those requests[19]. On 15 July 2004, the Appeals Chamber reversed the Trial Chamber's Decision of 5 February 2004, and directed the Trial Chamber to reconsider Mugiraneza's request in light of the Appeals Chamber's finding that the Trial Chamber had failed to articulate the reasonable basis for the exercising of its discretion in relation to the two co-accused, In this connection, the Appeals Chamber reasoned as follows, among other things :

While the exercise of the discretion of different Trial Chambers in relation to different cases is an unhelpful comparison to make, where the exercise of discretion concerns co-accused situated in an identical situation and results in different treatment being accorded to each of them, then an assessment of the reasonableness of that distinction can only be made if the Trial Chamber provides reasons for that distinction[20].

[19] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004 (TC), 24 March 2004; *The Prosecutor v. Bizimungu et al*., Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 5 February 2004 (TC), 24 March 2004.

[20] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence (AC), 15 July 2004, para. 21. (Emphasis added).

7. In the same Decision, the Appeals Chamber dismissed the Prosecution's cross-appeal because it had failed to establish a discernible error committed by the Trial Chamber in the exercise of its discretion in this case.

8. On 1 September 2004, the Trial Chamber invited both Prosper Mugiraneza and the Prosecution to make further submissions in the light of the Appeals Chamber's direction that the Trial Chamber should reconsider the matter[21].

FURTHER SUBMISSIONS OF THE PARTIES

9. The Defence submits that the Appeals Chamber Decision on 15 July 2004 vacated the Trial Chamber's Decision to the extent that it allowed the introduction of testimony relating to Mugiraneza's personal activities in Kibungo and Cyangugu *préfectures* and to the extent that it denied the request to retrospectively exclude the two witnesses who had already testified on his activities in these areas[22].

10. The Defence further states that "the substance of the Appeals Chamber's remand order was that the Trial Chamber may have abused its discretion by granting one form of relief to one Accused, Casimir Bizimungu, but granting less relief to Mugiraneza based on the same set of facts." The Defence again states that parties identically situated should be treated identically.

11. In the submission of the Defence, the Appeals Chamber Decision further requires the Trial Chamber to strike or otherwise retroactively exclude evidence received in accordance with the Remitted Decision[23].

12. The Defence includes in its Memorandum a request for additional relief. Citing judicial economy and "the status of the case" as justification, it requests the Trial Chamber to exclude "all testimony of all witnesses concerning [Mugiraneza's] personal actions in Kimbungo [*sic*] and Cyangugu *prefectures* to the extent that those acts are not pied in the indictment."[24]

13. In its Response to the Memorandum, the Prosecution submits that the Appeals Chamber concluded that the exercise of discretion by the Trial Chamber is a matter within the inherent powers of the Chamber[25].

14. In relation to the request in the Memorandum for additional relief, the Prosecution objects, stating that the issue of additional relief is unrelated to the instructions of the Chamber in requesting the current submissions of the Parties, and furthermore does not form part of the Appeals Chamber Decision. Therefore the request should be disregarded[26].

[21] Memorandum from Court Management Services Section, I September 2004.
[22] Memorandum, para. 2.
[23] Memorandum, para. 10.
[24] Memorandum, para. 12.
[25] Response to the Memorandum, para. 3.
[26] Response to the Memorandum, para. 4.

15. The Appeals Chamber Decision requires the Trial Chamber to explain why it arrived at two different Decisions in respect of the Motions by Bizimungu and Mugiraneza in circumstances where both accused appeared to be situated in an identical situation. The Appeals Chambers reasoned thus :

> 22. If there is a reasonable basis for the Trial Chamber exercising its discretion differently in relation to the two co-accused, the Trial Chamber failed to articulate that basis in its decision. The Trial Chamber found that Bizimungu would be prejudiced by the admission of the evidence sought to be excluded and, in contrast, that Mugiraneza would not be so prejudiced, in relation to the same counts, by the evidence relating to events in Prefectures not identified in the Indictment. In these circumstances, the Appeals Chamber cannot be satisfied that no such error occurred.
>
> 23. [...]
>
> 24. For the foregoing reasons, the Appeals Chamber is not satisfied that the Trial Chamber committed no error in the exercise of its discretion in holding that the evidence of the identified witness could be led in relation to Counts 1 and 3 of the Indictment, and by its refusal not to exclude the evidence of GTE. As the Appeals Chamber is unable to identify the basis of the distinction drawn by the Trial Chamber between the two co-accused the decision of the Triai Chamber in relation to Mugiraneza is reversed. The Trial Chamber is directed to reconsider the request of Mugiraneza in light of the guidance above.

16. The two main substantive issues the Trial Chamber had to deliberate upon in the Remitted Decision were :

> (a) The exclusion of the testimony of witnesses who had not yet testified; and
>
> (b) The retrospective exclusion of the evidence of Witness GTE and GKP who had already testified.

The Exclusion of the Testimony of Witnesses Who Had not Testified

17. The Trial Chamber recalls the submissions of the Parties whilst arguing the Motion leading to the Remitted Decision, set out in paragraphs 1-5 of the Remitted Decision, which are incorporated here by reference. Furthermore, and particularly in relation to the Prosecution submissions, the Trial Chamber notes that the brief was significantly modified by the oral submissions of 5 February 2004.

18. Whilst arguing the *Bizimungu* Motion, and in its written submissions, the Prosecution urged the Trial Chamber to accept the proposed testimony towards proof of all counts of the Indictment. However, during the oral submissions for the *Mugiraneza* Motion, the Prosecution advanced an "alternative argument", namely, that the testimony of the listed 17 witnesses, to the extent that they relate to acts occurring in Kibungo and Cyangugu *préfectures*, were being offered only in support of the charges of Complicity in Genocide (Complicity) and Conspiracy to Commit Genocide (Conspiracy)[27]. The Prosecution submitted as follows :

[27] T. 5 February 2004, pp. 12-13.

(i) The Indictment charges the crimes of Complicity and Conspiracy sufficient detail, and for these crimes it is not necessary to prove the presence of the Accused at a crime scene[28]. For these crimes the Indictment need not go beyond the "elements of the crime" to give him notice[29]. The cabinet in Kigali [of which the accused was a member] hatched the conspiracy, and that everything else was in execution of that conspiracy)[30].

(ii) The Indictment sets out with sufficient clarity the basis on which Complicity and Conspiracy are charged. This is so because the degree of specificity required to set out the material facts of these crimes in the Indictment is lower, and that the Trial Chamber should make its determination on these matters whilst understanding the nature of the Prosecution case[31].

(iii) The Accused suffers no prejudice in facing the evidence sought to excluded, as the evidence by which these charges would be proved was disclosed to the Defence in adequate time in the Pre-Trial brief and in the witness statements. Therefore the Accused can be under no illusion as to the evidence to which he must answer[32]. This is supported by the fact that Counsel for the Defence was ready and prepared to cross-examine Witnesses GTE and GKP without objection, and brought the Motion to exclude the evidence of 17 other witnesses only after the Decision in *Bizimungu*[33].

19. The Defence, on the other hand, during its oral submissions maintained the same position as it had in its written submissions, urging the Trial Chamber to follow its own Decision given in the *Bizimungu* motion. In view of the alternative argument advanced by the Prosecution, the Chamber twice gave the Defence an opportunity to present arguments in rebuttal; however, the Defence failed to address the issue[34].

20. It is the foregoing factors, which were not apparent in the reasoning of the Remitted Decision, which influenced the Trial Chamber in arriving at its Decision. The Trial Chamber therefore concluded in the following terms :

[...][The] Indictment charges the Accused with Conspiracy to Commit Genocide as alleged in Count 1 of the Indictment and Complicity in Genocide as alleged in Count 3 of the Indictment. The Trial Chamber considers that in certain paragraphs of the Indictment, for example paragraphs 6.14, 6.23, 6.25, 6.31 and 6.68, adequately set out the material facts in relation to the commission of those offences. Therefore, the Trial Chamber is of the view that evidence from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GJN, GJO, GKT, GJX, GJW, GJZ tan be adduced in support of those charges.

21. By contrast, the Prosecution, in the *Bizimungu* Motion, did not advance arguments on the relevance of the testimony of the proposed witnesses to the counts of conspiracy and Complicity. It made a brief reference to the idea of Conspiracy but did not elaborate the point. The Trial Chamber was therefore not afforded an oppor-

[28] T. 5 February 2004, p. 4.
[29] T. 5 February 2004, p. 9.
[30] T. 5 February 2004, p. 11.
[31] T. 5 February 2004, pp. 10 and 17.
[32] T. 5 February 2004, pp. 20-26; T. 5 February 2004, pp. 28-46.
[33] T. 5 February 2004, p. 12.
[34] T. 5 February 2004, pp. 42 and 45.

tunity in the *Bizimungu* Decision to consider this alternative submission. This analysis explains the difference in the outcome of the two Motions.

Case Law on Sufficiency of the lndictment

22. The Trial Chamber, in the following reasoning, will rely on the case law of this Tribunal as well as on other legal authorities. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Nyitegeka* case has accurately stated the position of both Tribunals on the issue of sufficiency and specificity of the Indictment. The Trial Chamber considers the following paragraphs as being particularly relevant :

> 193. The law governing challenges to the failure of an Indictment to provide notice of Material Facts is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreskic*. The *Kupreskic* Judgement stated that Article 18 (4) of the ICTY Statute, read in conjunction with Articles 21 (2), 4 (a) and 4 (b), "translates into 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."[35] *Kupreskic* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution Charges personal physical commission of criminal acts, the Indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."[36]
>
> […]
>
> 195. Failure to set forth the specific Material Facts of a crime constitutes a "material defect" in the Indictment[37]. Such a defect does not mean, however, that trial on that Indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreskic* stated that a defective Indictment "may, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic[38]. *Kupreskic* left open the possibility that the Appeals Chamber could deem a defective Indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the Charges against him or her."[39]

23. Further, the Trial Chamber notes the decision of the Appeals Chamber in the *Nyiramasuhuko* Case[40] where it stated :

> 11. [...] for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence. The required degree of specificity depends very much

[35] *Kupreskic et al*., Appeal Judgement, para. 88.
[36] *Ibid*., para. 89.
[37] *Ibid*., para. 114.
[38] *Ibid*. (emphasis added).
[39] *Ibid*.
[40] *Nyiramasuhuko v. Prosecutor*, Case N° ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004.

> on the facts of the case and the nature of the alleged criminal conduct. If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment. Where a defect remains, the question then arises whether the trial of the accused was rendered unfair.[41]
>
> 12. [...] the failure to specifically plead certain allegations in the indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion to under Rule 89 (C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of the other allegations specifically pleaded in the Indictment.

24. Being mindful of the consistency of the Appeals Chambers' case law to the effect that '[t]he required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct', the Trial Chamber recalls once more the Prosecution's elaborate submissions on the Conspiracy count, during the *Mugiraneza* Motion. As part of its submissions during the *Mugiraneza* Motion, the Prosecution had argued that a comparatively lower level of specificity is required in relation to the pleading of the material facts in the Indictment for Conspiracy and Complicity. The Prosecution did not bring to the attention of the Trial Chamber any case law on this issue. However, the jurisprudence of some national courts appear consistent with the Prosecution's position on this point. For example, in the United States Supreme Court, in the case of *Williamson*, it has been held that an indictment alleging a conspiracy to suborn perjury need not, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and of perjury[42]. The Court stated that "[...] in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."[43] Similarly, in Westbrook, concerning an allegation of conspiracy to embezzle funds, the court pointed out that "the gist of the crime of conspiracy is unlawful agreement and that where a conspiracy is alleged it is not necessary to set out the criminal object of the conspiracy with as great certainty as is required in cases where such an object is charged as a substantive offence."[44]

The Question of Prejudice Caused

25. A fundamental consideration of the Appeals Chamber in reversing the Remitted Decision was the question of the Trial Chamber's determination of possible prejudice caused to the Accused[45]. In reconsidering the Motion, the Trial Chamber thus pays specific attention in its reasoning as to whether or not any prejudice would in fact be caused to the Accused by allowing the evidence of the impugned witnesses.

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[41] (Internal footnote omitted).

[42] *John Newton Williamson, Plff. In Err., v. United States*, 207 U.S. 425, 28 S.Ct. 163; later followed by the Supreme Court in Wong Tai v. U.S., 273 U.S. 77.

[43] Williamson, p. 171 [emphasis added].

[44] *United States v. Westbrook et al.*, 114 F.Supp. 192, at p.196. [emphasis added].

[45] Appeals Decision, para. 22

26. In determining the question of prejudice resulting from witness testimony that the accused could not fairly have anticipated, it is important to consider whether the Prosecution had provided to the Defence "timely, clear and consistent" disclosure of the challenged testimony. In this regard, the Trial Chamber notes that the Prosecution Pre-Trial Brief, filed on 20 October 2003[46], gave sufficient notice to the Defence of the evidence underpinning the charges in the Indictment and that the Prosecution disclosed the relevant witness statements of the impugned witnesses, in unredacted format on 8 October 2003.

27. For the purpose of determining whether or not the proposed testimony of the impugned witnesses has a direct bearing upon the Indictment served upon the Accused, the Trial Chamber has undertaken its own preliminary analysis as to the relationship between the testimony of these witnesses and the Indictment. This analysis is preliminary for the purposes of the present Motion only, and is not exhaustive at this stage.

(i) The evidence of Witness GJV, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 5.13, 6.16;

(ii) The evidence of Witness GJQ, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 1.14, 1.15, 1.17, 1.28, 5.1, 5.3, 5.5, 5.10, 5.13, 5.14, 5.16, 6.14, 6.16, 6.18, 6.26, 6.30, 6.64, 6.68;

(iii) The evidence of Witness GKP, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 1.17, 1.19, 5.15, 5.19, 5.20, 5.22, 6.16, 6.18, 6.22;

(iv) The evidence of Witness GKS, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 6.26, 6.30;

(v) The evidence of Witness GKM, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 1.15;

(vi) The evidence of Witness GTF, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 1.14, 1.15, 1.17, 5.13;

(vii) The evidence of Witness GKR, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 1.14, 1.15, 1.17, 5.1, 5.3;

(viii) The evidence of Witness GJT, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 1.14, 1.15, 1.17, 5.1, 5.3, 5.10, 5.15, 5.16, 5.33, 6.14, 6.64, 6.68;

(ix) The evidence of Witness GJR, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following

[46] *The Prosecutor v. Bizimungu et al.*, Case N° ICTR-99-50-I, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) (i), 20 October 2003.

paragraphs of the Indictment : 1.14, 1.15, 1.17, 5.10, 5.15, 5.19, 5.22, 6.14, 6.16, 6.18, 6.26;

(x) The evidence of Witness GJU, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.15, 6.16;

(xi) The evidence of Witness GJN, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 1.14, 1.15, 1.17, 5.1;

(xii) The evidence of Witness GJO, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 1.14, 1.15, 1.17, 4.15, 5.1, 6.16;

(xiii) The evidence of Witness GKT, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 6.35, 6.36, 6.66;

(xiv) The evidence of Witness GJX, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 5.2, 5.3, 5.15, 5.16, 5.19, 5.20, 6.16, 6.35, 6.36;

(xv) The evidence of Witness GJW, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 5.3;

(xvi) The evidence of Witness GJZ, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 5.3, 5.15, 6.16, 6.35, 6.36;

(xvii) The evidence of Witness LY, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 5.1, 5.3, 5.22;

(xviii) The evidence of Witness GTE, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 4.15, 5.1, 5.3, 6.14, 6.15, 6.16, 6.26, 6.30, 6.31;

28. Pursuant to this analysis, the Trial Chamber is satisfied that, in relation to the Conspiracy and Complicity counts, the testimony of each of these witnesses is relevant evidence in relation to the Indictment. Given also the pre-trial disclosure, including the unredacted witness statements, and the Prosecution Pre-Trial Brief which links the anticipated testimony of these witnesses to specific counts, the Trial Chamber is satisfied that the Accused has received adequate notice of the case against him in a clear and timely manner and that no prejudice will be caused to the Accused by the admission of the testimony of the witnesses.

The Evidence of Witnesses Who Had Already Testified

29. As regards the additional relief requested by the Accused, which was to exclude retrospectively the testimony of Witness GTE, the Chamber recalls the direction of the Appeals Chamber in the Appeals Decision :

> 23. The Trial Chamber claims that its decision to not exclude the evidence of Witness GTE, concerning the crimes Mugiraneza is alleged to have committed in Kibungo *Prefecture*, is based on the notion that no prejudice accrued to Mugiraneza given the Defence's opportunity to cross-examine the witness. In contrast, with respect to Bizimungu, the Trial Chamber excluded the evidence of witnesses in relation to the alleged crimes of which Bizimungu allegedly incurred criminal responsibility in Ruhengeri *Prefecture* on the basis that that geographical region had not been pleaded in the Indictment. The Trial Chamber failed to render clear reasoning on this issue.

30. The Trial Chamber now clarifies its reasoning and its ruling.

31. The Trial Chamber recalls that during the oral arguments of 5 February 2004, the Presiding Judge asked Defence Counsel for Mugiraneza the reason why he did not raise an objection to the evidence of Witness GTE at the time. Counsel simply responded that he "forgot"[47]. The Trial Chamber found that :

> [...] the appropriate time to raise an objection seeking to exclude the evidence of the said witnesses was before the commencement of the evidence of the disputed witnesses or at least during the testimony of these witnesses. Furthermore, the Defence for Prosper Mugiraneza did not take the objection at the appropriate time, and since it had the opportunity to cross-examine the said witnesses, the Trial Chamber considers that no prejudice has been caused to the Accused[48].

32. The Trial Chamber considers that, although the Appeals Chamber Decision had not mentioned the case of Witness GKP, who had also testified, it is necessary to address this issue along with the analysis regarding Witness GTE.

33. In the *Mugiraneza* Decision, the Trial Chamber considered whether prejudice had been caused to the Accused and decided that no prejudice had been caused. However, in the *Bizimungu* Decision, the Trial Chamber failed to consider the issue of prejudice to the Accused and decided to exclude the evidence "in the interests of justice" without explaining the factors that went into that finding. The Trial Chamber, in the *Mugiraneza* Decision, was satisfied that it had committed an error in the exercise of its discretion in the *Bizimungu* Decision and did not feel bound to follow the latter Decision. This accounts for the difference between the two decisions.

34. Finally, the Trial Chamber understands that it did not make it sufficiently clear in its original findings in the Remitted Decision, but does so now, that it only intends to consider the evidence of Witnesses GTE and GKP in relation to the counts of Conspiracy and Complicity, in common with the other impugned witnesses, and for the same reasons.

Conclusion

35. The Trial Chamber finds that the Remitted Decision was correct in its result, although at the time inadequately explained its reasoning. Having so clarified the Decision, it does not find it necessary to address the Defence arguments contained in the Memorandum for additional relief.

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[47] T. 5 February 2004, pp. 2-3.
[48] Remitted Decision, para. 10.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

REVISES its Decision of 5 February 2004 in the following manner :

GRANTS the Defence Motion of 19 January 2004 in the following terms :

(i) Where the testimony sought to be adduced from Witnesses GJV, GJQ, GJY, GKS, GKM, GTF, GKR, GJT, GJR, GJU, GIN, GJO, GKT, GJX, GJW, GJZ, GTE, GKP, and LY relates to events occurring in Kibungo and Cyangugu *préfectures*, it will only be admitted as evidence against Counts 1 and 3 of the Indictment.

(ii) Where the testimony of any of the aforementioned Witnesses in relation events occurring in Kibungo and Cyangugu *préfectures* has already been heard, the Trial Chamber will only consider that portion of their testimony as evidence against Counts 1 and 3 of the Indictment.

DENIES the Motion in all other respects.

Arusha, 4 October 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB and GAP 6 October 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka – admissibility of witnesses – delay in the defence reply, no extension of time – specificity of the indictment, sufficient detail, material facts underpinning the charges, remedy at trial – evidence, relevance, admissibility – witness testimony, timely, clear and consistent disclosure – prejudice – case law of the Tribunal – motion denied

International instruments cited : Rules of procedure and evidence, Rule 89 (C) – Statute of the ICTY, art. 4 (a), 4 (b), 18 (4), 21 (2)

International cases cited :

I.C.T.R. : The Prosecutor v. Casimir Bizimungu et al.*, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 bis (B) (i), 20 October 2003 (ICTR-99-50-I) – Trial Chamber II,* The Prosecutor v Jérôme Bicamumpaka et al.*, Notice of Alibi from the Defence of Bicamumpaka Conceming Allegations Made By Witness GAP, 10 December 2003 (ICTR-99-50-T) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Deci-*

sion on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA, 23 January 2004 (ICTR-99-50, Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence, 25 June 2004 (ICTR-99-50,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Eliezer Nyitegeka*, Judgment, 9 July 2004 (ICTR-96-16-A,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 Case (ICTR-98-42-AR73,* Reports 2004*, p. X)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreskic et al.*, Appeal Judgement, 23 October 2001 (IT-95-16)*

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 "Motion of Defendant Bicamumpaka Opposing the Testimony of Witnesses GFA, GKB and GAP" filed on 12 July 2004, (the "Motion");

NOTING the "Prosecutor's Response to Jérôme Bicamumpaka's Motion Opposing the Testimony of Witnesses GFA, GKB and GAP" filed on 19 July 2004, (the "Response");

NOTING the "Motion to Extend Time to File (the "Motion for Extension of Time") and Jérôme Bicamumpaka's Reply to Prosecutor's Response to Bicamumpaka's Motion Opposing the Admissibility of the Testimony of Witnesses GFA, GKB and GAP" filed on 23 August 2004, (the "Reply");

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Jérôme Bicamumpaka requests that the Trial Chamber declare inadmissible the evidence of Witnesses GFA, GKB and GAP regarding Jérôme Bicamumpaka's involvement in events in Ruhengeri *préfecture*. The Defence moves the Trial Chamber to order the Prosecutor not to lead any such evidence from Witness GFA, who has not yet testified, and disregard any such evidence from Witnesses GKB and GAP, who have already testified.

2. The Defence asserts that the Indictment makes no specific allegations against Jérôme Bicamumpaka regarding activities in Ruhengeri *préfecture*. Therefore, the Defence argues, Jérôme Bicamumpaka is in the same position as Casimir Bizimungu, whose motion to declare inadmissible testimony on his acts in Ruhengeri *préfecture* was granted by the Trial Chamber[1] and upheld by the Appeals Cham-

[1] *The Prosecutor v. Casimir Bizimungu et al*., "Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA", 23 January 2004, (the "Decision of 23 January 2004").

ber[2] on the basis that "there are no specific acts alleged against Casimir Bizimungu in relations to events that took place in Ruhengeri *préfecture* in any part of the Indictment."[3]

3. The Defence submits that the Trial Chamber should apply the same reasoning to declare inadmissible the testimony of Witnesses GFA, GKB, and GAP regarding Jérôme Bicamumpaka's activities in Ruhengeri *préfecture*.

4. The Defence argues that the availability of this relief should not be affected by the fact that Witnesses GKB and GAP have already testified. The Defence notes that the Motion was filed less than two weeks after the Appeals Chamber ruled on the related motion from Casimir Bizimungu. Furthermore, the Defence submits that the Appeals Chamber did not consider the Trial Chamber in error when it declared inadmissible testimony of witnesses who had already testified regarding Casimir Bizimungu's activities.

5. The Defence finally notes that after it announced an alibi for Witness GAP's allegations regarding Ruhengeri *prefecture*, the Prosecutor decided not to call the two main witnesses for the alibi.

Prosecutor Submissions

6. The Prosecutor argues that the issue of Witnesses GFA, GKB, and GAP with regard to Jérôme Bicamumpaka differs from the issue on which the Trial Chamber and Appeals Chamber ruled regarding the witnesses testifying about Casimir Bizimungu's acts in Ruhengeri *préfecture*.

7. Regarding Witnesses GKB and GAP, the Prosecutor submits that unlike Casimir Bizimungu, the Defence did not make timely objections to the testimony in question. Citing the Appeals Chamber about objections raised upon appeal[4], the Prosecutor argues that Jérôme Bicamumpaka waived his right to claim lack of notice and prejudice because he did not allege any prejudice when the witnesses testified and waited until six to seven months later to file his Motion. The Prosecutor notes that the Defence did not cross-examine Witness GKB and did not object to either Witness GKB's or Witness GAP's testimony in the Trial Chamber. The Prosecutor also notes that the Trial Chamber Decision regarding Casimir Bizimungu's similar motion stated that "objection[s] of this type should [be] raised as soon as possible, at minimum before the commencement of the evidence of the disputed witness."[5]

8. The Prosecutor further argues, based on Appeals Chamber statements about appeals submissions, that the Defence bears the burden of proof for showing he has been prejudiced by the testimony of Witnesses GKB and GAP. The Prosecutor submits that the Defence's lack of objection in the Trial Chamber to their testimony shows that he was not prejudiced by it.

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[2] *The Prosecutor v. Casimir Bizimungu et al*., "Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence", 25 June 2004.

[3] Decision of 23 January 2004.

[4] *Nyitegeka v. The Prosecutor*, Case N° ICTR-96-16-A, Judgment, 9 July 2004.

[5] Decision of 23 January 2004, para. 17.

9. Regarding Witness GFA, the Prosecutor contends that unlike Casimir Bizimungu, the Defence for Jérôme Bicamumpaka received sufficient notice of the allegations against him for acts in Ruhengeri. The Prosecutor notes that when Casimir Bizimungu filed his similar motion, Witness GFA, one of the rive in question, was not on the witness list yet, while the Defence for Jérôme Bicamumpaka knew that Witness GFA was on the witness list and received his statements before filing its Motion.

10, Altematively, the Prosecutor submits that the Pre-Trial Brief has cured any defects in the Indictment regarding allegations against the Accused for acts in Ruhengeri. The Prosecutor points to Appeals Chamber decisions that allow such curing, and further argues that the testimony of Witnesses GKB and GAP and the anticipated testimony of Witness GFA about Jérôme Bicamumpaka's alleged acts in Ruhengeri *préfecture* are consistent with the Pre-Trial Brie£

11. Regarding the Defence's alibi for Witness GAP's allegations, the Prosecutor submits that one of the witnesses supporting the alibi was never a Prosecution witness, the other was removed from the Prosecutor's witness Iist on 23 June 2004, and both are available to be called by the Defence.

Defence Reply

12. According to the Defence, the Prosecutor's Response was received by the Legal Assistant, Me Philippe Larochelle, who was still present in Arusha on 12 July 2004. The Defence argues that the Legal Assistant was only given permission to meet with the Accused on 4 August and with the Lead Counsel on 11 August. The Defence contends that the Reply was drafted at the earliest opportunity and that it should be granted an extension of time to file the Reply.

DELIBERATIONS

13. As a preliminary matter, the Trial Chamber notes that the Defence Reply was filed more than one month after the Prosecutor's Response and after the deadline given by the Trial Chamber to reply. Further the Trial Chamber is not convinced by the reasons given by the Defence, namely that the Legal Assistant for the Defence was unable to meet with the Accused and in the impossibility of communicating with the Lead Counsel. The Trial Chamber is of the view that, although it had adopted a flexible approach in the past, the delay between the Response and the Reply is such that the Defence cannot reasonably expect the Trial Chamber to grant a motion for extension of time one month after the Reply was due. Therefore, the Trial Chamber will not take into consideration the Reply and will deny the Motion for Extension of Time.

14. The Trial Chamber, in the following reasoning, will rely on the case law of this Tribunal as well as on other legal authorities. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Niyitegeka* case has accurately stated the position of both Tribunals on the issue of sufficiency and specificity of the Indictment. The Trial Chamber considers the following paragraphs as being particularly relevant[6].

[6] *The Prosecutor v. Eliezer Niyitegeka*, Case N° ICTR-96-14-A, Judgement, 9 July 2004.

193. The law governing challenges to the failure of an Indictment to provide notice of Material Facts is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreskic*. The Kupreskic Judgement stated that Article 18 (4) the ICTY Statute, read in conjunction with Articles 21 (2), 4 (a) and 4 (b), "translates into 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."[7] *Kupreskic* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution Charges personal physical commission of criminal acts, the Indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."[8]

[...]

195. Failure to set forth the specific Material Facts of a crime constitutes a "material defect" in the Indictment[9]. Such a defect does not mean, however, that trial on that Indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreskic* stated that a defective Indictment "*may*, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic[10]. *Kupreskic* left open the possibility that the Appeals Chamber could deem a defective Indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the Charges against him or her."[11]

15. Further, the Trial Chamber notes the decision of the Appeals Chamber in the *Nyiramasuhuko* Case[12] where it stated :

11. [...] for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence. The required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct. If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment. Where a defect remains, the question then arises whether the trial of the accused was rendered unfair[13].

12. [...] the failure to specifically plead certain allegations in the indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion under Rule 89 (C) to admit any evidence which it deems to have pro-

[7] *Kupreskic et al*., Appeal Judgement, para. 88.
[8] *Ibid*., para. 89.
[9] *Ibid*., para. 114.
[10] *Ibid.* (emphasis added).
[11] *Ibid.*
[12] *Nyiramasuhuko v. Prosecutor*, Case N° ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004.
[13] (Internal footnote omitted).

bative value, to the extent that it may be relevant to the proof of the other allegations specifically pleaded in the Indictment.

16. In determining the question of prejudice resulting from witness testimony that the Accused could not fairly have anticipated, it is important to consider whether the Prosecution had provided to the Defence "timely, clear and consistent" disclosure of the challenged testimony. In this regard, the Trial Chamber finds that the Prosecution Pre-Trial Brief, filed on 20 October 2003[14], gave sufficient notice to the Defence of the evidence underpinning the charges in the Indictment and disclosed the relevant witness statements of the impugned witnesses, in unredacted format on 8 October 2003 for Witnesses GKB and GAP.

17. With respect to Witness GKB the Trial Chamber notes that there is no mention of the Accused in his statements. The Trial Chamber also notes that the statements were disclosed to the Defence on 8 October 2003 and that the Pre-Trial Brief does not mention this particular Witness in relation to the events alleged. However, when GKB testified on 10 December 2003, he stated that the Accused was present at the swearing-in ceremony[15]. The Trial Chamber considers that the fact that the Defence did not object at the time and did not even proceed to cross-examination when this witness testified on 8, 10, 12 and 15 December 2003 constitute a waiver of the right of the Accused to bring such a Motion for exclusion. The Trial Chamber reproduces here the intervention of the Defence Counsel :

> MR. GAUDREAU :
>
> Mr. President, as far as the Defence of Bicamumpaka is concerned, we also do not intend to cross-examine this witness because we have no interest in cross-examining her -- cross-examining him. And we also like to make the caveat that the fact of not cross-examining him does not mean that we accept *in toto* his testimony[16].

18. Therefore, the Trial Chamber does not see any reason to exclude the testimony of Witness GKB in relation to the alleged presence of the Accused at the swearing-in ceremony as the Defence has been unable to show any prejudice that could have occurred due to the testimony of this witness.

19. Regarding Witness GAP, the Trial Chamber finds, after a careful review of the statements disclosed in an unredacted format on 8 October, that the alleged swearing-in ceremony and the participation of Bicamumpaka was mentioned with ample details. The Trial Chamber also notes that Witness GAP testified on 19, 20, 21, 22 and 23 January 2004 and that the Defence Counsel for Bicamumpaka proceeded to an extensive cross-examination, especially on the issue of the impugned meeting. Furthermore, the Trial Chamber observes that the impugned swearing-in ceremony was specifically mentioned in the Pre-Trial Brief in the following terms :

> 278. Moreover, Bicamumpaka actively participated in the Interim Government's policy of removing local authorities opposed to massacres, and replacing them with those devoted to the cause. He actively participated in inciting the new

[14] *The Prosecutor v. Bizimungu et al*., Case N° ICTR-99-50-I, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) (i), 20 October 2003.

[15] T. 10 December 2003, p. 26.

[16] T. 11 December 2003, p. 2.

authorities to prioritize the killing of Tutsis. *The Prosecutor will lead evidence to prove that on a date unknown between 19 and 16 April 1994, Bicamumpaka installed Mr. Nsabumugha new* prefet *for Ruhengeri and incited the killing of Tutsis. He spelt out the new* prefet *'s function as the killing of Tutsis*. A few days after this, killing of Tutsis intensified in Ruhengeri[17].

20. Additionally, the Trial Chamber notes that the Defence did not object at the time that Witness GAP gave evidence. Furthermore, in relation to Bicamumpaka's presence at the swearing-in ceremony, the Trial Chamber is of the view that Defence could not have suffered any prejudice considering its filing of a Notice of alibi with respect to Witness GAP and this particular event[18]. The Trial Chamber recalls that this type of objection should be raised before the testimony of the impugned witness and that the Defence Counsel did not object to this part of the testimony in a timely manner.

21. Finally, the Trial Chamber is of the view that the evidence of Witness GAP, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 4.17, 6.9, 6.10, 6.18, 6.26, 6.30 and 6.35. The Trial Chamber considers that the said paragraphs state in sufficient details the material facts underpinning the charges in the Indictment, and that the pre-trial disclosure describe sufficiently the evidence by which such material facts are to be proved. Therefore, the Trial Chamber is satisfied that the Accused has received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimony of Witness GAP.

22. With respect to Witness GFA, the Trial Chamber notes that the objection was raised before the testimony of the witness in a timely manner. The Trial Chamber also notes that, even though the statements of Witness GFA were disclosed on 19 December 2003 to the Defence, the name of Witness GFA already appeared in the Pre-Trial Brief in relation to the events mentioned in paragraph 278 as reproduced above. The statements contained a clear and consistent description of the swearing-in ceremony as well as the participation of the Accused in that particular event. The Trial Chamber acknowledges that the transcripts of the testimony of Witness GFA were only disclosed on 29 September 2004 but after a careful review of the transcript, the Trial Chamber concludes that there is no new information contained in this testimony.

23. Finally, the Trial Chamber is of the view that the evidence of Witness GFA, as disclosed by the Pre-Trial Brief and the unredacted witness statements, can be related, amongst others, to the following paragraphs of the Indictment : 4.17, 6.9, 6.10, 6.18, 6.26, 6.30 and 6.35. The Trial Chamber considers that the said paragraphs state in sufficient details the material facts underpinning the charges in the Indictment, and that pre-trial disclosure describe sufficiently the evidence by which such material facts are to be proved. Therefore, the Trial Chamber is satisfied that the Accused has

[17] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-1, Prosecutor's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) (i), 20 October 2003, para. 278. (Emphasis added).

[18] *The Prosecutor v Jérôme Bicamumpaka et al*., Case N° ICTR-99-50-T, Notice of Alibi from the Defence of Bicamumpaka Conceming Allegations Made By Witness GAP, 10 December 2003.

received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimony of Witness GFA.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion for Extension of Time and,

DENIES the Motion.

Arusha, 6 October 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Corrigendum to the Decision on Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe 18 October 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi – corrigendum – testimony

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998 (ICTR-96-4-T,* Reports 1998*, p. 32 – Trial Chamber II,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe, 29 September 2004 (ICTR-99-50-T,* Reports 2004*, p.X)*

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");

RECALLING the Decision on Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe, filed on 29 September 2004[1], (the "Decision");

[1] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Justin Mugenzi's Motion in Respect of the Report and Proposed Evidence of Joseph Ngarambe (TC), 29 September 2004

NOTING that the Decision contained errors of a typographical nature;

DIRECTS that the following amendments be made to the Decision :

(1) The second paragraph of the preamble on page 2 of the Decision should read follows :

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the "Trial Chamber");

(2) Paragraph 19 on page 5 of the Decision should (including the addition of the citation) read as follows :

19. Moreover, the Defence asserts that the Prosecutor has failed to show that Joseph Ngarambe's testimony concerns "specific issues of a technicat nature, requiring special knowledge in a special field," which was required by the Chamber in a Decision in the case of *Akayesu*[2].

Arusha, 18 October 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

***

Decision on Casimir Bizimungu's Motion for Extension of Time 20 October 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bizimungu – motion for certification to appeal – extension of time – sufficient reasons – motion granted

International instruments cited : Rules of procedure and evidence, Rule 73 (C), 73 bis *(E)*

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 "*Requête de la défense de Casimir Bizimungu en vue d'obtenir une extension de délai*" filed on 20 September 2004, (the "Motion for Extension of Time");

[2] *The Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (TC), 9 March 1998.

NOTING the "Prosecution's Response to Casimir Bizimungu's Motion for Extension of Time to File for Certification to Appeal the Trial Chamber's Decision Dated 3 September 2004" filed on 27 September 2004, (the "Response");

NOTING the "Réplique de Casimir Bizimungu à la réponse du Procureur concernant la requête écrite de la défense d'obtenir une extension de délai" filed on 30 September 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 "Decision");

CONSIDERING that the Decision was filed on Friday 3 September 2004 and sent by fax from Court management Section to the Defence on 7 September 2004;

CONSIDERING that the Defence has brought to the attention of the Trial Chamber that it intended to file a motion for certification to appeal the impugned Decision on 13 September, namely within the time limit prescribed by Rule 73 (C) of the Rules of Procedure and Evidence;

CONSIDERING that the Defence has pointed out to the Trial Chamber that it was unable to file the motion for certification to appeal due to the fact that both Counsel were travelling from Canada and did not have contact with each other;

CONSIDERING FINALLY that the Defence has given sufficient reasons for its Motion for Extension of Time, the Trial Chamber is of the view that the Defence should be allowed to file a motion for certification within seven (7) days upon notification of this Decision.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Bicamumpaka's Motions to Declare Parts of the Testimony of Witnesses GHT, GHY and GHS Inadmissible 21 October 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka – admissibility of testimony – specificity of the indictment, material facts underpinning the charges, enough detail, preparation of the defence – adequate notice of the case in a clear, timely and consistent manner – prejudice of the accused –remedy at trial – pre-trial brief – evidence, relevance – Direct and Public Incitement to Genocide, use of media, Kangura – addition of witnesses to the Prosecution witness list – reversal of a conviction by the Appeals Chamber – ICTY

International instruments cited : Statute, art. 17 (4) and 20 (4) – Rules of procedure and evidence, Rules 47 (C), 89 (C) – ICTY Statute, art. 4 (a), 4 (b), 18 (4), 21 (2)

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean de Dieu Kamuhanda*, Decision on the Prosecutor's Motion to Add Witnesses GKI, GKJ and GKL, 6 February 2002 (ICTR-99-54A-T,* Reports 2002*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, 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 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. André Ntagerura et al*, Judgement, 25 February 2004 (ICTR-96-10A,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Eliezer Niyitegeka*, Appeal Judgement, 9 July 2004 (ICTR-99-14-A,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42-AR73,* Reports 2004*, p. X)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreskic et al.*, Judgement, 23 October 2001 (IT-95-16)*

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");

SEISED of

(i) "Bicamumpaka's Motion to Declare Parts of the Witnesses GHT and GHY Testimonies Inadmissible", filed on 15 September 2004 (the "Motion Concerning Witnesses GHT and GHY");

(ii) "Bicamumpaka's Motion to Declare Parts of the Witnesses GHS Testimony Inadmissible", filed on 27 September 2004 (the "Motion Concerning Witness GHS");

HAVING RECEIVED

(iii) The "Prosecutor's Extremely Urgent Response to Jérôme Bicamumpaka's Motion to Declare Parts of the Witness GHT and GHY Testimonies Inadmissible", filed on 17 September 2004 (the "Response to the Motion Conceming Witnesses GHT and GHY");

(iv) "Bicamumpaka's Reply to the Prosecutor's Response to the Motion to Declare Parts of the Witness GHT's and GHY's Testimony Inadmissible", filed on 22 September 2004 (the "Reply to the Response to the Motion Concerning Witnesses GHT and GHY");

(v) The "Prosecutor's Extremely Urgent Response to Jérôme Bicamumpaka's Motion Declare Parts of the Witness GHS Testimony Inadmissible", filed on 4 October 2004 (the "Response to the Motion Concerning Witness GHS");

Relief Sought

1. The Defence requests the Chamber to direct the Prosecution not to lead any evidence from Witnesses GHT and GHY (in relation to events occurring in Kabuga *commune*) or from Witness GHS (in relation to events involving the Accused in Kigali city).

Supporting Arguments

2. The Defence argues that to admit witness testimonies and other evidence in relation to material facts not pleaded in the indictment violates the basic rights of an Accused to be informed in detail of the nature and cause of the charges against him so as to adequately prepare his defence, as guaranteed by Articles 17 (4) and 20 (4) of the Statute of the Tribunal (the "Statute") and Rule 47 (C) of the Rules of Procedure and Evidence (the "Rules").

3. The Defence submits that the Indictment does not specify any events in Kigali beyond those concerning the *Centre Hospitalier de Kigali* (CHK). The Indictment contains general statements in paragraphs 6.38 and 6.39 concerning the role of the Rwandan Army (FAR) and militiamen in Kigali, but not the Ministers of the Government generally, nor Bicamumpaka specifically[1]. Therefore, the Indictment does not provide sufficient notice of charges based on events in Kabuga *commune* as alleged by Witnesses GHT and GHY or charges based on events in Kigali *préfecture* or city as alleged by Witness GHS.

4. The Defence submits that references in the Indictment to Kigali are distinguishable from references to Gitarama, which speak generally of criminal activity by Ministers and members of the Government. Moreover, the references to Kigali are inapposite, as they contain no general reference to criminal activity by the civilian government or its ministers, beyond the alleged events occurring at CHK.

5. The Defence submits that according to the jurisprudence of the Tribunal, a witness may not testify on facts not pleaded with sufficient particularity in the Indictment[2], and, witness statements are insufficient in and of themselves to set out the material facts alleged against the Accused, in order to determine evidence that is admissible during trial[3].

[1] Motion Concerning Witnesses GHT and GHY, para. 8; Motion Concerning Witness GHS, para. 8.

[2] The Defence cites *Prosecutor v. Niyitegeka*, Case N° ICTR-99-14-A, Judgement [AC], 9 July 2004, para. 193, and *Prosecutor v. Kupreskic et al*., Case N° IT-95-16, Judgement [AC], 23 October 2001, para. 88 as authority for its proposition.

[3] The Defence cites *Prosecutor v. Niyitegeka*, Case N° ICTR-99-14-A, Judgement [AC], 9 July 2004, para. 221, and *Proseeutor v. Ntagerura et al*, Case N° ICTR-99-46-T, Judgement [TC], 25 February 2004, para. 66 as authority for its proposition.

6. The Defence states that it should hot be required at this stage of the proceedings to revisit its investigations into a new charge introduced at this stage. Any such investigation would be hasty, inadequate, and would prejudice the rights of the Accused to a fair trial.

Prosecution Response

7. The Prosecution opposes the granting of both Motions. The Indictment contains allegations specifically dealing with the Accused's criminal activities in Kigali, besides those the Defence highlights in its Motions[4]. The Prosecution categorises its case as one where the Accused perpetrated and is responsible for widespread killings and other transgressions of international humanitarian law over a period of time throughout Rwanda, not excluding any *préfecture*, and including Kigali. It identifies paragraphs 5.19, 5.22, 5.25, 6.10 and 6.30 as being the relevant paragraphs of the Indictment alleging the criminal conduct of the Accused in Kigali to which the testimony of Witnesses GHT, GHY and GHS is material, and go to provide proof.

8. The Prosecution submits that the relevance, or materiality of evidence to an indictment and the degree of specificity of an indictment depend upon the nature of the Prosecution's case, the nature or mode of the Accused's participation in the alleged crime, the complexity of the crimes, and the geographical area and period over which the crimes are committed. Taking this into consideration, the paragraphs of the Indictment identified adequately set out the facts in Witness GHT, GHY and GHS's statements. Their testimony is thus admissible.

9. The Prosecution provides the following summary of the contents of allegations of criminal conduct against the Accused contained in the statements of Witnesses GHT, and GHY[5].

> (i) GHT states that on 7 April 1994, Jérôme Bicamumpaka arrived in her father in law's house in Kabuga (Kigali rural) in a white pick up vehicle carrying five soldiers who were armed with rifles. The vehicle was loaded with weapons. Jérôme Bicamumpaka then asked one Abubacar Nduwayezu who at the time was a motorcycle taxi driver to go and help him distribute weapons to the *Interahamwe* militiamen so that "the latter could begin to kill the Tutsis." Jerome Bicamumpaka cautioned GHT's father in law's family members to stay away from the Sorghum fields to avoid being killed because "the Tutsi massacres are going to begin."
>
> (ii) GHY states that a few days following 6 April 1994 in Kabuga (Kigali rural), her brother in law informed her that Jérôme Bicamumpaka had ordered the killing of all Tutsis.
>
> (iii) GHY further stated that a motor vehicle belonging to the Ministry of Justice arrived in her home carrying *Interahamwe* and weapons that were unloaded and kept in the house of a named person. Thereafter GHY saw Jérôme Bicamumpaka get out of the same vehicle and went into the named person's residence where the weapons were earlier unloaded and kept.

[4] Response to the Motion Concerning Witnesses GHT and GHY, para. 6; Response to the Motion Concerning Witness GHS, para. 6.

[5] Response to the Motion Concerning Witnesses GHT and GHY, para. 11.

(iv) GHY states that killings reached their peak in the locality after the weapons were distributed.

And in relation to Witness GHS[6]

(v) Witness GHS worked for a printing company in Kigali as secretary and semi-manager. Witness got to know accused Jérôme Bicamumpaka in 1992 when the latter started bringing his private documents and MDR party documents to be published and photo-copied. Witness used to type the documents brought by Jérôme Bicamumpaka for them to be printed and remembers contents of the documents typed.

(vi) Witness states that in 1993, after the death of President (Ndadaye) of Burundi, documents bearing the following titles were brought by Jérôme Bicamumpaka to be printed.

"MDR is against the Arusha Accords"

"We shall not get into the same trap as Burundi"

"We shall fight the *Inyenzi* (Tutsi) to the last one."

(vii) In 1994, after the Kabusunzu Congress, it was publicly announced that MDR Power had separated from MDR Jérôme Bicamumpaka in the company of others including Marie Vianney and Nkezabera who attended the Kabusunzu meeting came to the office of the witness to print the Statute of MDR Power.

(viii) In 1994 March, witness overheard a conversation between the Director of *Kangura* Newspaper, Hassan Ngeze, and Jérôme Bicamumpaka, to the effect that in 1959, "we forgot to eliminate the children, when you kill a snake you have to hit the head and you have to find and destroy the eggs. In 1959, we didn't destroy the eggs but this time we should hit the head of the snake and find and eliminate all the eggs."

10. The Prosecution submits that no prejudice has been caused to the Accused, and the latter cannot be surprised, since the statements of Witnesses GHY and GHT "were disclosed in 2000 and in the Prosecutor's application for variation of witnesses dated 24 May 2004"[7] and "the redacted English statement of Witness GHS was disclosed in 2000 and the French in 2002. The unredacted versions of both languages were disclosed on 8 October 2003. On 20 October 2003 the Prosecutor disclosed the evidence of this witness in summary form [...]."[8]

Defence Reply

11. In Reply to the Response to the Motion concerning Witnesses GHT and GHY the Defence submits that the paragraphs cited by the Prosecution therein as paragraphs charging events against the Accused in Kigali are insufficient. They inadequately set out the events in Kigali mentioned in the testimony of Witnesses GHT and GHY. It further submits that :

[6] Response to the Motion Concerning Witness GHS, para. 11.
[7] Response to the Motion Concerning Witnesses GHT and GHY, para. 19.
[8] Response to the Motion Concerning Witness GHS, para. 19.

(i) Paragraph 5.19 speaks only of the role of MRND party members distributing weapons to militia, and that the Accused was not a member of the MRND party;

(ii) Paragraph 5.22 charges "some members of government", but not all, and makes no mention of either the Accused or events in Kigali;

(iii) Paragraph 5.25 speaks of the role of UNAMIR in introducing the Kigali Weapons Security Area- events which have no connection with the testimony of Witnesses GHT and GHY;

(iv) Paragraph 6.10 mentions "numerous cabinet members," but makes specific mention either of the Accused nor events in Kigali.

(v) Paragraph 6.30 mentions Kigali only as part of a list of prefectures, which a list of individuals "knew or had reason to know that their subordinates had committed or were preparing the commit errors [*sic*], and failed to prevent these crimes from being committed or to punish the perpetrators thereof." The paragraph does not sufficiently specify the events alleged by Witnesses GHT and GHY in Kigali.

12. The Defence submits that the Prosecution bas failed to address the Defence submissions in the Motion Concerning Witnesses GHT and GHY, and reiterates that the events in Gitarama, and their specification in the Indictment, are factually distinguishable from events occurring in Kigali.

DELIBERATIONS

Preliminary Matters

13. The Trial Chamber will decide the Motion concerning Witnesses GHT and GHY and the Motion concerning Witness GHS together as the issues involved for determining the admissibility of the testimony of the three witnesses and the submissions from the Parties thereon are similar.

14. Although the Motion Concerning Witness GHT and GHY was filed prior to the testimonies of Witnesses GHT and GHY, upon the directions of the Trial Chamber, Witnesses GHT and GHY testified without prejudice to the consideration of, and subject to, the outcome of the present Decision. Witness GHS has not yet testified before the Trial Chamber.

Analysis

15. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Nyitegeka* case has accurately stated the position of both Tribunals on the issue of sufficiency and specificity of the Indictment. The Trial Chamber considers the following paragraphs as being particularly relevant[9]:

[9] *The Prosecutor v. Eliezer Niyitegeka*, Case N° ICTR-96-14-A, Judgement (AC), 9 July 2004.

193. The law governing challenges to the failure of an Indictment to provide notice of Material Facts is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreskic*. The *Kupreskic* Judgement stated that Article 18 (4) of the ICTY Statute read in conjunction with Articles 21 (2), 4 (a) and 4 (b), "translates into 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."[10] *Kupreskic* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution charges personal physical commission of criminal acts, the Indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."[11]

195. Failure to set forth the specific Material Facts of a crime constitutes a "material defect" in the Indictment[12]. Such a defect does not mean, however, that trial on that Indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreskic* stated that a defective Indictment "*may*, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic[13]. *Kupreskic* left open the possibility that the Appeals Chamber could deem a defective Indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the Charges against him or her."[14]

16. Further, the Trial Chamber notes the decision of the Appeals Chamber in the *Nyiramasuhuko* case[15] where it stated :

11. [...] for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence. The required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct. If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment. Where a defect remains, the question then arises whether the trial of the accused was rendered unfair[16].

12. [...] the failure to specifically plead certain allegations in the indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion under Rule 89 (C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of the other allegations specifically pleaded in the Indictment.

[10] *Kupreskic et al*. Appeal Judgement, para. 88.
[11] *Ibid*., para. 89.
[12] *Ibid*., para. 114.
[13] *Ibid.* (emphasis added).
[14] *Ibid.*
[15] *Nyiramasuhuko v. Prosecutor*, Case N° ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004.
[16] (Internal footnote omitted).

17. As the Defence submits, Kabuga *commune* is not specifically mentioned in the Indictment. However, the Trial Chamber considers that this does not necessarily prevent the admission of evidence relating to events occurring in Kabuga *commune*[17]. In line with the Appeals Chamber reasoning, the Trial Chamber must determine whether the paragraphs in the Indictment clearly set out the charges against the Accused, including the material facts underpinning the charges against the Accused. Where the Indictment does set out the material facts underpinning the charges, but is lacking in specificity on the details, the Trial Chamber may look to the pre-trial disclosure to determine whether the Accused would be prejudiced by the admission of the evidence.

18. Unredacted disclosure of the statements of Witnesses GHT and GHY was made on 8 October 2003. The Pre-Trial Brief was filed on 20 October 2003[18]. The Trial Chamber finds that the material facts concerning the distribution of weapons by members of the cabinet of the interim government, of which the Accused was a member, are set out in paragraphs 5.22, and 6.10 read together with 6.9 of the Indictment. The witness statements of Witnesses GHT and GHY and the Pre-Trial Brief gave further details on the material facts concerning the Accused's alleged particular involvement in distribution of weapons and set out the evidence against the Accused in detail.

19. The Trial Chamber further notes its previous ruling on the addition of these witnesses to the Prosecution Witness list :

> Regarding the addition of Witnesses DCH, GHT, and GHY who were inadvertently omitted in the Prosecutor's Witness list, the Trial Chamber notes that they had nonetheless been included in the Prosecutor's Pre-Trial Brief of 20 October 2003. In addition, Witness GHT's statement was disclosed on 15 December 2000; Witness GHY's statement was disclosed on 20 August 2002; and Witness DCH's statement was disclosed on 19 December 2003. The Trial Chamber is of the view that the addition of these witnesses does not constitute an addition *per se* but is to be considered as a correction of a mistake by the Prosecutor. Further, the Trial Chamber notes that the Defence bas had sufficient notice of the particulars of these witnesses and of the content of their prospective testimony, and will not be unduly prejudiced by their addition to the Prosecutor's Witness List[19].

20. Thus, this issue has already received the attention of the Trial Chamber, and at that time the Parties were given the opportunity to make their submissions. The Trial Chamber recalls that the Defence for Bicamumpaka did not oppose this Motion.

21. The Trial Chamber is thus satisfied that the Accused has received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimonies of Witnesses GHT and GHY.

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[17] See for example *The Prosecutor v. Jean de Dieu Kamuhanda*, Case N° ICTR-99-54A-T, Decision on the Prosecutor's Motion to Add Witnesses GKI, GKJ and GKL (TC), 6 February 2002, para. 13.

[18] Prosecution's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) (i), filed on 20 October 2003; See particularly para. 198 therein.

[19] *The Prosecutor v. Casimir Bizimungu et al*., Case No. 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) (TC), 23 June 2004, para. 20.

22. Unredacted disclosure of the statements of Witness GHS was made on 8 October 2003. The Pre-Trial Brief was filed on 20 October 2003[20]. The paragraphs of the Indictment cited by the Prosecution in its Response to the Motion concerning Witness GHS[21] are inapt. According to the Prosecution's Pre-Trial Brief, Witness GHS will be called to establish Conspiracy to Commit Genocide, Complicity in Genocide, and Direct and Public Incitement to Genocide[22]. The Trial Chamber also notes the content of the Witness Statement of GHS dated 10 April 2000, where the Accused is alleged to have had the following conversation with Hassan Ngeze, Editor of *Kangura* newspaper :

> Bicamumpaka : I hope you did not forget anything.
>
> Ngeze : Don't worry - I did not leave out a thing, my writing is very solid.
>
> Bicamumpaka : Be sure that it is very strong, because this time we have to eliminate all the cockroaches. In 1959 we forgot to eliminate the children. When you kill a snake you have to hit the head and you have to find and destroy the eggs. In 1959 we didn't destroy the eggs, but this time we should hit the head of the snake and find and eliminate all the eggs.

23. The Trial Chamber finds that the material facts concerning the involvement of members of the government, which includes the Accused, in Direct and Public Incitement to Genocide by spreading messages of Hutu power and ethnic hatred and violence through the use of the media, including *Kangura* newspaper, are set out in paragraphs 5.1, 5.3, 5.10 and 5.11 of the Indictment. The witness statements of Witness GHS and the Pre-Trial Brief gave further details on the material facts concerning the Accused's alleged particular involvement in the above-mentioned crime and set out the evidence against the Accused in detail.

24. The Trial Chamber is thus satisfied that the Accused has received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimonies of Witness GHS.

25. The Trial Chamber is thus satisfied that the evidence of Witnesses GHT and GHY, and the anticipated evidence of Witness GHS is relevant, and that no prejudice is caused to the Accused by their admission.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion Concerning Witnesses GHT and GHY;

DENIES the Motion Concerning Witness GHS,

Arusha, 21 October 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[20] Prosecution's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) (i), filed on 20 October 2003; See particularly para. 275-277 therein.

[21] Response to the Motion Concerning Witness GHS, para. 12.

[22] Prosecution's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) (i), filed on 20 October 2003, para. 275-277; Witness Summary, p. 126.

Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay 3 November 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – fair trial – right to a trial without undue delay – dismissal of the Indictment – factors to determine if the trial suffered undue delay, conduct of the parties, complexity of the case, conduct of the relevant authorities – conduct of the Prosecutor – balance between right to be tried without undue delay and need to ascertain the truth about the serious crimes with which the Accused is charged – delay not attributable to the OTP – prejudice to the Accused, burden of proof lies with the Defence – motion denied

International instruments cited : Statute, art. 19, 20 (4) (C) – Rules of procedure and evidence, Rules 5 (A) and (B), 73 (A)

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Joseph Kanyabashi*, Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, 23 May 2000 (ICTR-96-15-I,* Reports 2000*, p. 1320) – Trial Chamber,* The Prosecutor v. Justin Mugenzi et al.*, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82 (B)), 8 November 2002 (ICTR-99-50-I,* Reports 2002*, p. X)*

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 "Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief," dated 27 February 2004, in which the Appeals Chamber remitted the matter to the Trial Chamber for reconsideration;

RECONSIDERING THEREFORE

Décision relative à la requête de Prosper Mugiraneza demandant l'audition de sa requête en rejet de l'acte d'accusation pour violations du droit de l'accusé d'être jugé sans retard excessif, ou tout autre mesure appropriée 3 novembre 2004 (ICTR-99-50-T)

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Président de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – procès équitable – droit d'être jugé sans retard excessif – rejet de l'acte d'accusation – facteurs pour déterminer le retard excessif, comportement des parties, complexité de l'affaire, comportement des autorités compétentes – comportement du Procureur – équilibre entre droit d'être jugé sans retard excessif et nécessité de faire la lumière sur les crimes graves imputés à l'accusé – retard non imputable au Bureau du Procureur – préjudice subi par l'accusé, preuve à charge de la défense – requête rejettée

Instruments internationaux cités : Statut, art. 19, 20 (4) (C) – Règlement de procédure et de preuve, art. 5 (A) et (B), 73 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance II, Le Procureur c. Joseph Kanyabashi*, Décision relative à la requête en extrême urgence en Habeas Corpus et arrêt des procédures, 23 mai 2000 (ICTR-96-15-1,* Recueil 2000*, p. 1321) – Chambre de première instance,* Le Procureur c. Justin Mugenzi et consorts*, Décision sur la requête de Justin Mugenzi en suspension d'instance ou, à titre subsidiaire, en mise en liberté provisoire (article 65) et, outre ce qui précède, en disjonction d'instances [article 82 (B)], 8 novembre 2002 (ICTR-99-50-I,* Recueil 2002*, p. X)*

LE TRIBUNAL PÉNAL 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 décision de la Chambre d'appel intitulée *Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand for Speedy Trial and for Appropriate Relief* rendue le 27 février 2004, par laquelle la Chambre d'appel a renvoyé la question à la Chambre de première instance pour qu'elle la réexamine,

REEXAMINANT DONC

(i) "Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (C) of the Statute, Demand for Speedy Trial and for Appropriate Relief", filed on 17 July 2003;

(ii) the "Prosecutor's Response to Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (C) of the Statute, Demand for Speedy Trial and for Appropriate Relief", filed on 28 July 2003; and

(iii) "Prosper Mugiraneza's Response to the Prosecutor's Reply to Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (C) of the Statute, Demand for Speedy Trial and for Appropriate Relief", filed on 2 August 2003;

BEING FURTHER SEIZED of

(i) Prosper Mugiraneza's application for "Hearing or Other Appropriate Relief on His Motion for Dismissal for Violation of His Right to a Trial Without Undue Delay" and the Confidential Annex thereto, filed on 23 August 2004 (the "Motion");

(ii) The "Prosecutor's Response to Prosper Mugiraneza's Motion for Hearing or Other Appropriate Relief on His Motion for Dismissal for Violation of His Right to a Trial Without Undue Delay," dated 30 August 2004 (the "Response");

(iii) "Prosper Mugiraneza's Response to the Prosecutor's Reply to Prosper Mugiraneza's Motion for Hearing or Other Appropriate Relief on His Motion for Dismissal for Violation of His Right to a Trial Without Undue Delay," and the Confidential Annex thereto, filed on 4 September 2004 (the "Reply");

NOTING the Chamber's "Decision on Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (C) of the Statute, Demand for Speedy Trial and for Appropriate Relief," dated 2 October 2003;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Article 20 (4) (C) of the Statute which affords accused persons the minimum guarantee of a trial "without undue delay";

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

Submission of the Defence

1. The Defence is seeking a reconsideration of its Motion of 17 July 2003 to dismiss the Indictment against Prosper Mugiraneza (the "Accused").

2. The Defence contends that the Decision of the Appeals Chamber is an affirmation by the latter that the Defence has made out a *prima facie* case of the violation

i) La requête de Mugiraneza intitulée *Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (C) of the Statute, Demand for Speedy Trial and for Appropriate Relief*, déposée le 17 juillet 2003;

ii) La réponse du Procureur intitulée *Prosecutor's Response to Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (C) of the Statute, Demand for Speedy Trial and for Appropriate Relief*, déposée le 28 juillet 2003;

iii) La réplique de Prosper Mugiraneza intitulée *Prosper Mugiraneza's Response to the Prosecutor's Reply to Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20 (4) (C) of the Statute, Demand for Speedy Trial and for Appropriate Relief*, déposée le 2 août 2003,

SAISI EN OUTRE

i) D'une requête de Mugiraneza, intitulée Prosper Mugiraneza's application for *Hearing or Other Appropriate Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay*, déposée, avec ses annexes confidentielles, le 23 août 2004 (la «Requête»);

ii) De la réponse du Procureur, intitulée *Prosecutor's Response to Prosper Mugiraneza's Motion for Hearing or Other Appropriate Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay*, déposée le 30 août 2004 (la «Réponse»);

iii) De la réplique de Prosper Mugiraneza, intitulée *Prosper Mugiraneza's Response to the Prosecutor's Reply to Prosper Mugiraneza's Motion for Hearing or Other Appropriate Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay* déposée, avec ses annexes confidentielles, le 4 septembre 2004 (la «Réplique»),

PRENANT ACTE de la décision relative à la requête de Prosper Mugiraneza demandant le rejet de l'acte d'accusation pour violation de l'article 20 (4) (c) du Statut, un déroulement rapide du procès et une réparation appropriée pour préjudice subi, rendue par la Chambre de première instance le 2 octobre 2003,

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve, (le «Règlement»), en particulier l'article 20 (4) (c) du Statut qui garantit à tout accusé au moins le droit d'être jugé «sans retard excessif»,

TRANCHE À PRÉSENT la question sur la seule base des mémoires déposés par les parties en vertu de l'article 73 (A) du Règlement

ARGUMENTS DES PARTIES

Arguments de la défense

1. La défense demande à la Chambre de réexaminer sa requête en rejet de l'acte d'accusation dressé contre Prosper Mugiraneza (l'«accusé»), déposée le 17 juillet 2003.

2. Selon la défense, la décision de la Chambre d'appel confirme que la défense a produit des éléments suffisants pour établir la violation du droit de l'accusé d'être

of the Accused's right to be tried without undue delay[1], and asserts that when viewed in light of all the factors set out by the Appeals Chamber the delay was undue for the purposes of the Statute of the Tribunal. It further contends that the burden now falls on the Prosecutor to show that that right has not been violated.

3. The Defence asserts that the right to a fair trial, as mentioned in Article 20 of the Statute and other international human rights instruments, provides an accused person with the right to trial without undue delay. The Defence considers that the four and a half year period since the arrest of the accused constitutes undue delay as a matter of law. It considers further that there is no excuse for a delay of this length while a presumptively innocent man is confined in pre-trial detention.

4. The Defence argues that this case is not more complex than any other case before this Tribunal or the International Criminal Tribunal for the Former Yugoslavia (ICTY); that neither the number of charges nor witnesses is extraordinary; and that there is a "dearth of physical and original documentary evidence."

5. The Defence's position is that the actions of "relevant authorities" such as the Security Council, the General Assembly, the Registry and the Office of the Prosecutor (OTP) must all be called into question. He states that the Council failed to provide *ad litem* judges until long after such appointments were approved for the ICTY, and that the General Assembly failed to provide either adequate financial resources or the oversight to ensure that resources are utilised wisely.

6. Insofar as the conduct of the parties is concerned, the Defence argues that the OTP has lacked a sense of urgency in bringing the Accused to trial. The Defence cites the repeated complaints on the lack of disclosure and the Prosecutor's repeated promises to disclose as evidence of the Prosecutor's lack of urgency in the matter. None of the delays is directly attributable to the conduct of the Accused. Given the responsibility of the Prosecutor to bring a defendant to trial, the Prosecutor has the duty to show why the delay is not undue for purposes of the Statute and international law and why Mugiraneza has not been prejudiced by the delay.

7. Indeed the Defence submits that the Accused has suffered prejudice as a result of the delay that has been occasioned in the proceedings against him. The Defence contends that the most obvious prejudice suffered by the Accused is the continuous incarceration which he has been subject to, during which time he has been unable to lead a normal life or and to support his family. This alone, the Defence submits, should be sufficient prejudice to "make a *prima facie*" case for dismissal of the charges against him. Further prejudice has been suffered as a result of the death of a witness with exculpatory information, GKT, in February 2004. Three other witnesses, GJS, GNN and GNH cannot be located by Witnesses and Victims Support Section[2].

[1] Prosper Mugiraneza was arrested in Cameroon on 6 April 1999 pursuant to a request by the Prosecutor. The indictment was confirmed on 13 May 1999. He was transferred to the United Nation Detention Facilities on 31 July 1999.

[2] See Memorandum from David G. Chappel to Roger Kouambo-Tchinda, 19 April 2004, Re : Request by Defence Counsel (Mr. Tom Moran) to visit witnesses.

jugé sans retard excessif[1]; toujours selon elle, à la lumière de tous les facteurs énoncés par la Chambre d'appel, le retard a été excessif aux fins du Statut. Elle fait encore valoir qu'il appartient à présent au Procureur d'établir que ce droit n'a pas été violé.

3. La défense affirme qu'en vertu du droit à un procès équitable énoncé à l'article 20 du Statut et dans d'autres instruments internationaux relatifs aux droits de l'homme, l'accusé a le droit d'être jugé sans retard excessif. Elle estime que la période de quatre ans et demi qui s'est écoulée depuis l'arrestation de l'accusé constitue un retard excessif au regard du droit. Elle considère en outre qu'un retard aussi important est inexcusable, dès lors qu'une personne présumée innocente est placée en détention provisoire.

4. À entendre la défense, la présente affaire n'est pas plus complexe qu'une quelconque autre affaire portée devant le Tribunal de céans ou le Tribunal pénal international pour l'ex-Yougoslavie, que ni le nombre de charges ni celui des témoins ne sont extraordinaires et qu'on y relève un «manque cruel de preuves matérielles et documentaires» (Traduction).

5. La défense met en cause les mesures prises par les «autorités compétentes», qu'il s'agisse du Conseil de sécurité, de l'Assemblée générale, du Greffe ou du Bureau du Procureur. Elle déclare que le Conseil de sécurité n'a nommé les juges *ad litem* que longtemps après ceux du Tribunal pénal international pour l'ex-Yougoslavie, que l'Assemblée n'a ni fourni des ressources financières suffisantes, ni mis en place un mécanisme de contrôle permettant de s'assurer que celles-ci étaient utilisées à bon escient.

6. Pour ce qui est du comportement des parties, la défense fait valoir que le Bureau du Procureur n'a pas fait montre de diligence dans l'exercice des poursuites contre l'accusé. Elle en veut pour preuve les multiples plaintes qu'elle a formulées pour non-respect de l'obligation de communication des pièces, et les multiples promesses du Procureur à ce sujet. Aucun de ces retards n'était directement imputable au comportement de l'accusé. Le Procureur étant chargé de la poursuite, il lui appartenait d'établir que le retard n'était pas excessif au regard du Statut et du droit international et que Mugiraneza n'avait pas subi de préjudice du fait de ce retard.

7. La défense déclare en effet que l'accusé a subi un préjudice du fait du retard enregistré dans l'instance engagée contre lui. Elle fait valoir que le préjudice le plus visible subi par l'accusé tient à son maintien en détention prolongé qui l'a empêché de mener une vie normale et de pourvoir aux besoins de sa famille. A lui seul, ce préjudice suffirait, selon elle, à justifier le rejet des charges retenues contre l'accusé. Elle relève encore le préjudice qu'a représenté pour l'accusé le décès en février 2004 d'un témoin à décharge, GKT, sans compter que la Section d'aide aux victimes et aux témoins[2] ne parvient pas à localiser trois autres témoins, à savoir GJS, GNN et GNH.

[1] Prosper Mugiraneza a été arêté au Cameroun le 6 avril 1999 en vertu d'une demande du Procureur. L'acte d'accusation a été confirmé le 13 mai 1999. Mugiraneza a été transféré au quartier pénitentiaire des Nations Unies le 31 juillet 1999.

[2] Voir le mémorandum de David G. Chappe1 à Roger Kouambo-Tchinda du 19 avril 2004, au sujet de la demande du conseil de la défense (Me Tom Moran) à rencontrer des témoins.

8. The Defence submits that it has called for a speedy trial on several occasions and requests that, for the above-mentioned reasons, the Trial Chamber should order the indictment against Mugiraneza dismissed with prejudice and that he be released from custody.

Prosecutor's Response

9. The Prosecutor contends that the Appeals Chamber's Decision in remitting the matter back to the Trial Chamber is limited to the conduct of the Prosecutor, as opposed to a complete re-opening of question as to whether there has been undue delay. Equally, the said Decision does not prescribe a new test for the finding of undue delay. In the Prosecutor's submission, the question facing the Trial Chamber is simply whether or not the Prosecutor has by his conduct "contributed to any delay in the trial of the Accused."

10. The Prosecutor's contention is that the Accused is in lawful detention having made an initial appearance before the court and pleaded not guilty to the charges against him, and the Prosecutor has not in any way "aided or impeded his trial." He further maintains that the responsibility for any delay cannot be attributed to his office. Moreover, the Prosecutor submits that the conduct of the Defence "as a whole has contributed significantly to the length of the instant proceedings." The filing of pre-trial motions and appeals against interlocutory decisions necessarily influences the expeditiousness of the proceedings. The Prosecutor further adds that the "delay, if any, […] arises from the incessant and unmitigated number of worthless motions of frivolous and unnecessary issues that the Defendant files…"

11. It is submitted that the Chamber had, in its vacated Decision, relied heavily on its Decision in respect of Justin Mugenzi's application for a Stay of Proceedings or Provisional Release wherein the "Defence absolved the Prosecutor of delay."[3] At no stage of the status conferences did any party have cause to behave in a way that is tantamount to an abuse of process such as to necessitate a stay of proceedings against any of the accused.

12. Concerning the diligence exercised by his Office, the Prosecutor recalls that at the Status Conference of 6 September 2002, the Defence agreed that the Prosecutor had fulfilled his disclosure obligations pursuant to Rules 66, 67 and 68; so that the only issue outstanding at the time was that of translation of material into the working languages of the Tribunal. The Prosecutor argues that it has never been canvassed that the Tribunal was not in a position to prosecute due to a backlog of cases, nor has the Chamber said that a trial date could not be set because the judicial calendar was full. The Prosecutor further maintains that no delay is attributable to his Office, the Chamber, the judicial calendar, the Statute, the Rules or the facilities and resources provided by the United Nations.

[3] *Prosecutor v. Justin Mugenzi et al.*, Case N° ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82 (B)), TC, 8 November 2002.

8. La défense fait valoir qu'elle a demandé à plusieurs reprises un procès rapide et invite la Chambre, pour les raisons susvisées, à rejeter l'acte d'accusation dressé contre Mugiraneza avec interdiction pour le Procureur d'y revenir, et à ordonner la mise en liberté de l'accusé.

Réponse du Procureur

9. Le Procureur considère que la décision de la Chambre d'appel de renvoyer l'affaire devant la Chambre de première instance ne concerne que le comportement du Procureur et non une reprise totale des débats pour établir s'il y a eu ou non retard excessif. La décision ne prescrit pas non plus de nouveaux critères à l'aune desquels établir s'il y a eu retard excessif. Selon le Procureur, la question qui se pose à la Chambre est tout simplement de savoir si le comportement du Procureur a «occasionné un quelconque retard dans le procès de l'accusé».

10. Selon le Procureur, l'accusé est détenu de façon régulière : il a fait sa comparution initiale, il a plaidé non coupable des charges portées contre lui et le Procureur n'a en aucune manière «entravé ou aidé à entraver le procès de l'accusé». Il soutient par ailleurs qu'aucun retard ne peut être imputé à son Bureau. De plus, il estime que le comportement de la défense «a dans l'ensemble contribué de manière significative à la lenteur de l'instance». Le dépôt des requêtes préalables au procès et les appels des décisions incidentes influent nécessairement sur le degré d'avancement du procès. Le Procureur soutient encore que «si retard il y a eu, il est imputable à une véritable avalanche de requêtes inutiles déposées par la défense sur des questions fantaisistes et sans objet».

11. Le Procureur soutient que dans la décision en partie infirmée, la Chambre s'était fortement appuyée sur sa décision relative à la requête de Justin Mugenzi en suspension d'instance ou, à titre subsidiaire, en mise en liberté provisoire, dans laquelle la «défense avait tenu le Procureur quitte du retard»[3]. À aucun moment de la conférence de mise en état, aucune partie n'a eu un comportement constitutif d'abus de procédure pouvant justifier la suspension de l'instance engagée contre l'un quelconque des accusés.

12. Pour ce qui est de la diligence exercée par son Bureau, le Procureur rappelle qu'à la conférence de mise en état du 6 septembre 2002, la défense avait admis que le Procureur avait rempli les obligations en matière de communication découlant des articles 66, 67 et 68 du Règlement, de telle sorte que le seul problème qui se posait à l'époque était celui de la traduction des documents dans les langues de travail du Tribunal. D'après le Procureur, il n'a jamais été dit que le Tribunal ne pouvait pas poursuivre l'accusé à cause de l'engorgement du rôle ni que la Chambre ne pouvait fixer de date pour l'ouverture du procès en raison d'un tel engorgement. Le Procureur réfute l'idée qu'un quelconque retard puisse être imputé à son bureau, à la Chambre, au rôle, au Statut, au Règlement ou aux installations et ressources mises à disposition par les Nations Unies.

[3] *Le Procureur c. Justin Mugenzi et consorts*, Chambre de première instance, affaire n° ICTR-99-50-1, Décision sur la requête de Justin Mugenzi en suspension d'instance ou, à titre subsidiaire, en mise en liberté provisoire (article 65) et, outre ce qui précède, en disjonction d'instances [article 82 (B)], 8 novembre 2002.

13. The Prosecutor submits that the dismissal of an Indictment against an accused person with prejudice, a stay of proceedings or a halting of the proceedings altogether is only warranted in exceptionally grievous cases. It is argued that genocide is so heinous a crime that a stay would only be considered in the most exceptional circumstances and must, at any rate, be attended by proven egregious behaviour on the part of the Prosecutor. It must as such be confined to case in which the Prosecution has been so delayed as to prevent a fair trial of the accused.

14. The Prosecutor submits that the burden of proving delay and for establishing "entitlement" to the relief sought rests squarely on the Defence, as the moving party. Further, on the issue of whether prejudice has been suffered by the Accused, the Prosecutor cites the case of Joseph Kanyabashi in which the detention of the accused person for over four years did not warrant a stay of proceedings[4]. Pursuant to Rules 5 (A) and (B), relief should only be granted if the Trial Chamber "finds that the alleged non-compliance is proved and that it has caused material prejudice to that party." The Prosecutor argues that not only has he not violated any of the Rules, the Defence has also failed to show that material prejudice has been caused to the accused. The remedy being sought is therefore disproportionately inordinate.

15. Having submitted that the reconsideration of the present matter relates to the conduct of the Prosecutor and further submitting that the Prosecutor has done all in his power to diligently prosecute the case, the Prosecutor prays that the Motion be dismissed in its entirety.

Defence Reply to the Prosecutor's Response

16. Contrary to the Prosecutor's contention, the Defence asserts that the Decision of the Appeals Chamber was based on five different factors, all of which must be taken into account in the Trial Chamber's reconsideration. These factors are set out as follows :

(i) A five part test to determine whether there has been a violation of the accused's right to a trial without undue delay[5];

(ii) That the Chamber erred in including the fundamental purpose of the Tribunal as a determining factor;

[4] *Prosecutor v. Joseph Kanyabashi*, Case N° ICTR-96-15-I, Decision on the Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, TC, 23 May 2000.

[5] This "five part test" derives from the Appeals Chamber's statement that in determining whether there has been a violation of the right of the accused to be tried without undue delay, the Appeals Chamber takes the view that it is necessary to consider, *inter alia*, the following factors : (1) The length of the delay; (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;(3) The conduct of the parties;(4) The conduct of the relevant authorities; and (5) The prejudice to the accused, if any.

13. Le Procureur affirme que le rejet d'un acte d'accusation avec interdiction pour le Procureur d'y revenir, ou la suspension des poursuites ou de l'instance ne se justifient que dans des cas d'une gravité exceptionnelle. Il soutient que le génocide est un crime à ce point odieux qu'une suspension des poursuites ne peut être envisagée que dans des circonstances exceptionnelles et exige, dans tous les cas, la preuve que le comportement du Procureur a vraiment laissé à désirer. Autrement dit, il faut que le retard enregistré dans l'exercice des poursuites rende impossible la tenue d'un procès équitable de l'accusé.

14. D'après le Procureur, il appartient tout bonnement à la défense, puisque c'est sa requête, de démontrer qu'il y a eu retard et d'établir le bien-fondé de la mesure sollicitée. Par ailleurs, pour ce qui est du préjudice qu'aurait subi l'accusé, le Procureur invoque l'affaire *Kanyabashi* dans laquelle le maintien en détention provisoire de l'accusé pendant plus de quatre ans n'a pas donné lieu à une suspension des poursuites[4]. Conformément aux paragraphes A et B de l'article 5 du Règlement, la Chambre ne peut accorder une telle mesure que «si la preuve de la violation présumée est rapportée et si celle-ci a effectivement fait subir un préjudice substantiel à cette partie». Le Procureur fait valoir que non seulement il n'a commis aucune violation du Règlement, mais que la défense, de son côté, n'a pas établi que l'accusé avait subi un préjudice substantiel. Il estime par conséquent que la mesure sollicitée par la défense est exorbitante.

15. Ayant soutenu que le réexamen de la présente affaire avait trait au comportement du Procureur et que par ailleurs celui-ci avait fait tout ce qui était en son pouvoir pour diligenter l'affaire, le Procureur demande à la Chambre de rejeter la requête dans sa totalité.

Réplique de la défense à la réponse du Procureur

16. La défense soutient que, contrairement aux affirmations du Procureur, la décision de la Chambre d'appel reposait sur cinq facteurs, et que ceux-ci s'imposent à la Chambre de première instance au moment de réexaminer la question. Ces facteurs sont ainsi énoncés :

> i. Pour déterminer s'il y a eu violation du droit de l'accusé d'être jugé sans retard excessif, il faut employer un critère articulé autour de cinq éléments[5];
>
> ii. La Chambre [de première instance] a commis une erreur en retenant au nombre des facteurs déterminants l'objectif fondamental du Tribunal;

[4] *Le Procureur c. Joseph Kanyabashi*, Chambre de première instance, affaire n° ICTR-96-15-1, Décision relative à la requête en extrême urgence en *Habeas Corpus* et arrêt des procédures, 23 mai 2000.

[5] Ce critère a été énoncé par la Chambre d'appel lorsqu'elle a déclaré que, pour établir s'il y avait eu violation du droit de l'accusé d'être jugé sans retard excessif, il fallait tenir compte, entre autres, des facteurs ci-après : (1) La durée du retard; (2) La complexité de l'instance, notamment le nombre de charges, le nombre d'accusés, le nombre de témoins, le volume des moyens de preuve et la complexité des questions de fait et de droit; (3) Le comportement des parties; (4) Le comportement des autorités compétentes; (5) Le préjudice éventuel subi par l'accusé.

(iii) That one of the central factors to be considered is the conduct of the Parties including that of the Prosecutor;

(iv) That the Chamber erred in failing to consider the conduct of the Prosecutor and thereby failed to take into account a "necessary factor to determine whether there was undue delay";

(v) That the Chamber used an incorrect legal standard to determine whether Mugiraneza's right to trial without undue delay was violated.

The Defence warns that for the Trial Chamber to limit the scope of its reconsideration of the present matter solely to an inquiry into the conduct of the Prosecutor, without consideration of all of the other factors set out by the Appeals Chamber, would be erroneous. There is nothing in the said Decision to limit the Trial Chamber's reconsideration to the actions of the Prosecutor.

17. Responding to the Prosecutor's submission that one of the reasons for delay in the instant proceedings is the Defendant's filing of "worthless motions" and "pretrial motions and appeals against interlocutory decisions," the Defence points out that of the six interlocutory appeals that have been certified by the Chamber, four were filed by the Prosecutor. Besides, by their very nature interlocutory appeals take little of the Trial Chamber's resources. The Defence also argues that the Prosecutor has failed to identify any of the "unmitigated number of worthless motions of frivolous and unnecessary issues" purportedly filed by the accused, nor has the Prosecutor shown how the commencement of the trial was delayed by the filing of Defence motions.

18. The Defence argues that it is wrong for the Prosecutor to rely on the *Mugenzi* Decision to justify the Chamber's failure to consider the Prosecutor's actions, having already decided upon the same in the latter case. Indeed in that case, a consideration of the "fundamental purpose of the Tribunal" was held to be a factor in assessing undue delay. This position has been specifically rejected by the Appeals Chamber decision in the present matter. The Defence further contends that whether or not the defence in *Mugenzi* had absolved the Prosecutor of delay is irrelevant given that the Prosper Mugiraneza was not a party to that motion.

19. The Defence also refutes the Prosecutor's contention that the backlog of cases in the Tribunal has not caused delay in the instant case. The Defence relies on official documents of the United Nations such as the 2001 report of the President of the Tribunal to the General Assembly and the Security Council in which a compelling case was made out for the appointment of *ad litem* judges to expeditiously try cases which were being delayed by backlogs.

20. Regarding other systemic delays, the Defence also refutes the Prosecutor's position on his responsibility *vis-à-vis* the translation of documents. The Defence contends that disclosure material does not fall within the definition of "official documents" in Article 12 as cited by the Prosecutor. The Registry therefore has no obligation to translate anything not filed with it, including documents disclosed pursuant to Rules 66 and 68. In this regard, the Defence submits that the Prosecutor seems to have shown little sense of urgency in ensuring that documents are translated in a timely manner.

21. With regard to responsibility for delay, the Defence points to examples of "some delays during the trial that are fully attributable to the Prosecutor." The

iii. Un des facteurs essentiels à prendre en compte est le comportement des parties, y compris celui du Procureur;

iv. La Chambre a commis une erreur en ne prenant pas en compte le comportement du Procureur, car elle a, de ce fait, écarté un facteur nécessaire pour déterminer s'il y avait eu retard excessif;

v. La Chambre s'est fondée sur une norme juridique erronée pour déterminer si le droit de Mugiraneza d'être jugé sans retard excessif avait été violé.

Aux yeux de la défense, la Chambre commettrait une erreur en limitant son réexamen au seul comportement du Procureur, sans tenir compte de tous les autres facteurs énoncés dans la décision de la Chambre d'appel. Aucune disposition de ladite décision ne limite le réexamen de la Chambre de première instance au comportement du Procureur.

17. Répliquant à l'argument du Procureur selon lequel l'une des causes du retard enregistré dans l'instance est le dépôt par l'accusé de «requêtes inutiles» et une avalanche de requêtes préalables au procès et d'appels de décisions incidentes», la défense fait remarquer que quatre des six appels incidents certifiés par la Chambre avaient été déposés par le Procureur. De plus, de par leur nature même, ces appels n'entament guère les ressources de la Chambre de première instance. La défense argue encore que «dans la véritable avalanche de requêtes inutiles déposées par la défense sur des questions fantaisistes et sans objet», le Procureur n'a pu en détacher aucun, tout comme il n'a pas pu démontrer que le retard apporté à l'ouverture du procès était imputable aux requêtes déposées par la défense.

18. La défense soutient que le Procureur s'appuie à tort sur la décision *Mugenzi* pour expliquer la décision de la Chambre de ne pas examiner le comportement du Procureur, ayant déjà statué sur cette question dans la décision susvisée. Dans cette affaire, en effet, «l'objectif fondamental du Tribunal» avait été retenu comme facteur pour évaluer le caractère excessif du retard. Cet argument a été rejeté expressément par la Chambre d'appel dans sa décision rendue en la présente espèce. Pour la défense, le fait pour elle d'avoir, dans l'affaire *Mugenzi*, tenu le Procureur quitte du retard n'est pas pertinent, car Prosper Mugiraneza n'était pas partie à ladite requête.

19. La défense conteste également l'argument du Procureur selon lequel l'engorgement du rôle n'a pas causé de retard à la présente instance. Elle s'appuie sur des documents officiels des Nations Unies, notamment le rapport 2001 du Président du Tribunal à l'Assemblée générale et au Conseil de sécurité, dans lequel il soulignait l'urgence de nommer des juges *ad litem* pour accélérer le déroulement des procès qui s'enlisaient par suite de l'engorgement du rôle.

20. À propos d'autres retards chroniques, la défense réfute également les arguments du Procureur lui endossant la responsabilité de la traduction des documents. Elle soutient que les pièces à communiquer ne font pas partie des «documents officiels» visés à l'article 12 [de la Directive à l'intention du Greffe du Tribunal pénal international pour le Rwanda] cité par le Procureur. Le Greffe n'a par conséquent aucune obligation de traduire des documents qui n'ont pas été déposés, notamment les pièces communiquées conformément aux articles 66 et 68 du Règlement. La défense relève à cet égard le peu d'empressement du Procureur à faire traduire les documents dans les délais.

21. En ce qui concerne la responsabilité des retards, la défense cite des exemples de «retards enregistrés par l'instance et entièrement imputables au Procureur». Elle

Defence cites the transcript of proceedings of 10 February 2004 in which the Prosecutor told the Court that it was out of witnesses and will not be ready until Friday, 13 February. However, the next witness to testify, GJV, informed the Court that he had been in Arusha since 9 February, and would have been ready to testify had he been called. The Defence also asserts that the Prosecutor did not exercise diligence in complying with his disclosure obligations and submits that the record does reflect this lack of diligence. The Prosecutor has disclosed documents which are three or four years old, which have been in his possession for two years or more, and more than three years after the initial appearance of the Accused.

22. The Defence urges the Chamber to consider both the "in-trial delays" as well as that of the length of the trial itself in determining whether the Accused's right to a trial without undue delay has been violated.

23. The Defence maintains that the burden lies with the Prosecutor to disprove undue delay. The Defence holds the view that at some point delay must become undue for the purposes of Article 20 (4) (C) of the Statute and that wherever the line is drawn it is less than four years, six months and 28 days which in the instant case is the time between his arrest and the scheduled start of the trial.

24. The Defence also argues that no showing of material prejudice is necessary, as the Tribunal's Statute specifically affords accused persons the right to be tried without undue delay. The Defence submits that relief for violation of that right is available and is distinct from the question of whether the delay violated the right to a fair trial. Be that as it may, the accused has shown his pre-trial detention, and the death and unavailability of witnesses have caused him prejudice.

25. In light of the arguments set out in the original motion, the present motion and Reply, the Defence submits that there is no effective remedy other than a dismissal of the indictment against Mugiraneza with prejudice for the violation of his right to a trial without undue delay.

DELIBERATIONS

26. The Appeals Chamber has directed the Trial Chamber to reconsider its Decision of 2 October 2003 because the Trial Chamber erred in applying the correct legal standard. In so doing, the Appeals Chamber considered that the Trial Chamber erred in considering the "fundamental purpose of the Tribunal" in determining whether there was undue delay. The Appeals Chamber took the view that a determination of whether the Accused's right to be tried without undue delay has been violated must necessarily include a consideration of, *inter alia*, the following factors :

(1) The length of the delay;

(2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;

(3) The conduct of the parties;

fait état du compte rendu de l'audience du 10 février 2004 lors de laquelle le Procureur avait déclaré à la Chambre qu'il n'avait plus de témoin et qu'il ne pourrait pas en appeler avant le vendredi 13 février. Toutefois, le témoin appelé ensuite à la barre, GJV, avait dit à la Chambre qu'il se trouvait à Arusha depuis le 9 février et qu'il aurait été prêt à déposer si on le lui avait demandé. La défense affirme également que le Procureur ne s'est pas acquitté avec diligence de ses obligations en matière de communication et que ce manque de diligence est relevé dans le dossier. Les pièces communiquées par le Procureur datent de trois ou quatre ans et sont en sa possession depuis plus de deux ans. Elles ont été communiquées à la défense plus de trois ans après la comparution initiale de l'accusé.

22. La défense prie instamment la Chambre de prendre en compte les «retards intervenus à l'instance», ainsi que la longueur du procès lui-même pour déterminer si le droit de l'accusé d'être jugé sans retard excessif a été violé.

23. La défense soutient qu'il appartient au Procureur de démontrer qu'il n'y a pas eu retard excessif. Elle estime qu'à un certain point le retard doit être jugé excessif au sens de l'article 20 (4) (c) du Statut. Selon elle, quel que soit le seuil fixé, ce retard est moins long que les quatre années, six mois et 28 jours qui constituent en l'espèce le temps écoulé entre l'arrestation de l'accusé et la date prévue pour l'ouverture de son procès.

24. La défense fait valoir qu'il n'est pas requis d'établir l'existence d'un préjudice substantiel, le Statut reconnaissant explicitement à l'accusé le droit d'être jugé sans retard excessif. Elle soutient qu'une réparation s'impose et existe en cas de violation de ce droit et qu'elle ne se confond pas avec la question de savoir si le retard constitue une violation du droit de l'accusé à un procès équitable. Quoiqu'il en soit, l'accusé a démontré qu'il avait subi un préjudice du fait de sa détention provisoire, de la mort d'un témoin et de l'indisponibilité d'autres témoins.

25. À la lumière des arguments énoncés dans la requête initiale, la présente requête et la réplique, la défense soutient que la seule réparation efficace est le rejet de l'acte d'accusation dressé contre Mugiraneza, avec interdiction pour le Procureur d'y revenir, pour violation du droit de l'accusé d'être jugé sans retard excessif.

DÉLIBÉRATIONS

26. La Chambre d'appel a prescrit à la Chambre de première instance de réexaminer sa décision du 2 octobre 2003 au motif que la Chambre de première instance avait commis une erreur en n'appliquant pas la norme juridique qui s'imposait. La Chambre d'appel a estimé, en effet, que la Chambre de première instance avait commis une erreur en prenant en compte «l'objectif fondamental du Tribunal» pour déterminer s'il y avait eu retard excessif. Pour établir qu'il y a eu violation du droit de l'accusé d'être jugé sans retard excessif, la Chambre d'appel a jugé qu'il fallait nécessairement tenir compte, entre autres, des facteurs ci-après :

1) La durée du retard;

2) La complexité de l'instance, notamment le nombre de charges, le nombre d'accusés, le nombre de témoins, le volume des moyens de preuve, la complexité des questions de fait et de droit;

3) Le comportement des parties;

(4) The conduct of the relevant authorities; and

(5) The prejudice to the accused, if any.

27. In considering that "one of the central factors to consider is the conduct of the parties, including that of the Prosecutor," the Appeals Chamber found "that the Trial Chamber, by stating, '(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay,' has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay."

28. The Trial Chamber understands the Appeals Chamber's Decision as indicating that there cannot be a determination of whether the right to trial without undue delay was violated without considering the totality of the five criteria laid out in paragraph 26 above.

29. To dispose of this matter, recourse must be had to articles 19 and 20 (4) (c) of the Statute of the Tribunal. They provide as follows :

> Article 19
>
> The Trial Chamber shall ensure that a trial is fair and expeditious, and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the right of the accused and due regard for the protection of victims and witnesses.
>
> Article 20 (4) (c)
>
> 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 :
>
> […]
>
> (c) To be tried without undue delay

30. The abovementioned provisions require the Trial Chamber to ensure that an Accused person's right to be tried without undue delay is guaranteed. But in doing this, the Trial Chamber must also be vigilant to ensure that the right to a trial without undue delay is balanced with the need to ascertain the truth about the serious crimes with which the Accused is charged[6]. The Chamber recalls that in this regard, the need for such a balancing exercise was categorically stated in both the *Mugenzi* Decision as well as in the Decision which is presently being reconsidered.

31. In assessing whether the Accused's right to be tried without undue was violated, regard was indeed had to the complexity of the case and the conduct of the relevant authorities *vis-à-vis* the length of time that had passed between the time of arrest and the commencement of trial. The Chamber recalls that it cited the case of *Kanyabashi*[7] and held that a finding of undue delay depends on the circumstances

[6] *Prosecutor v. Justin Mugenzi et al*., Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), TC, 8 November 2002, para 32.

[7] *Prosecutor v. Joseph Kanyabashi*, Case N° ICTR-96-15-I, Decision on the Extremely Urgent Motion on *Habeas Corpus* and for Stoppage of Proceedings, TC, 23 May 2000.

4) Le comportement des autorités compétentes;

5) Le préjudice éventuel subi par l'accusé.

27. Ayant posé que «l'un des facteurs essentiels à retenir était le comportement des parties, y compris celui du Procureur», la Chambre d'appel a conclu «qu'en considérant qu'il n'était pas nécessaire de s'interroger sur le rôle que le Procureur [avait] pu jouer dans le retard excessif allégué, la Chambre de première instance n'avait pas fait le tour de la question et avait de ce fait omis un facteur indispensable pour déterminer s'il y avait eu retard excessif». [Traduction]

28. La Chambre de première instance interprète la décision de la Chambre d'appel comme signifiant que l'on ne peut établir la violation du droit de l'accusé d'être jugé sans retard excessif sans tenir compte de chacun des cinq critères énoncés au paragraphe 26 ci-dessus.

29. Pour se prononcer sur la question, il faut partir des articles 19 et 20 (4) (c) du Statut, respectivement libellés comme suit :

Article 19

La Chambre de première instance veille à ce que 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 assurée.

Article 20 (4) (c)

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

[…]

c) être jugé sans retard excessif;

[…]

30. En vertu de ces articles, la Chambre est tenue de veiller au respect du droit de l'accusé d'être jugé sans retard excessif. Ce faisant, elle doit cependant veiller à maintenir un équilibre entre ce droit et la nécessité de faire la lumière sur les crimes graves imputés à l'accusé[6], comme cela a été précisé explicitement aussi bien dans la décision *Mugenzi* que dans celle qui est présentement réexaminée.

31. Pour déterminer si le droit de l'accusé d'être jugé sans retard excessif avait été violé, la Chambre avait effectivement pris en compte la complexité de l'instance et le comportement des autorités compétentes, vu le temps écoulé entre l'arrestation de l'accusé et l'ouverture de son procès. La Chambre rappelle qu'elle avait fait état de l'affaire *Kanyabashi*[7] et conclu que le caractère excessif du retard dépendait des cir-

[6] *Procureur c. Justin Mugenzi et consorts*, Chambre de première instance, affaire n° ICTR-99-50-1, Décision sur la requête de Justin Mugenzi en suspension d'instance ou, à titre subsidiaire, en mise en liberté provisoire (art. 65 du Règlement) et, outre ce qui précède, en disjonction d'instances [art. 82 (B)], 8 novembre 2002, para. 32.

[7] *Le Procureur c. Joseph Kanyabashi*, Chambre de première instance, affaire n° ICTR-96-15-1, Décision relative à la requête en extrême urgence en *Habeas Corpus* et arrêt des procédures, 23 mai 2000.

of the case. Having regard to the "complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement," the Chamber considered that the time between the arrest of the accused and the "imminent commencement of his trial" was not to be assessed as being undue.

32. As regards the conduct of the Parties, the Chamber has examined the arguments put forward by both the Defence and the Prosecution, and as guided by the Appeals Chamber, has particularly enquired into the conduct of the Prosecutor. While the Chamber disagrees with the Prosecutor's contention that delay, if any, has arisen from the filing of "incessant and unmitigated number of worthless motions of frivolous and unnecessary issues" by the Defence, the Chamber does accept, on the basis of the facts put forward by the Prosecutor that the delay in this case, if any, is not attributable to the OTP.

33. As far as prejudice to the Accused is concerned, the Chamber notes that the Defence has failed to show how the delay of four years, six months and 28 days has prejudiced Accused such as to prevent a fair trial and necessitate a dismissal of the Indictment against him. The burden for proving prejudice does indeed lie with the Defence.

34. In light of the above, the Chamber finds that Article 20 (4) (c) has not been violated. The present Motion, therefore, falls to be dismissed.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the Defence Motion.

Arusha, 3 November 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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The Chamber notes that the issue of reasonable length of proceeding has been addressed by the U.N. Human Rights Committee, the European Court of Human Rights and the Inter-American Commission on Human Rights. "The reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider". In the opinion of the European Court of Human Rights, "the reasonableness of the length of proceedings coming within the scope of Article 6 (1) must be assessed in each case according to the particular circumstances. The Court has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement. [four factors]". [Footnotes omitted]

constances de l'affaire. Au regard de «la complexité des questions de fait et de droit soulevées par l'affaire, de la conduite des requérants et des autorités compétentes et de l'intérêt en jeu pour les requérants, sans méconnaître l'exigence du «délai raisonnable», la Chambre avait jugé que le temps écoulé entre l'arrestation de l'accusé et «l'ouverture imminente de son procès» ne pouvait être qualifié d'excessif.

32. En ce qui concerne le comportement des parties, la Chambre a examiné les arguments de la défense et ceux du Procureur. Selon les prescriptions de la Chambre d'appel, elle a analysé en particulier le comportement du Procureur. Elle ne peut suivre celui-ci lorsqu'il affirme que s'il y a eu retard, celui-ci est imputable à la véritable avalanche de requêtes inutiles déposées par la défense sur des questions fantaisistes et sans objet. Toutefois, elle accepte, sur la base des faits présentés par le Procureur, que le retard enregistré en l'espèce n'est pas imputable au Bureau du Procureur.

33. Pour ce qui est du préjudice subi par l'accusé, la Chambre relève que la défense n'a pas pu démontrer en quoi le retard de quatre ans, six mois et 28 jours causait à l'accusé un préjudice tel qu'il rendait impossible la tenue d'un procès équitable et appelait le rejet de l'acte d'accusation dressé contre l'accusé. Il appartient, en effet, à la défense d'établir que l'accusé a subi un tel préjudice.

34. Au vu de ce qui précède, la Chambre estime qu'il n'y a pas eu violation de l'article 20 (4) (c) du Statut. La présente requête doit par conséquent être rejetée.

PAR CES MOTIFS, LA CHAMBRE DE PREMIÈRE INSTANCE

REJETTE la Requête

Arusha, le 3 novembre 2004

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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La Chambre note que la question de la durée raisonnable de l'instance a été traitée par le Comité des droits de l'homme de l'ONU, la Cour européenne des droits de l'homme et la Commission interaméricaine des droits de l'homme. «Le caractère raisonnable du délai ne peut être traduit en un nombre fixe de jours, de mois ou d'années d'autant plus qu'il dépend d'autres éléments dont le juge doit tenir compte». De l'avis de la Cour européenne des droits de l'homme, «le caractère raisonnable de la durée de l'instance relevant de l'article 6 (1) [de la Convention européenne des droits de l'homme] doit s'apprécier dans chaque cas selon les circonstances particulières. La Cour doit tenir compte, notamment, de la complexité des questions de fait et de droit soulevées par l'affaire, de la conduite des requérants et des autorités compétentes et de l'intérêt en jeu pour les requérants, sans méconnaître l'exigence du «délai raisonnable» [quatre facteurs] [notes de bas de pages omises].

Decision on Mugenzi's Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements (Rule 94 bis*) 10 Novembre 2004 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi – expert reports, disclosure – draft report – efficient preparation of the cross-examination – qualification as expert – no legal basis

International instruments cited : Rules of procedure and evidence, Rules 73 (A), 94 bis

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on the Defence Motion for an Extension of the Time Limit for Filing the Notice in Respect of Expert Witness Statements, 25 May 2001 (ICTR-98-42-T,* Reports 2001*, p. 1844) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana et al.*, Decision on the Prosecutor's oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52-T,* Reports 2001*, p. 1172) – Trial Chamber III,* The Prosecutor v. Laurent Semanza*, Decision on Defence Extremely Urgent Motion for Extension of Time and for an order of Cooperation of the Government of Rwanda, 13 December 2001 (ICTR-97-20-I,* Reports 2001*, p. 3296) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 September 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

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 "Highly Confidential Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements" (the "Motion") filed on 19 October 2004;

NOTING (i) the "Memorandum from Casimir Bizimugnu in support of Justin Mugenzi's Highly Confidential Motion for the Filing, Service or Disclosure of Expert Reports and or Statements" filed on 21 October 2004 AND (ii) the "Prosecutor's

Décision sur la requête de la défense intitulée **Highly Confidential Justin Mugenzi's Urgent Motion for the Filing Service or Disclosure of Expert Reports and/or Statements** *(art. 94* **bis** *du Règlement) 10 novembre 2004 (ICTR-99-50-T)*

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Président de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

Mugenzi – déclaration de témoin expert, communication – projet de rapport – rapports similaires – préparation efficace du contre-interrogatoire – qualification d'expert – absence de fondement juridique

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73 (A), 94 bis

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance II, Le Procureur c. Pauline Nyiramasuhuko et consorts*, Decision on the Defence Motion for an Extension of the Time Limit for Filing the Notice in Respect of Expert Witness Statements, 25 mai 2001 (ICTR-98-42-T,* Reports 2001*, p. 1844) – Chambre de première instance I,* Le Procureur c. Ferdinand Nahimana et consorts*, Décision relative à la requête orale du Procureur en modification de la liste des témoins choisis, 26 juin 2001 (ICTR-99-52-T,* Recueil 2001*, p. 1173) – Chambre de première instance III,* Le Procureur c. Laurent Semanza*, Decision on Defence Extremely Urgent Motion for Extension of Tirne and for an order of Cooperation of the Government of Rwanda, 13 décembre 2001(ICTR-97-20-I,* Recueil 2001*, p. 3296) – Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts*, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, 28 septembre 2004 (ICTR-98-41-T,* Recueil 2004*, p. X)*

LE TRIBUNAL PÉNAL 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 la Défense intitulée «*Highly Conjdential Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements*», (la «requête») déposée le 19 octobre 2004,

VU (i) Le document de la défense intitulé «Memorandum from Casimir Bizimungu in support of Justin Mugenzi's Highly Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements», déposé le 21 octobre 2004; (ii) La réponse du Procureur intitulée «Prosecutor's Response to Mugenzi's Urgent Motion

Response to Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert reports and/or Statements" filed on 22 October 2004;

HAVING BEEN SEIZED of "Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements" on 15 October 2004;

NOTING the Correspondence from the Prosecution to the Registry regarding Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements dated 18 October 2004 in which the Prosecution brought to the attention of the Defence that the Motion of 15 October 2004 contained closed session material that should be removed from the public domain;

NOTING that the Defence brought this issue to the attention of the Chamber who, during the 18 October 2004 proceedings, directed the Registry to mark as CONFIDENTIAL the annexes to the Motion filed on Friday 15 October 2004 as confidential.

NOTING that the Defence's request to withdraw the Motion filed on 15 October 2004 from the role was granted by the Chamber on 20 October 2004;

NOTING the letter by Ms Saint Laurent to Mr. Ng'arua, Counsel for Bizimungu filed on 3 November 2004 acknowledging receipt of three expert reports and requesting the *curriculum vitae* of those experts;

NOTING the "Prosecutor's Response to Notices Filed Under Rule 94 *bis* (B) of the Rules of Evidence and Procedure by Casimir Bizimungu, Jérôme Bicamumpaka, and Justin Mugenzi Objecting to the Qualification and Statements of Prosecutor's Expert Witnesses Deo Mbonyinkebe, Binaifa Nowjoree, and Jean Rubaduka" filed on 8 November 2004 (the "Prosecutor's Response to Notices");

NOTING that the Annexes A-l, A-2 and A-3 to the Prosecutor's Response to Notices were filed on 10 November 2004;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 94 *bis* 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 for Bicamumpaka

1. The Defence argues that on 5 March 2004, the Prosecution indicated that the reports of the scheduled expert witnesses would be supplied to the Chamber and to the Defence by 15 April 2004. The Defence cites extracts of closed session transcripts annexed to the Motion in support.

2. The Defence states that since then, it has received nothing. As the proceedings would be adjourned soon and until mid-January 2005, the Defence adds that this would be an ideal period to prepare itself for the testimonies of those experts.

for the Filing, Service or Disclosure of Expert Reports and/or Statements», déposée le 22 octobre 2004,

AYANT ÉTÉ SAISI le 15 octobre 2004 de la requête de la défense intitulée «Justin Mugenzi's Urgent Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements»,

VU la lettre en date du 18 octobre 2004 adressée par le Procureur au Greffe à propos de la requête susvisée de la défense et dans laquelle le Procureur appelait l'attention de la défense sur le fait que la requête du 15 octobre 2004 contenait des documents relevant du huis clos, qui ne devraient pas être accessibles au public,

NOTANT que la défense a signalé cette question à la Chambre et que celle-ci a enjoint au Greffe à l'audience du 18 octobre 2004 de porter la mention «CONFIDENTIEL» sur les annexes de la requête déposée le vendredi 15 octobre 2004,

NOTANT que la Chambre a fait droit le 20 octobre 2004 à la demande de la défense de retirer du rôle la requête déposée le 15 octobre 2004,

NOTANT la lettre adressée par Me Saint Laurent, conseil de Bizimungu, à M. Ng'arua, déposée le 3 novembre 2004, dans laquelle il accusait réception de trois rapports d'experts et demandait le *curriculum vitae* de ces experts,

PRENANT ACTE de la réponse du Procureur intitulée «Prosecutor's Response to Notices Filed Under Rule 94 *bis* (B) of the Rules of Evidence and Procedure by Casimir Bizimungu, Jerome Bicamumpaka, and Justin Mugenzi Objecting to the Qualification and Statements of Prosecutor's Expert Witnesses Deo Mbonyinkebe, Binaifa Nowjoree, and Jean Rubaduka», déposée le 8 novembre 2004 (la «Réponse du Procureur aux notifications»),

NOTANT que les annexes A-1, A-2 et A-3 de la réponse du Procureur aux notifications ont été déposées le 10 novembre 2004,

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), en particulier l'article 94 *bis* du Règlement,

DÉCIDE sur la seule base des mémoires déposés par les parties, conformément au paragraphe (A) de l'article 73 du Règlement.

ARGUMENTS DES PARTIES

La défense de Bicamumpaka

1. La défense soutient que le Procureur a indiqué le 5 mars 2004 qu'il communiquerait à la Chambre et à la défense d'ici au 15 avril 2004 les rapports attendus des témoins experts. À l'appui, elle cite des extraits, annexés à la requête, du compte rendu de l'audience tenue à huis clos.

2. La défense déclare que, depuis lors, elle n'a rien reçu. Comme les audiences vont bientôt être suspendues, et ce, jusqu'à la mi-janvier 2005, elle fait observer qu'elle aimerait mettre cette période à profit pour se préparer en vue des dépositions de ces témoins experts.

3. The Defence argues that while Rule 94 *bis* allows the Prosecution to file such reports with the Chamber no later than 21 days before the expert is to testify, this is only a minimum requirement; the same Rule indicates that the full statements shall be disclosed to the opposing party as early as possible.

4. The Defence adds that the Prosecution has a duty to control and require expert witnesses to act with expedience in the preparation of their reports and that in the case of Justin Mugenzi, the Prosecution has had some six years to prepare such reports.

5. The Defence therefore submits that the Chamber should order the Prosecution to file the reports of all expert witnesses it intends to call by 28 October 2004, failing which the Prosecution should be barred from calling or relying upon the said evidence.

The Defence for Bizimungu

6. The Defence for Bizimungu supports the Motion and adds that it has reminded the Prosecutor of the urgency in disclosing the Expert Reports on 23 July 2004, making reference to the 5 March 2004 Status Conference discussion on this issue.

7. The Defence alleges that it needs to absorb the content of any expert report to prepare for the research of counter-expert material for cross-examination.

8. The Defence recalls that it is expected to be the first Defence team in this joint trial to present its case and it cannot enlist witnesses before having analysed the Prosecution expert reports. Therefore, any delay in disclosing the reports, might cause delays in the presentation of the Defence case. The Defence submits that it is in the interests of justice to disclose those reports by 28 October 2004.

9. The Defence for Bizimungu in a letter filed on 3 November 2004 requested the Prosecution to file the *curriculum vitae* of the three experts for which reports had been filed.

The Prosecution's Response

10. The Prosecution recalls that during the 5 March 2004 Status Conference, it identified the following four expert witnesses to be called to testify : Alison Desforges, Jean Rubaduka, Binaifa Nowrojee and Deo Bonyinkebe.

11. The Prosecution cites Rule 94 *bis* (A) of the Rules and a Decision in the *Semanza* Case[1] to indicate that the rule does not set a specific deadline for disclosure

[1] *The Prosecutor v. Semanza*, Decision on Defence Extremely Urgent Motion for Extension of Time and for an order of Cooperation of the Government of Rwanda, 13 December 2001.

3. La défense fait valoir que l'article 94 *bis* du Règlement autorise le Procureur à déposer de tels rapports auprès de la Chambre au plus tard 21 jours avant la date prévue pour le témoignage de l'expert, mais qu'il ne s'agit là que d'une condition minimale. En effet, ce même article dispose que la déclaration est communiquée dans son intégralité à la partie adverse dès que possible.

4. La défense ajoute que le Procureur est tenu d'insister auprès des témoins experts pour qu'ils diligentent l'élaboration de leurs rapports et de s'assurer qu'il en est ainsi. Elle fait valoir que, dans le cas de Justin Mugenzi, le Procureur a eu pas moins de six années pour préparer de tels rapports.

5. La défense soutient donc que la Chambre devrait enjoindre au Procureur de déposer, d'ici au 28 octobre 2004, les rapports de tous les témoins experts qu'il entend citer, faute de quoi il lui serait interdit d'appeler ces témoins à la barre ou de se fonder sur lesdits rapports.

La défense de Bizimungu

6. La défense de Bizimungu appuie la requête et ajoute qu'elle a rappelé au Procureur, le 23 juillet 2004, qu'il devait communiquer d'urgence les rapports des témoins experts, en faisant référence à l'examen de cette question lors de la conférence de mise en état du 5 mars 2004.

7. La défense allègue qu'il lui faut se familiariser avec le contenu de tout rapport d'expert pour orienter sa recherche d'éléments lui permettant de contredire le témoin expert lors du contre-interrogatoire.

8. La défense rappelle qu'elle sera la première équipe de la défense dans ce procès conjoint à présenter ses moyens et qu'elle ne peut pas dresser la liste de ses témoins avant d'avoir analysé les rapports des témoins experts à charge. En conséquence, tout retard intervenant dans la communication des rapports pourrait entraîner des retards dans la présentation des moyens de la défense. Selon elle, l'intérêt de la justice commande que ces rapports soient communiqués d'ici au 28 octobre 2004.

9. Dans une lettre déposée le 3 novembre 2004, la défense a demandé au Procureur de déposer les *curriculum vitae* des trois témoins experts dont les rapports avaient été déposés.

La réponse du Procureur

10. Le Procureur rappelle qu'il a indiqué à la conférence de mise en état du 5 mars 2004 qu'il entendait appeler à la barre quatre témoins experts, à savoir Alison Des Forges, Jean Rubaduka, Binaifa Nowjoree et Deo Bonyinkebe.

11. Le Procureur, s'appuyant sur l'article 94 *bis* (A) du Règlement et sur une décision rendue dans l'affaire *Semanza*[1] affirme que l'article en question ne fixe pas de

[1] *Le Procureur c. Semanza*, Decision on Defence Extremely Urgent Motion for Extension of Tirne and for an order of Cooperation of the Government of Rwanda, 13 décembre 2001.

whereas in the *Nyiramasuhuko* case[2], the Chamber had set a deadline for disclosure of the expert reports. In the instant proceedings, the Prosecution argues that no such deadlines have been set.

12. The Prosecution cites the *Nahimana* Case[3] in which the Chamber considered the element of surprise and whether there was enough rime for the opposing party to prepare.

13. The Prosecution states that it has intimated to the Defence that the Report of Alison Des Forges will be similar to her previous reports in the *Military I*, *Akayesu*, *Media*, *Ndindabahizi*, *Simba* and *Gacumbitsi* cases and that it disclosed to the Defence her testimony in the *Akayesu*, *Military I*, *Media* and *Gacumbitsi* cases on 18 September 2003. The Prosecution adds that the draft expert report of Deo Mbonyinkebe was disclosed to the Defence on 22 October 2004 and that it undertakes to disclose the draft expert reports of Jean Rubaduka and that of Binaifa Nowrojee on 25 October 2004.

14. Therefore, the Prosecution concludes that it has complied with its disclosure obligations, that the Defence has sufficient material to prepare and will not be taken by surprise.

HAVING DELIBERATED

15. The Chamber recalls that Rule 94 *bis* (A) states that :

> 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 statements 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."[4]

16. The Chamber further recalls that pursuant to Rule 94 *bis* (B), the opposing party shall file a notice to the Chamber within 14 days of the filing of the statements indicating whether it accepts (i) the qualification or the witness as an expert, (ii) expert witness statement and if it wishes to cross-examine the expert witness.

17. Rule 94 *bis* clearly addresses disclosure and filing obligations. As stated in the *Bagosora et al.* case, "its purpose is to ensure that the opposing party has sufficient notice of the content of the expert witness's testimony to effectively prepare for cross-examination and make objections thereto."[5]

[2] *The Prosecutor v. Nyiramasuhuko et al*., Decision on the Defence Motion for an Extension of the Time Limit for Filing the Notice in Respect of Expert Witness Statements, 25 May 2001.

[3] *The Prosecutor v. Nahimana et al*., Decision on the Prosecutor's oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001.

[4] *The Prosecutor v. Bagosora et al*., Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, ICTR-98-41-T, 28 September 2004.

[5] *The Prosecutor v. Bagosora et al*., Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, ICTR-98-41-T, 28 September 2004.

délai précis pour la communication, contrairement à ce qu'aurait fait la Chambre dans l'affaire *Nyiramasuhuko*[2], en fixant une date butoir pour la communication des rapports d'experts. En l'espèce, le Procureur soutient qu'un tel délai n'a pas été fixé.

12. Le Procureur fait état de l'affaire *Nahimana*[3] dans laquelle la Chambre a examiné la question sous l'angle de l'élément de surprise et du point de vue de savoir si la partie adverse disposait de suffisamment de temps pour se préparer.

13. Le Procureur affirme qu'il a indiqué à la défense que le rapport Alison Des Forges serait similaire à ceux présentés antérieurement aux procès *Militaires I*, *Akayesu*, *Médias*, *Ndindabahizi*, *Simba* et *Gacumbitsi*. Il dit avoir communiqué à la défense, le 18 septembre 2003, le texte de la déposition faite par le témoin dans les affaires *Akayesu*, *Militaires I*, *Médias* et *Gacumbitsi*. Il ajoute que le projet de rapport d'expert de Déo Mbonyinkebe a été communiqué à la défense le 22 octobre 2004 et qu'il entend communiquer les projets de rapports d'expert de Jean Rubaduka et de Binaifa Nowjoree, le 25 octobre 2004.

14. C'est pourquoi, le Procureur conclut qu'il s'est conformé à ses obligations de communication, que la défense dispose de suffisamment d'éléments pour se préparer et qu'elle ne sera pas prise par surprise.

APRÈS EN AVOIR DÉLIBÉRÉ

15. La Chambre rappelle le libellé de l'article 94 *bis* (A) du Règlement :

> 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 21 jours avant la date prévue pour le témoignage de cet expert.

16. La Chambre rappelle en outre que, conformément à l'article 94 *bis* (B) du Règlement, la partie adverse fait savoir à la Chambre de première instance, dans les 14 jours suivant le dépôt de la déclaration du témoin expert, si (i) elle accepte 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.

17. L'article 94 *bis* traite manifestement des obligations de communication et de dépôt de pièce. Ainsi qu'il a été déclaré dans l'affaire *Bagosora et consorts*, «son but est de garantir que la partie adverse est suffisamment informée du contenu de la déposition attendue du témoin expert pour se préparer efficacement en vue du contre-interrogatoire et soulever des objections relativement à ce rapport»[4] [traduction].

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[2] *Le Procureur c. Nyiramasuhuko et consorts*, Decision on the Defence Motion for an Extension of the Time Limit for Filing the Notice in Respect of Expert Witness Statements, 25 mai 2001.

[3] *Le Procureur c. Nahimana et consorts*, Décision relative à la requête orale du procureur en modification de la liste des témoins choisis, 26 juin 2001.

[4] *Le Procureur c. Bagosora et consorts*, Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, ICTR-98-41-T, 28 septembre 2004 [para. 61].

18. Considering that those witnesses have not been scheduled to testify within 21 days, the Chamber is of the view that there is no legal basis for the remedy sought by the Defence, insofar as they seek to bar the Prosecution from calling or relying upon the evidence of witnesses whose reports have not been filed by 28 October 2004.

19. The Chamber notes that the experts will be called during the last trial session scheduled to start on 1 February 2005. Nonetheless, the Chamber recalls that during the 5 March 2004 Status Conference, discussions on the issue of disclosure of the expert reports took place and the Prosecution gave indications that it had asked the experts to file their reports at least by 15 April 2004. The Chamber had reminded the Prosecution that it should adhere to that date[6]. The Chamber wishes to further remind the Prosecution that disclosure of the full statements of the expert witnesses should be made, as a matter of principle, as early as possible.

20. The Chamber also notes that since the filing of the Motion, (i) the draft Expert Report of Deo Mbokyinkebe was filed in French with the Registry on 21 October 2004, (ii) the draft Expert Report of Binaifer Nowrojee was filed with the Registry on 25 October 2004 in both languages, and (iii) the Expert Report of Jean Rubaduka was filed in French with the Registry on 25 October 2004. The Defence for Bicamumpaka, Mugenzi and Bizimungu have filed their notice pursuant to Rule 94 *bis* (B) of the Rules. With respect to the two draft expert reports, the Chamber does not find that a draft form satisfies the filing obligation, and orders the Prosecution to indicate by 15 December 2004 any variance between the draft Reports and any eventual final Reports to be filed pertaining to Deo Mbokyinkebe and Binaifer Nowrojee to allow the Defence sufficient time to prepare.

21. The Chamber further notes that no report has yet been filed with respect to Alison Des Forges. The Prosecution's indication that Des Forges' Report will be similar to previous reports filed in six other cases does not satisfy the disclosure obligations envisaged under Rule 94 *bis* (A). The Chamber orders that the final Report by Alison Des Forges be filed by 15 December 2004 at the latest so as to allow sufficient time both for its translation and the preparation of the Defence.

22. Finally, with respect to Bizimungu's request for the filing of the *curriculum vitae* of the three expert witnesses, the Chamber notes that in the Prosecutor's Response to Notices, the Prosecution indicates that it has attached the curriculum vitae of expert witnesses Deo Mbonyinkebe, Binaifa Nowrojee and Jean Ruboduka. The Chamber notes that those documents were not attached to the said Response but were filed a day later, on 10 November 2004. Without going into the substance of this Response, the Chamber recalls the *Nahimana et al*. case in support of the contention that the *curriculum vitae* of expert witnesses should be submitted "as verification or in support of their expert status."[7] Consequently, the Chamber orders the filing of the *curriculum vitae* of Alison Des Forges by 15 December 2004.

[6] T. 5 March 2004 (ICS).

[7] *The Prosecuror v. Nahimana et al*., Decision on the Expert Witnesses for Defence, Case ICTR-99-52-T, 24 January 2003.

18. Comme il n'est pas prévu que ces témoins déposent dans un délai de 21 jours, la Chambre estime qu'il n'y a pas de fondement juridique pour la mesure sollicitée par la défense, celle-ci demandant d'interdire au Procureur d'appeler à la barre les témoins dont les rapports n'auront pas été déposés d'ici au 28 octobre 2004 ou de s'appuyer sur les dépositions de ces témoins.

19. La Chambre relève que les experts seront appelés à la barre durant la dernière session, qui doit commencer le 1er février 2005. Cela étant, elle rappelle qu'à la conférence de mise en état du 5 mars 2004, il a été question de la communication des rapports d'experts et que le Procureur a indiqué qu'il avait demandé aux experts de déposer leurs rapports d'ici au 15 avril 2004. À cette occasion, la Chambre avait rappelé au Procureur qu'il devait respecter cette date[5]. Elle tient à rappeler de nouveau au Procureur qu'en principe, les déclarations des témoins experts doivent être communiquées dans leur intégralité dès que possible.

20. La Chambre relève par ailleurs que depuis le dépôt de la requête, (i) le projet de rapport d'expert de Deo Mbokyinkebe a été déposé en français auprès du Greffe, le 21 octobre 2004; (ii) le projet de rapport de l'expert Binaifa Nowjoree a été déposé auprès du Greffe le 25 octobre 2004 dans les deux langues; (iii) le rapport d'expert de Jean Rubaduka a été déposé en français auprès du Greffe le 25 octobre 2004. Les conseils de Bicamumpaka, Mugenzi et Bizimungu ont adressé à la Chambre la notification prescrite à l'article 94 *bis* (B) du Règlement. En ce qui concerne les deux projets de rapports d'expert, la Chambre estime qu'un rapport à l'état de projet ne remplit pas les critères de dépôt de pièces et elle invite le Procureur à lui signaler d'ici au 15 décembre 2004 toute différence qui pourrait exister entre le texte des projets de rapports et celui des rapports finals qui seront déposés pour Déo Mbokyinkebe et Binaifa Nowjoree, afin de donner à la défense suffisamment de temps pour se préparer.

21. La Chambre note encore qu'aucun rapport n'a encore été déposé par Alison Des Forges. L'indication donnée par le Procureur, à savoir que le rapport de celle-ci serait similaire à ceux qu'elle avait déposés antérieurement dans six autres affaires, ne satisfait pas à l'obligation de communication prévue au paragraphe (A) de l'article 94 *bis*. La Chambre ordonne que le rapport final d'Alison Des Forges soit déposé d'ici au 15 décembre 2004, de manière à laisser suffisamment de temps pour la traduction ainsi que pour la préparation de la défense.

22. Enfin, à propos de la demande de *Bizimungu* concernant le dépôt des *curriculum vitae* des trois témoins experts, la Chambre relève que dans la réponse du Procureur aux notifications, celui-ci indique qu'il a joint ces *curriculum vitae* de Déo Mbonyinkebe, Binaifa Nowjoree et Jean Ruboduka. La Chambre constate que ces documents n'étaient pas joints à ladite réponse, mais qu'ils ont été déposés un jour plus tard, le 10 novembre 2004. Sans s'attarder à la substance de cette réponse, la Chambre rappelle l'affaire *Nahimana et consorts* a l'appui de l'affirmation que les *curriculum vitae* des témoins experts doivent être soumis «pour permettre de vérifier ou de confirmer leur qualité d'expert»[6]. En conséquence, elle invite le Procureur à déposer le *curriculum vitae* d'Alison Des Forges d'ici au 15 décembre 2004.

[5] Compte rendu de l'audience à huis clos du 5 mars 2004.

[6] *Le Procureur c. Nahimana et consorts*, Décision sur la requête de la défense aux fins de comparution de témoins experts, affaire n° ICTR-99-52-T, 24 janvier 2003.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS in part the Defence Motion ordering the Prosecution to disclose the Expert Reports within a certain deadline;

ORDERS the Prosecution to file the final statement and the *curriculum vitae* of Alison Des Forges by 15 December 2004 at the latest;

ORDERS the Prosecution to indicate by 15 December 2004 any variance between the draft Reports and any eventual final Reports to be filed pertaining to Deo Mbokyinkebe and Binaifer Nowrojee.

DENIES the Defence Motion in ail other respect.

Arusha, 10 November 2004;

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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PAR CES MOTIFS,

FAIT DROIT en partie à la requête de la défense et enjoint au Procureur de communiquer les rapports d'expert dans un délai déterminé;

INVITE le Procureur à déposer d'ici au 15 décembre 2004 la déclaration finale et le *curriculum vitae* d'Alison Des Forges;

INVITE le Procureur à signaler d'ici au 15 décembre 2004, toute différence qui pourrait exister entre le texte des projets de rapports et celui des rapports finals qui seront déposés pour Deo Mbokyinkebe et Binaifa Nowjoree;

REJETTE la requête de la défense à tous autres égards.

Arusha, le 10 novembre 2004.

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Bicamumpaka's Request for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the Testimony or Witnesses GFA, GKB AND GAP (Rule 73 of the Rules) 17 November 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamupaka – certification to appeal – admissibility of witness testimony – admissibility of evidence, responsibility of the Trial Chamber, intervention of the Appeals Chamber in exceptional circumstances – admission of evidence does not determine authenticity or trustworthiness of the documents – no automatic right of interlocutory appeal – motion denied

International instruments cited : Rules of procedure and evidence, Rule 73

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Pauline Nyiramsuhuko's Appeal on Admissibility of Evidence, 4 October 2004 (ICTR-98- 42-AR73.2,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Mugiraneza Interlocutory Appeal Against a Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004 (ICTR-99-50-AR73.3 and AR73.4,* Reports 2004*, p. X)*

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 "Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the testimony of Witnesses GFA, GKB and GAP" filed on 22 October 2004 (the "Motion");

NOTING

(i) The "Prosecutor's Response to Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the testimony of Witnesses GFA, GKB and GAP", filed on 28 October 2004;

(ii) "Bicamumpaka's Reply to "Prosecutor's Response to Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal a Decision of 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of the testimony of Witnesses GFA, GKB and GAP"" filed on 8 November 2004;

NOTING the "Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB and GAP" (the "6 October 2004 Decision");

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 seeks certification pursuant to Rule 73 of the Chamber's Decision dated 6 October 2004 which denied the Defence motion opposing the admissibility of witnesses GFA, GKB and GAP.

2. The Defence alleges that the question of admissibility of evidence 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 in conformity with the requirements of Rule 73 (B) of the Rules.

3. As far as the conduct of the proceedings is concerned, the Defence recalls the Decisions on exclusion of evidence of 23 January 2004 and 3 February 2004 which were confirmed by the Appeals Chamber on 25 June 2004. The Defence also recalls the Decision on partial exclusion of evidence of 5 February 2004 which was directed by the Appeals Chamber for reconsideration on 5 July 2004. The Trial Chamber gave its reasons on 4 October 2004 and maintained the 5 February 2004 Decision. On 6 October 2004, the Chamber denied Bicamumpaka's Motion on exclusion of evidence of witnesses GFA, GKB and GAP.

4. The Defence argues that without appellate resolution, Bicamumpaka may be convicted on all counts because Witnesses GFA and GAP's allegations support paragraphs of the indictment that support all counts of the indictment. The Defence alleges that this contrasts with the situation of accused Bizimungu and that the only difference between the two is the timing of their objections whereas the Accused are placed in identical situations. The Defence argues that in a joint trial, when an accused objects to the admissibility of certain evidence, the co-accused preserves its right to object at a later stage.

5. The Defence alleges that admissibility of evidence of acts against Bicamumpaka in the *Prefecture* of Ruhengeri certainly affects the outcome of the trial. The Defence alleges that the circumstances are analogous to the 18 March 2004 Decision where the Chamber allowed certification because the "issue of admissibility of testimonies of Prosecution witnesses could significantly affect the outcome of the trial against the accused, insofar as to whether the Trial Chamber will take into account the testimony of theses witnesses for its final deliberations or not could significantly affect its deliberation."

6. The Defence submits that an immediate resolution of the issue will materially advance the proceedings by knowing if a case can be made against Bicamumpaka for those alleged acts committed in Ruhengeri and to prepare a defence. The Defence also

adds that resolving a radical difference between decisions on similar issues will also serve that purpose.

7. Finally, the Defence observes that all decisions dealing with exclusion of witnesses have been certified indicating that the conditions under the Rule are met.

The Prosecution's Response

8. 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 *Prosecutor v. Nyiramasuhuko*.

9. The Prosecution alleges that the criteria of Rule 73 (B) are not met because the Chamber's decision is correct and unlikely to be overturned by the Appeals Chamber. Contrary to the Defence's argument, Bicamumpaka and Bizimungu are not in exactly identical situations and particularly, the timing of their objections is different and the Trial Chamber has decided that this delay amounts to a waiver of Bicamumpaka's right to object to the testimonies of GKB and GAP. Moreover, the Prosecution alleges that the other difference between Bizimungu and Bicamumpaka is the sufficiency of the notice to the Accused of the substance of GFA's evidence.

10. Finally the Prosecution argues that the Appeals Chamber has articulated the standard governing this case in its 15 July 2004 Decision on Mugiraneza's interlocutory appeal. As a result, the proceedings are unlikely to be materially advanced by yet another appeal.

The Defence's Reply

11. The Defence indicates that the Response does not adequately address the standard for certification and specifically the fact that the issue of exclusion of evidence has always been certified. Moreover, the Defence rejects the Prosecution's argument that the Chamber's Decision on certification could depend on the likelihood of the success of the appeal.

12. The Defence adds that in its application for certification to appeal the Decision excluding Witnesses GKB, GFA and GAP among others, the Prosecution had asserted that "the exclusion of evidence is sufficient for certification because it affects a fair determination of the matter" and that admissibility of evidence is similarly sufficient.

HAVING DELIBERATED

13. The Chamber recalls the Appeals Chamber Decision in *Nyiramasuhuko v. The Prosecutor*[1] restating the conditions of Rule 73 (B) of the Rules for certification to

[1] *Nyiramasuhuko v. The Prosecutor*, Case N° ICTR-98- 42-AR73.2, Decision on Pauline Nyiramsuhuko's Appeal on Admissibility of Evidence [AC], 4 October 2004.

be granted by a Trial Chamber and stating particularly on the issue of admissibility of evidence the following :

> "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 evidencet[2]."

14. Furthermore, in the same Decision, the Appeals Chamber ruled that :

> "[T]he 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 o the evidence[3]."

15. The Chamber also recalls the Appeals Chamber Decision on Mugiraneza Interlocutory Appeal against a Decision of the Trial Chamber on Exclusion of Evidence in which guidance was provided to the Trial Chamber with respect to issues of exclusion of evidence[4].

16. In light of the above mentioned Decisions and 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. Moreover, the Chamber wishes to clarify that even if some decisions on admissibility of evidence have been certified, this does not necessarily mean, as the Defence submits, that all such decisions fall into a special category under Rule 73 carrying an automatic right of interlocutory appeal. This is not the case and the principle remains that all decisions rendered under Rule 73 "are without interlocutory appeal" save when the specific conditions of certification provided under sub Rule (B) have been met.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Defence Motion.

Arusha, 17 November 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[2] *Idem*, par.5, footnote omitted.

[3] *Idem*, par. 7, footnote omitted.

[4] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-AR73.3 and AR73.4, Decision on Mugiraneza Interlocutory Appeal Against a Decision of the Trial Chamber on Exclusion of Evidence, A.C., 15 July 2004.

Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files) 17 November 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Judge Lee Gacuiga Muthoga; Judge Emile Francis Short

Bicamumpaka – exculpatory evidence, disclosure – multiple motions on the same issue – information requested by the Defence, Prosecutor in a better position than the Defence to obtain the information, efforts of the Prosecutor, disclosure to the Defence, duty of the Prosecutor to fully investigate a case – defence must identify the material in specific terms and show that the material is exculpatory – motion denied

International instruments cited : Rules of procedure and evidence, Rule 68

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 "Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files)" filed on 6 October 2004, (the "Motion");

NOTING the "Prosecutor's Response to Jérôme Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files)" filed on 11 October 2004, attaching and incorporating a document in the same title filed on 7 September 2004 (the "Response");

NOTING ALSO "Bicamumpaka's Reply to Prosecutor's Response to Jerome Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files)" filed on 15 October 2004, (the "Reply");

THE CHAMBER NOW DECIDES the Motion on the basis of the written submissions.

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence requests the Trial Chamber to order the Prosecution to disclose to the Defence three case files of the Kigali Court of First Instance in Rwanda (the "Kigali Court Case Files"). The case files relate to proceedings of that Court concerning the *Mouvement Démocratique Républicain* (the "MDR") political party. The Defence specifically identified those case files as :

(i) 21.398/93/S1 relating to a suit filed on 26 July 1993 by one Faustin Twagiramungu seeking judicial nullification of

(a) the decision by which the Political Bureau of the MDR suspended him on 17 July 1993 as the President of the MDR, and

(b) the decisions taken "at the Kabusunzu Congress" on 23 and 24 July 1993;

(ii) 21.500/93/S1 relating to a suit filed by the MDR against Mr Twagiramungu; and

(iii) 21.507/93/S1 relating to a suit filed by Mr Twagiramungu against the MDR.

2. According to the Defence, these case files contain materials which (a) tend to exonerate the Accused from the crimes for which he is being tried before the ICTR, (b) mitigate his guilt in that regard, or (c) undermine the credibility of Prosecution Witnesses GBR and GLP whose evidence before the ICTR are contradicted by information to be found in the Kigali Court Case Files.

3. The Defence theory of exculpation runs as follows. The case for the Prosecution rests upon a theory that the MDR Party was split into two factions at some point before the genocide and the other crimes for which the Accused stands charged; that out of this split, emerged the "Power Faction" of the MDR to which the Accused belonged; that the other faction was the "Moderate Faction" led by Mr Twagiramungu; and that it was the machinations of the "Power Faction" that resulted in the genocide and the other crimes in the Indictment.

4. However, the Defence contends that the Kigali Court Case Files will show that there was in fact no "Power Faction", but rather an attempt by the main party to expel Mr Twagiramungu and a few of his followers, with the result that everyone else who did not belong to the Twagiramungu group was mischievously labelled as belonging to the "Power Faction".

5. The Defence submits that it had amicably sought in vain to obtain those files from the Prosecution.

6. The Defence relies on the authority of the Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence rendered by this Trial Chamber on 23 April 2004[1].

Prosecution Submissions

7. In response, the Prosecution filed a voluminous set of documents to prove that the Kigali Court Case Files are not in the possession of the Office of the Prosecutor of the ICTR.

8. The remainder of the Prosecution's response alleges that the Moving Party in this Motion is in the habit of filing multiple motions on the same issue; and that the current motion exemplifies this habit. In this connection, the Prosecutor attaches as

[1] *Prosecutor v Bizimungu et al* (Case N° ICTR-99-50-T).

"Annex B" to its Response an undated document prepared by the Defence which is otherwise identical to the Motion dated 6 October 2004 and filed on the same date.

Defence Reply

9. In reply, the Defence denies that it has filed multiple motions on the same issue. According to the Defence, the document attached as "Annex B" to the Prosecutor's Response was simply a draft of the present Motion, which was attached to a letter it wrote to the Prosecution demanding the disclosure of the Kigali Court Case Files, and was intended to inform the Prosecution that it intended filing a motion for production of the files if the demand in that letter was not met.

DELIBERATIONS

10. The Trial Chamber will first address the Prosecution's allegation that the Defence has filed multiple motions on the same issue raised in this Motion. Having examined "Annex B" to the Prosecutor's Response, the Chamber is satisfied that the Defence did not file the document before this Tribunal. It appears that it was the Prosecution that attached it to its Response. The document bears no registry stamp showing that it had been filed nor does it have a date or a signature. Moreover, paragraph 5 of the Defence's letter dated 30 July 2004, and attached by both sides to their Motion papers, clearly states that the document in question was a "draft Motion." In view of these facts, there was no basis for this allegation by the Prosecution.

11. As regards the issue raised by the Motion, the Chamber recalls its Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, dated 14 September 2004, where is stated as follows :

> [T]he Trial Chamber considers that Rule 68 (A) does not impose an obligation on the Prosecutor to search for materials which he does not admit having knowledge of nor does it entitle the Defence to embark on a fishing expedition to obtain exculpatory material. *It does, however, mean that where the Defence has specific knowledge of any information covered by the Rule and which is not currently within the possession or control of the Prosecutor, and the Defence requests that information in specific terms, the Prosecutor should attempt to obtain that information where the Prosecutor is in a better position than the Defence to do so. Once this is successfully done, that material should be disclosed to the Defence. This obligation stems from the Prosecutor's inherent and ongoing duty to fully investigate a case before this Tribunal*[2]. [Emphasis added.]

12. This was essentially a restatement of the principle stated earlier in this Chamber's Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence rendered on 23 April 2004, which is relied upon by the Defence. There, the Chamber held as follows :

> The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence

[2] *Prosecutor v Bizimungu et al* (Case N° ICTR-99-50-T), para 10.

> or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; *provided it is shown that the Defence had made prior efforts to obtain such document by its own means.* This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, [footnote omitted] where, as a practical reality, the Prosecution enjoys greater leverage than the Defence[3]. [Emphasis added.]

13. It follows from the case law that the Prosecution may not avoid its duty to disclose a specifically identified exculpatory material, merely by declaring that the material is not within its possession or custody. As the foregoing jurisprudence shows, the Prosecution has a duty to make every effort to obtain known exculpatory materials in the hands of third parties.

14. This duty of the Prosecution may require it to carry out investigations at the instance of the Defence. However, it does not entitle the Defence to embark on a fishing expedition for exculpatory material. In view of this special nature of the duty, the jurisprudence has seen fit to temper its engagement in the following way. First, the duty does not warrant a fishing expedition. Hence there is the need for the Defence to identify the material in specific terms and to show that it is exculpatory. The Defence may not avoid these requirements by making submissions that do not identify the material in specific terms or do not show precisely how the material is exculpatory. Second, the duty recognises certain other prerequisites, including the following : the circumstances must show that the Prosecutor is in a better position than the Defence to obtain the material in question from the third party; and the Defence must show that it has made every effort to obtain the materials.

15. First, notwithstanding that the materials sought have been specifically identified, the Defence has still not managed to take the Motion outside the realms of a fishing expedition, for it is not clear how the materials are exculpatory. The Defence has not established that the Kigali Court Case Files contain information which "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". To say that the Kigali Court Case Files will show that there was no "Power Faction" of the MDR does not assist the Chamber in determining whether the application meets the requirements of Rule 68. The submissions of the Defence have failed to show that the materials have more than an abstract logical relationship to the innocence of the Accused, or that the materials are significantly helpful to an

[3] *Prosecutor v Bizimungu et al* (Case N° ICTR-99-50-T), para 9.

understanding of the innocence of the Accused[4]. Second, as has been settled by case law, where the exculpatory material is in the hands of a third party, the Defence must show that it has made every effort to obtain the material from such a third party. The Defence has not, in the present Motion, shown what, if any, efforts it has made to obtain the materials.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the motion.

Arusha, 17 November 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 **bis** *(E) 17 November 2004 (ICTR-99-50-T)*

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Judge Lee Gacuiga Muthoga; Judge Emile Francis Short

Witness statement in lieu of oral testimony – witness within the meaning of Rule 92 bis*, must be mentioned on the Prosecutor's witness list – motion denied*

International instruments cited : Rules of procedure and evidence, Rule 73 (A), 92 bis

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on Prosecutor's Motion for Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 bis, 14 October 2004 (ICTR-97-21-T,* Reports 2004*, p. X)*

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");

[4] See *Prosecutor v Delalić* (IT-96-21-T) Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence of 26 September 1996 at para 7 (Trial Chamber II).

BEING SEIZED of the "Prosecutor's Motion and Notice Pursuant to Rule 92 *bis* (E) Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 23 September 2004 (the "Motion");

NOTING

(i) "Mugenzi's Response to the Prosecutor's Motion Pursuant to Rule 92 *bis* Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 11 October 2004;

(ii) "Mugiraneza's Response to the Prosecutor's Motion Pursuant to Rule 92 *bis* Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 11 October 2004;

(iii) The "Strictly Confidential Response from Casimir Bizimungu to the Prosecutor's Motion Pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence", filed on 12 October 2004;

(iv) "Bicamumpaka's Objection to and Response to the Prosecutor's Notice and Motion Pursuant to Rule 92 *bis* Showing Widespread and Systematic Rapes Committed Throughout the Territory of Rwanda During the Period Covered by the Temporal Jurisdiction of the Tribunal", filed on 13 October 2004;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Evidence (the "Rules"), particularly Rule 92 *bis* 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 Prosecutor's Motion

1. The Prosecution gives Notice pursuant to Rule 92 *bis* (E) of the Rules asking that the Trial Chamber admit as evidence the witness statements of 51 witnesses in lieu of oral testimony. The Prosecution also requests that none of the witnesses be required to appear for cross-examination.

The Defence Responses

2. The Defence for Mugenzi argues that the Prosecution has been inconsistent on the number of new witnesses to be admitted, varying between 28, 30 and 51 in the Motion. In any event, according to the Defence for Mugenzi, Bicamumpaka, Bizimungu and Mugiraneza, these witnesses cannot be admitted because they are all new witnesses who have never before been listed as witnesses on whom the Prosecution would rely in these proceedings.

3. The Defence for Mugenzi argues that the Chamber's order of 4 June 2004 to the Prosecution to compile a "Final List of Witnesses" was intended to produce a

reduced and streamlined list of witnesses. The Defence for Mugenzi contends that the Prosecution has instead violated the entire basis of this order by adding as many as 51 new witnesses to the list. The Defence for Mugenzi states that the injustice of adding so many new witnesses must be considered prior to any consideration of the matter in terms of Rule 92 *bis* because in order to admit a written statement under Rule 92 *bis*, that statement must be from a witness. Therefore, according to the Defence for Mugenzi and Bizimungu, admission of the person to the list of witnesses must precede the acceptance of his written statement under Rule 92 *bis*.

HAVING DELIBERATED

4. Pursuant to Rule 92 *bis* (A), "[a] Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a witness 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."[Emphasis added].

5. The text of Rule 92 *bis* (A) implies that for a statement to be admitted pursuant to this Rule, its author must first be a witness. A person becomes a witness in the trial when his/her name has been entered in Prosecution's list of witnesses filed in the case. The Trial Chamber notes that none of the 51 persons whose statements are annexed to the Motion are mentioned in the Prosecutor's List of Witnesses submitted on 9 June 2004 or indeed on any other date. The Trial Chamber further notes that none of the makers of these 51 statements testified on any date prior to 9 June 2004. Therefore, the Trial Chamber considers that none of the makers of the statements sought to be introduced is a witness in the case within the meaning of Rule 92 *bis* (A).

6. A recent Decision of the Trial Chamber in the case of *Prosecutor v. Nyiramasuhuko* adopts this interpretation :

> "It results from the text of Rule 92bis (A) that, for a statement to be admitted pursuant to this Rule, its author must be a witness. The Trial Chamber notes that Mr Charles Njogu and Mr. Stephen John Myall are not mentioned on the Prosecution List of Witnesses. Yet, for these affidavits to be considered for admission under Rule 92*bis*, the Prosecution should have moved the Trial Chamber pursuant to Rule 73*bis* (E) for leave to add their authors on its Witness List. Therefore, it is the view of the Trial Chamber that the motion for admission of these affidavits under Rule 92*bis* is not properly brought before the Trial Chamber as the aforementioned pre-condition has not been met by the Prosecution."[1]

7. In the circumstances, the statements whose admission is sought do not constitute "the evidence of a witness" so as to bring them under the ambit of Rule 92 *bis* (A).

8. The Trial Chamber therefore considers that the statements cannot be introduced pursuant to Rule 92 *bis* (A) as they are not statements of witnesses in this case. Accordingly, the Trial Chamber is of the view that the Motion falls to be denied.

[1] *The Prosecutor v. Pauline Nyiramasuhuko et al*., Case N° ICTR-97-21-T, "Decision on Prosecutor's Motion for Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 *bis*", 14 October 2004, para. 12.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER
DENIES the Motion.

Arusha, 17 November 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motions to order the Prosecution to Disclose all Statements of Jean Kambanda 24 November 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – statements disclosure – out of time reply – duty of the Prosecutor to disclose prior statements and exculpatory material – clear, accurate and exhaustive information regarding the status of disclosure – tone of the language used in written pleadings, courteous use of language – motion denied

International instruments cited : Rules of procedure and evidence, Rules 66 (A) (ii) and 68 – Code of Professional Conduct for Defence Counsel of 8 June 1998, Article 17 (1)

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

(i) "Prosper Mugiraneza's Second Motion to Order the Prosecutor to Disclose All Statements of Jean Kambanda" filed on 14 September 2004, (the "Second Motion");

(ii) "Prosper Mugiraneza's Third Motion Seeking Disclosure Pursuant to Rule 66 (A) (ii) and 68 of Statements by Jean Kambanda in the Possession of Prosecutor or in the Alternative, for Sanctions" filed on 28 September 2004 (the "Third Motion");

(iii) "Yet Another Motion by Prosper Mugiraneza for Access to Statements by Prosecution Witness Jean Kambanda" filed on 13 October 2004 (the "Fourth Motion");

CONSIDERING :

(iv) The "Prosecutor's Response to Prosper Mugiraneza's Second Motion to Order the Prosecutor to Disclose All Statements of Jean Kambanda" filed on 20 September 2004 (the "Response");

(v) The "Prosecutor's Response to "Yet Another Motion by Prosper Mugiraneza for Access to Statements by Prosecution Witness Jean Kambanda" Dated 13 October 2004" filed on 20 October 2004 (the "Second Response");

(vi) "Prosper Mugiraneza's Reply to the Prosecutor's Response to Yet Another Motion by Prosper Mugiraneza for Access to Statements by Prosecution Witness Jean Kambanda" filed on 22 October 2004 (the "Reply");

ANALYSIS

1. The Trial Chamber has received two different versions of "Prosper Mugiraneza's Reply to Prosecutor's Response to Prosper Mugiraneza's Second Motion to Order the Prosecutor to Disclose All Statements of Jean Kambanda," which were filed with the Registry on 24 September 2004 and 27 September 2004 respectively. However, since both versions were received out of time pursuant to the deadlines for filing set by the Trial Chamber[1] without any good reason being given, the Trial Chamber will disregard both.

2. According to the submissions made by the Prosecution, it has already disclosed additional material with respect to Jean Kambanda[2]. It has written to all Defence teams inviting them to visit the Office of the Prosecutor, where all the Jean Kambanda Interviews will be downloaded to their laptops[3]. Furthermore, it has undertaken to disclose any other material relating to Jean Kambanda, as and when it comes to its notice[4].

3. It is not clear from the submissions, which are partly contradictory on the facts, exactly what has been disclosed and what remains to be disclosed. It is clear however that the Prosecution is under a duty to disclose prior statements as well as exculpatory material pertaining to all witnesses he intends to call pursuant to Rules 66 (A) (ii) and 68 of the Rules of Procedure and Evidence (the "Rules"), and the Defence has made known that it is seeking exactly that.

4. The Prosecution should provide both the Trial Chamber and the Defence with clear, accurate and exhaustive information regarding the status of disclosure of the Rule 66 (A) (ii) and Rule 68 material pertaining to Prosecution Witness Kambanda. Although the disclosure of all statements and exculpatory material related to Jean Kambanda is an ongoing obligation, if any relevant materials are currently in the possession of the Prosecution, they must be made available now.

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[1] Memorandum "File Submission- In the Matter of *'The Prosecutor vs. Bizimungu et al.*' (ICTR-99-50-T)", Ref :ICTR/JUD-11-6-2-04/133, 16 September 2004.

[2] Response, para. 3.

[3] Response, para. 4, and Attachment H thereto.

[4] Response, para. 5.

5. Finally, the Trial Chamber notes the complaint of the Prosecution that the language used by the Defence in the Motions and corresponding Replies is discourteous towards the Office of the Prosecutor. The Prosecution takes particular offence at being called "recalcitrant". Without making any determination on the matter, the Trial Chamber recalls that Article 17 (1) of the Code of Professional Conduct for Defence Counsel of 8 June 1998 requires the courteous use of language. The Trial Chamber has so far observed a high level of professional discourse between the Parties in this case, and expects that the tone of the language used in written pleadings should live up to that standard.

CONSEQUENTLY THE TRIAL CHAMBER

DISMISSES the Second Motion.

DISMISSES the Third Motion.

DISMISSES the Fourth Motion.

ORDERS the Prosecution to file with the Registry a summary providing clear, accurate and exhaustive information in relation to all materials currently within their possession regarding the status of disclosure of statements and exculpatory materials involving Prosecution Witness Jean Kambanda, in accordance with their disclosure obligations under Rules 66 (A) (ii) and 68 of the Rules. This should be filed no later than Wednesday 1 December 2004. Any remaining disclosure relating to this list should be made concurrently.

Arusha, 24 November 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible 24 November 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka – exclusion of testimony – evidence – facts not alleged in the indictment, not necessarily inadmissible evidence, prejudice of the Accused – sufficiency and specificity of the indictment, dependend on the facts of the case and the nature of the alleged criminal conduct identity of the victim, time and place of the events, means by which the acts were committed – material defect in the indictment, not automatic reversal by the Appeals Chamber – remedy at trial – ICTY – addition of witnesses on the Prosecution's witness list – motion granted in part

International instruments cited : Statute, art. 17 (4) and 20 (4) – Rules of procedure and evidence, Rule 47 (C), 89 (C) – ICTY Statute, art. 4 (a), 4 (b), 18 (4), 21 (2)

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. André Ntagerura et al., *Judgement, 25 February 2004 (ICTR-99-46-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *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 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al*, Decision on Urgent and Confidential Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKF, GBN, ADT and GTD, 1 July 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Eliézer Niyitegeka*, Judgement, 9 July 2004 (ICTR-99-14-A,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence, 15 July 2004 (ICTR-99-50-AR73.3 and AR 73.4,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42-AR73,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir 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 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Bicamumpaka's Motions to Declare Parts of the Testimony of Witnesses GHT, GHY and GHS Inadmissible, 21 October 2004 (ICTR-99-50-T,* Reports 2004*, p. X)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreskic et al., *Appeal Judgement, 23 October 2001 (IT-95-16)*

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");

SEISED of "Bicamumpaka's Urgent Motion to Declare Parts of the Witnesses GTA and DCH's Testimony Inadmissible", filed on 16 September 2004 (the "Motion);

HAVING RECEIVED

(i) The "Prosecutor's Extremely Urgent Response to Jérôme Bicamumpaka's Motion to Declare Parts of the Witness GTA and DCH's Testimony Inadmissible", filed on 17 September 2004 (the "Response"), and

(ii) "Bicamumpaka's Reply to the Prosecutor's Extremely Urgent Response to the Motion to Declare Parts of the Witness GTA and DCH's Testimony Inadmissible", filed on 27 September 2004;

SUBMISSIONS

Relief Sought

1. The Defence requests the Chamber to direct the Prosecution not to lead any evidence from Witness DCH in relation to events involving the Accused and the killing of John Vuningoma, and to exclude the testimony of Witness GTA already received in this respect.

Supporting Arguments

2. The Defence submits that Witness GTA's testimony, received between 8 and 10 March 2004, and Witness DCH's Witness Statements, dated 20 February 2000 and 23 July 2003, support facts that are not alleged in the Indictment against the Accused.

3. The Defence argues that to admit witness testimonies and other evidence in relation to material facts not pleaded in the indictment violates the basic rights of an Accused to be informed in detail of the nature and cause of the charges against him or her so as to adequately prepare his or her defence, as guaranteed by Articles 17 (4) and 20 (4) of the Statute of the Tribunal (the "Statute") and Rule 47 (C) of the Rules of Procedure and Evidence (the "Rules").

4. The Defence submits that according to the jurisprudence of the Tribunal, a witness may not testify on facts not pleaded with sufficient particularity in the Indictment[1], and, witness statements are insufficient in and of themselves to set out the material facts alleged against the Accused, in order to determine evidence that is admissible during trial[2].

5. According to the Defence, the jurisprudence of the Tribunal is clear that an indictment must plead murder of individuals with heightened particularity, including the names of victims, the location and dates of events, and the "means by which the acts were committed." The Defence further submits that according to the Appeals Chamber Judgment in *Kupreskic*, unless "hundreds of men" were killed, the Indictment must specify the identity of the victims.

6. According to the Defence, there is no mention of John Vuningoma in the Indictment. Indeed, there is no mention of the Accused's involvement in a killing in Gitarama. Therefore, the required level of specificity in the Indictment has not been met, and the Prosecution may hot lead evidence on the Accused's alleged participation in the murder of John Vuningoma.

7. The Defence states that it should not be required at this stage of the proceedings to revisit its investigations into events concerning the killing of John Vuningoma. Any

[1] Motion, para. 5; The Defence cites *Prosecutor v. Niyitegeka*, Case N° ICTR-99-14-A, Judgement [AC], 9 July 2004, para. 193, and *Prosecutor v.Kupreskic et al*., Case N° IT-95-16, Judgement [AC], 23 October 2001, para. 88 as authority for its proposition.

[2] Motion, para. 6; The Defence cites *Prosecutor v. Niyitegeka*, Case N° ICTR-99-14-A, Judgement [AC], July 2004, para. 221, and *Prosecutor v. Ntagerura et al*, Case N° ICTR-99-46-T, Judgement [TC], 25 February 2004, para. 66 as authority for its proposition.

such investigation at this stage would be hasty, inadequate, and would be highly prejudicial to the right of the Accused to a fair trial.

8. In relation to the testimony of Witness GTA, who testified between 8 and 10 March 2004, and who was cross-examined by the Defence, the Defence submits that the opportunity to cross-examine the Witness does not suffice to overcome the prejudice accrued to the Defence, since the charges alleged by the Witness were not included in the Indictment. The Defence cites a Decision of the Appeals Chamber as authority for this proposition[3].

Prosecution Response

9. The Prosecution opposes the Motion. In its submission, the Prosecution indicates that the Indictment contains allegations specifically dealing with the Accused's criminal activities in Gitarama, besides those the Defence highlights in its Motion[4]. The Prosecution categorises its case as one where the Accused perpetrated and is responsible for widespread killings and other transgressions of international humanitarian law over a period of time throughout Rwanda, not excluding any *préfecture*, including Kigali. It identifies paragraphs 6.14, 6.30, 6.35, and 6.54 as being the relevant paragraphs of the Indictment alleging the criminal conduct of the Accused in Gitarama to which the evidence of Witnesses GTA and DCH are material, and go to provide proof. In particular, paragraph 6.54 of the Indictment is an example of specificity in the Indictment showing that members of the Government encouraged their subordinates in the militia, military and the general population to kill in Gitarama.

10. The Prosecution submits that the relevance, or materiality of evidence to an indictment and the degree of specificity of an indictment depend upon the nature of the Prosecution's case, the nature or mode of the Accused's participation in the alleged crime, the complexity of the crimes, and the geographical area and period over which the crimes are committed. Taking these factors into consideration, the paragraphs of the Indictment identified adequately set out the facts in Witnesses GTA and DCH's statements and their testimony are thus admissible.

11. The Prosecution provides the Trial Chamber with a summary of GTA's testimony of 9 and 10 March 2004. The testimony includes a statement that the Accused ordered the killing of a man called John Vuningoma at a roadblock[5].

12. The Prosecution provides a summary of DCH's "proposed testimony," which at the time of filing of the Response, had already commenced but was hot yet complete. The summary includes reference to the Witness's anticipated testimony that the Accused ordered a soldier in Gitarama to shoot a man called John Vuningoma. The soldier obeyed the instructions and shot and killed the man[6].

[3] *The Prosecutor v. Casimir Bizimungu et al*, Case N° ICTR-99-50-AR73.3 and AR 73.4, Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on Exclusion of Evidence (AC), 15 July 2004, para. 23-24.

[4] Response, para. 5 (i).

[5] Response, para. 8.

[6] Response, para. 8.

13. The Prosecution submits that no prejudice has been caused to the Accused, and he cannot be surprised, since "the redacted statements of witnesses GTA and DCH were disclosed to the Defendants before the commencement of the trial, and the unredacted ones of witness GTA (who has already finished his testimony) were disclosed in with the Pre-Trial Brief dated 23 October 2003 while those of DCH were disclosed in 19 December 2003, June and September 2004 [sic]."[7]

14. The Prosecution quotes a previous Decision of the Trial Chamber given in respect of the evidence of Witness GTD relating to events occurring in Gitarama *Préfecture* as supporting its contention that the facts contained in the statements of Witnesses GTA and DCH are sufficiently pleaded in the Indictment[8].

15. The Prosecution submits that the military were under the control of the Government supervised directly by the Minister of Defence and the soldiers were their subordinates. The Accused ordered his subordinates to shoot and kill John Vuningoma and the soldiers obeyed his instructions.

Defence Reply

16. The Defence highlights the fact that in the Response, the Prosecution does not question the Defence assertion that allegations of killings must be pied with heightened particularity in the Indictment.

17. The Defence submits that paragraph 6.54 of the Indictment, cited by the Prosecution as demonstrating specificity in the Indictment in relation to the present matter, does nothing of the sort. There is no mention of the individual killed, the location of the killing or the rime of the killing. Paragraphs 6.14, 6.30 and 6.35- cited by the Prosecution as showing events in Gitarama- do not meet the heightened standard of particularity concerning the killing of an individual. Neither are they included in the Gitarama subsection of section 7 of the Indictment, where the Prosecution pleads with specificity the events in various geographical regions. Specifically :

(i) Paragraph 6.14 makes no mention of Vuningoma or his killing. It does not mention the name of the soldier who allegedly killed Vuningoma. Neither is there a mention of Gitarama *préfecture*.

(ii) Paragraph 6.30 makes no mention of Vuningoma, or his killing. There is no mention of the name of the soldier who allegedly killed Vuningoma, or the relationship of the soldier to the Accused. The paragraph mentions Gitarama, but only as a part of a list of prefectures, in which a list of individuals "knew or had reason to know that their subordinates had committed or were preparing to commit errors [*sic*], and failed to prevent these crimes from being committed or to punish the perpetrators thereof."

[7] Response, para. 18.

[8] The Prosecution cites *The Prosecutor v. Casimir Bizimungu et al*, Case N° ICTR-99-50-T, Decision on Urgent and Confidential Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKF, GBN, ADT and GTD [TC], 1 July 2004, para. 15.

(iii) Paragraph 6.35 makes no mention of Vuningoma, his killing, the soldier who allegedly killed him, or the soldier's relationship with the Accused. There is also no mention of Gitarama *préfecture*.

18. The Defence claims that the Response is factually incorrect. The redacted witness statements were not disclosed before the start of trial. Even though the Trial started on 3 November 2003, no statement of Witness DCH was disclosed before 19 December 2003 despite the fact that the statement of Witness DCH conceming the Accused's killing of John Vuningoma was taken in February 2000.

DELIBERATIONS

19. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Nyitegeka* case has accurately stated the position of both Tribunals on the issue of sufficiency and specificity of the Indictment. The Trial Chamber considers the following paragraphs as being particularly relevant[9] :

> 193. The law governing challenges to the failure of an Indictment to provide notice of Material Facts is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreskic*. The *Kupreskic* Judgement stated that Article 18 (4) of the ICTY Statute, read in conjunction with Articles 21 (2), 4 (a) and 4 (b), "translates into 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."[10] *Kupreskic* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution Charges personal physical commission of criminal acts, the Indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."[11]
>
> 195. Failure to set forth the specific Material Facts of a crime constitutes a "material defect" in the Indictment[12]. Such a defect does not mean, however, that trial on that Indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreskic* stated that a defective Indictment "*may*, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic[13], *Kupreskic* left open the possibility that the Appeals Chamber could deem a defective Indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the Charges against him or her."[14]

[9] *The Prosecutor v. Eliezer Niyitegeka*, Case N° ICTR-96-14-A, Judgement (AC), 9 July 2004.
[10] *Kupreskic et al*. Appeal Judgement, para. 88.
[11] *Ibid*., para. 89.
[12] *Ibid*., para. 114.
[13] *Ibid.* (emphasis added).
[14] *Ibid.*

20. Further, the Trial Chamber notes the Decision of the Appeals Chamber in the *Nyiramasuhuko* case[15] where it stated :

> 11. [...] for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence. The required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct. If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment. Where a defect remains, the question then arises whether the trial of the accused was rendered unfair[16].
>
> 12. [...] the failure to specifically plead certain allegations in the indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion to under Rule 89 (C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of the other allegations specifically pleaded in the Indictment.

21. From the jurisprudence of the Appeals Chamber quoted above, it is clear that if the Accused is to be charged with the murder of an individual, the Indictment must set out "the identity of the victim, the time and place of the events and the means by which the acts were committed."[17]

22. It is also clear from the quoted jurisprudence that the failure to specifically plead the allegation of the murder of John Vuningoma in the Indictment does not necessarily render the evidence inadmissible, since it may be relevant to proof of the other allegations specifically pleaded in the Indictment. Should it be so relevant, and should the Trial Chamber determine that the paragraphs in the Indictment clearly set out the relevant charges against the Accused, including the material facts underpinning the charges, there would be no reason to exclude the evidence. As the Trial Chamber has decided on previous occasions[18], where the Indictment sets out the material facts underpinning the charges, but is lacking in specificity on the details, the Trial Chamber may look to the pre-trial disclosure to determine whether the Accused would be prejudiced by the admission of the evidence.

23. The Trial Chamber recalls that unredacted disclosure of the statements of Witnesses GTA was made at the same time as the Prosecution Pre-Trial Brief, filed on 20 October 2003[19]. Unredacted disclosure of the statements of Witness DCH was first made on 19 December 2003[20].

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[15] *Nyiramasuhuko v. Prosecutor*, Case N°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004.

[16] (Internal footnote omitted).

[17] *Kupreskic et al*. Appeal Judgement, para. 89.

[18] See for example *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Bicamumpaka's Motions to Declare Parts of the Testimony of Witnesses GHT, GHY and GHS Inadmissible [TC], 21 October 2004, para. 17; Also, *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Decision - Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 [TC], 4 October 2004.

[19] Response, para. 18; Prosecution's Pre-Trial Brief Pursuant to Rule 73 *bis* (B) (i), filed on 20 October 2003.

[20] Response, para. 18; Reply, para. 7.

24. The Trial Chamber further recalls its previous ruling on the addition of Witnesses DCH to the Prosecution Witness list :

> Regarding the addition of Witnesses DCH, GHT, and GHY who were inadvertently omitted in the Prosecutor's Witness list, the Trial Chamber notes that they had nonetheless been included in the Prosecutor's Pre-Trial Brief of 20 October 2003. In addition, Witness GHT's statement was disclosed on 15 December 2000; Witness GHY's statement was disclosed on 20 August 2002; and Witness DCH's statement was disclosed on 19 December 2003. The Trial Chamber is of the view that the addition of these witnesses does not constitute an addition *per se* but is to be considered as a correction of a mistake by the Prosecutor. Further, the Trial Chamber notes that the Defence has had sufficient notice of the particulars of these witnesses and of the content of their prospective testimony, and will not be unduly prejudiced by their addition to the Prosecutor's Witness List[21].

25. The Trial Chamber recalls that the Defence for Bicamumpaka did not oppose this Motion.

26. The Defence cites paragraphs 23 and 24 of the Appeals Chamber's Decision on Mugiraneza's interlocutory appeal on exclusion of evidence as authority for its proposition that the opportunity to cross-examine Witness GTA does not suffice to overcome the prejudice accrued to the Defence, since the charges alleged by the Witness were not included in the Indictment. The cited paragraphs read as follows :

> The Trial Chamber claims that its decision to not exclude the evidence of Witness GTE, concerning the crimes Mugiraneza is alleged to have committed in Kibungo *Prefecture*, is based on the notion that no prejudice accrued to Mugiraneza given the Defence's opportunity to cross-examine the witness. In contrast, with respect to Bizimungu, the Trial Chamber excluded the evidence of witnesses in relation to the alleged crimes of which Bizimungu allegedly incurred criminal responsibility in Ruhengeri *Prefecture* on the basis that that geographical region had not been pleaded in the Indictment. The Trial Chamber failed to render clear reasoning on this issue.
>
> For the foregoing reasons, the Appeals Chamber is not satisfied that the Trial Chamber committed no error in the exercise of its discretion in holding that the evidence of the identified witness could be led in relation to Counts 1 and 3 of the Indictment, and by its refusal not to exclude the evidence of GTE. As the Appeals Chamber is unable to identify the basis of the distinction drawn by the Trial Chamber between the two co-accused the decision of the Trial Chamber in relation to Mugiraneza is reversed. The Trial Chamber is directed to re-consider the request of Mugiraneza in light of the guidance above.

The Trial Chamber finds that the quoted paragraphs do not support the Defence proposition. The Appeals Chamber merely directed the Trial Chamber to render clear

[21] *The Prosecutor v. Casimir Bizimungu et al.*, Case N° 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) (TC), 23 June 2004, para. 20.

reasoning on the distinction between its two seemingly inconsistent decisions. In this regard, the Trial Chamber recalls its recent Decision[22].

27. Indeed, the Trial Chamber notes that the Defence took no objection at any stage to the testimony of Witness GTA regarding file evidence of the murder of John Vuningoma, and proceeded to cross-examine the witness comprehensively and in such a manner as to suggest that it was adequately prepared for the testimony of the Witness. Accordingly, the Trial Chamber sees no reason to exclude from the record the evidence of Witness GTA in relation to this event.

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 all 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.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in part, in the following terms only :

The Trial Chamber will disregard the evidence of Witnesses GTA the killing of John Vuningoma in relation to Count Six of the Indictment.

DENIES the Motion in all other respects.

Arusha, 24 November 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[22] *The Prosecutor v. Casimir Bizimungu et al*, Case N° ICTR-99-50-T, Decision - Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 [TC], 4 October 2004.

Decision on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief 24 November 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka, Mugenzi – defence request of a document listing the Prosecution Witnesses and the paragraphs of the Indictment to which all such witnesses will testify – Accused's right to be informed in detail of the nature and cause of the charges against him – specificity of the pre-trial brief, tool for the Defence to properly anticipate the evidence, adequately prepare for the cross-examination of witnesses, and for effective preparation to meet the case against the Accused, non binding guide to the Chamber through the case – issues and events to which each witness will testify must be stated in relation to the concise statements of facts alleged in the Indictment – timeliness, witnesses who have already testified – sanctions against an opposing Party – motion granted in part

International instruments cited : Statute, art. 20 (4) (a) – Rules of procedure and evidence, Rules 73 (A), 73 bis*, 90 (F), 98* bis

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora*, Decision on Defence Motions of Nsengiyumva, Kabiligi and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter Motion, 23 May 2002 (ICTR-96-7-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB and GAP, 6 October 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on the Joint Defence Motion for an Update of the Prosecution's Pre-Trial Brief, 2 November 2004 (ICTR-98-41-T,* Reports 2004*, p. X)*

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 "Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief," filed on 22 September 2004 (the "Motion");

CONSIDERING

i) the "Prosecutor's Response to Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief," filed on 29 September 2004 (the "Response"), and;

ii) the Defence "Reply to Prosecutor's Response to Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief," dated 6 October 2004 (the "Reply");

RECALLING the Chamber's Order of 7 October 2003 (the "Initial Order"),

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Article 20 (4) (a) and Rule 73 *bis*;

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 Order the Prosecutor to file a document listing the Prosecution Witnesses and the paragraphs of the Indictment to which *all* such witnesses will testify. This Motion is in furtherance of the Initial Order, which required the Prosecutor to file a Pre-Trial Brief in conformity with Rule 73 *bis*. The Defence argues that the Prosecutor's filing was defective. If not remedied, this defect stands to violate the Accused persons' right to be informed in detail of the nature and cause of the charges against them as provided for in Article 20 (4) (a) of the Statute.

2. The Defence submits that pursuant to that Initial Order, the Prosecutor served the Defence with a 94-page document setting out the law and the facts as alleged at the time. Attached to this document was a list of 95 witnesses, with their relevant pseudonyms and a 52-page schedule with a summary of the anticipated testimony of each of those witnesses as well as the offence which the testimony purports to substantiate and naming the relevant accused to be incriminated. Although this schedule provided the offences to which each witness was to testify, it did not specify the paragraphs of the Indictment which each of those witnesses was to speak to so that it is impossible for the evidence to be properly assessed.

3. It is further argued, that the deletion and addition of witnesses from the Prosecutor's original list makes it imperative, in the interest of efficiency, for the Chamber and the Defence to be provided with a document which relates the evidence of each witness to the specific paragraph of the Indictment which the Prosecutor contends that it goes to prove.

4. The Defence recalls that the Indictment in the instant case runs into 81 pages and comprises 179 paragraphs. Bicamumpaka and Mugenzi are both charged with Counts 1, 2, 3, 6, 7, 8, 9, 10 and Counts 4 and 5 respectively. With the exception of these latter two Counts, the Indictment recites the same 51 paragraphs as the factual basis for both the acts and/or omissions relating to direct criminal responsibility and command responsibility for all four Accused persons. Seventeen paragraphs of the Indictment are cited in support of Count 4, against Bicamumpaka and the other 2 Accused persons. Twenty paragraphs of the Indictment are cited as supporting Count 5 against Mugenzi.

5. In addition to the powers which Rule 73 *bis* affords the Chamber, and the fact that an Order pursuant to that Rule has already been entered in the instant case, the Defence contends that the jurisprudence is also unambiguous on the issue of specificity of Pre-Trial Briefs. Merely indicating the offences or counts of the Indictment to which witnesses will testify is insufficient, and a violation of Article 20 (4). The Defence cites the case of *Bagosora* in support of this contention where it was held that :

> "[…] pursuant to Rule 73 *bis* (B) (iv) (c) the Prosecution should indicate the points of the Indictment on which each witness will testify. This rule implements the rights of the Accused to be informed in detail of the nature and cause of the charges against him, which is guaranteed in Article 20 (4) (a) of the Statute. However, the summary of witness statements indicates only the names of the Accused and the crime on which each witness will testify. The Chamber agrees with the Defence that that the reference in the Rule to the "points of the indictment" does not mean the "counts of the indictment", which only recite or rephrase the legal text of the Statute relating to the crimes within the jurisdiction of the Tribunal and to the mode of criminal responsibility of the accused. Witnesses do not testify on such abstract legal matters, but rather to the factual circumstances underlying such charges as alleged in the indictment's concise statement of facts or the crimes and of the cases filed in accordance with Article 17 (4) of the Statute and Rule 47 (C). Furthermore, citing only the counts of the indictments, which relate to a number of events, does not properly inform the Accused of the anticipated evidence relating to specific allegations. Consequently, the Chamber is of the view that the Prosecution should indicate to which events, circumstances or paragraphs in the concise statement of facts in the Indictments each of the witnesses will testify."[1]

6. As an example of how the current Pre-Trial Brief is defective for lack of specificity, the Defence cites the example of Witness GMC. This witness is listed to testify in relation to the crimes of complicity in genocide, genocide, conspiracy to commit genocide and crimes against humanity (extermination), i.e., Counts 3, 2, 1 and 7 respectively. The Defence argues that using the current Pre-Trial Brief, the Chamber and the Defence are "simply left to guess how it can be that this witness incriminates the Accused in respect of these counts but [not] in respect of counts 6, 8, 9 and 10, for which the relevant paragraphs of the indictment are said to be identical."

7. The Defence argues that this lack of specificity causes delays, during both examination-in-chief and cross-examination, as neither the Chamber nor the Defence is able to focus or limit a witness' testimony to the pertinent part of the charges against the accused. It is submitted that the Chamber should exercise its powers to avoid needless consumption of time with regard to the presentation of evidence as provided for in Rule 90 (F)[2].

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[1] *Prosecutor v. Bagosora*, ICTR-96-7-T, "Decision on Defence Motions of Nsengiyumva, Kabiligi and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter Motion," 23 May 2002, para.12.

[2] Rule 90 (F) states, inter alia : "The Trial Chamber shall exercise control over the mode of interrogating witnesses and presenting evidence so as to : … (ii) avoid needless consumption of time."

8. The Defence maintains that the Pre-Trial Brief and list of witnesses are of considerable significance at all stages of the litigation. It gives the Accused notice of the evidential case against him *vis-à-vis* the Indictment, and it enables the Chamber and the Defence to ascertain whether a witness' testimony is pertinent to any part of the Indictment. Perhaps most significantly, at the close of the Prosecutor's case, a sufficiently specific Pre-Trial Brief would enable the Chamber and the Defence to assess whether the evidence which, according to the Prosecutor, proves the various counts of the Indictment, does in fact do so; or whether there are elements which are not supported by the evidence. In the absence of such a "road map", the drafting and decision-making on Rule 98 *bis* motions for acquittal will be immensely complicated, and the Defence, in particular, will essentially be left in the unfair position of having to guess at the Prosecutor's approach to the case.

9. For ease of reference and by way of example of a document which would adequately inform the Chamber and the Defence, the latter has annexed to this Motion the Prosecutor's filing in the *Bagosora* case in compliance with the Decision cited in paragraph 5 above.

10. It is submitted that in granting the present Motion, the Chamber and the Defence will be able to particularly relate the new witnesses to the Indictment. It is argued that while the Prosecutor was granted leave to vary its witness list by adding those new witnesses, this was done on the basis that no prejudice would accrue to the Accused.The Defence submits that the Chamber could not have intended to subject the Prosecutor to different requirements in respect of the new witnesses, such that it leaves the Defence with less notice than it had with the original list of witnesses.

The Prosecutor's Response

11. The Prosecutor contends that he has complied with the requirements of Rule 73 *bis.* According to the Prosecutor, paragraphs 124-127, 129, 131-133, 136-137 of the Pre- Trial Brief does specify the relevant paragraphs of the Indictment and the witnesses testifying in support of the same. Likewise, pages 98-150 of the Brief sets out the pre-trial summary of anticipated testimony of prosecution witnesses and the counts of the Indictment and the "substance that proves the points in the Indictment on which each witness will testify." The Prosecutor also lists numerous paragraphs of the Pre-Trial Brief in which the anticipated evidence of the witnesses are set out without specifying the points in the Indictment to which that evidence relates. It is argued that Rule 73 *bis* (B) (iv) has therefore been complied with.

12. The Prosecutor submits that the Pre-Trial Brief is a document of "lesser magnitude and is not subject to challenge in terms of specificity […], is a road-map for the Trial Chamber to manage the case [and] is not designed to inure to the benefit of the Defence." It is the Indictment, the Prosecutor submits, as the primary accusatory instrument, which may be subject to challenge in terms of its specificity.

13. The Prosecutor contends that, in any event, the Defence was obliged to raise any objection with regard to the Pre-Trial Brief in a timely manner. The Prosecutor argues that if at all a Pre-Trial Brief could be challenged for want of specificity, the principle of timely objections as applied to cases where the specificity of an Indictment is challenged, must equally apply to situations in which a Pre-Trial Brief is

being challenged for lack of specificity. In support of this argument, the Prosecutor cites the Appeals Chamber's Judgement in the case of *Niyitigeka* on the timeliness of objections with regard to material facts not pleaded in the Indictment.

14. It is argued that, any challenge to the Pre-Trial Brief "should happen 'before the date set for trial'" as stated in Rule 73 *bis* (B). The case of *Bagosora*, as cited by the Defence in support of its Motion, is distinguishable from the instant situation in that the Defence in the former case filed its Motion challenging the Prosecutor's Pre-Trial Brief four months prior to the testimony of the first prosecution witness.

15. The Prosecutor submits that the delay in the filing of the instant application is inordinate, and is tantamount to the Defence "seeking a review of the composite rule 73 *bis* (B) Order of the Chamber by seeking new orders directing the Prosecutor" to file the document relating the testimony of all Prosecution witnesses to the specific paragraphs of the Indictment.

16. The Prosecutor submits that there has been, and will be, no prejudice to the Defence and prays that the Motion be dismissed in its entirety as it is superfluous, excessive, unfounded in law, frivolous, vexatious and an abuse of the judicial process.

The Defence Reply

17. The Defence states that the law regarding the content of the Pre-Trial Brief is unambiguous. The only decision interpreting Rule 73 *bis* (B) (iv) clearly holds that the Pre-Trial Brief, in implementing the accused's right to be informed of the charges against him, must indicate the specific paragraphs of the Indictment on which each witness will testify.

18. It is submitted that the rationale behind that Rule is plain in that it serves to provide accused persons with a better understanding of the case that the Prosecutor intends to present against them, and how it will be presented. This, the Defence contends, is of particular significance where the accused persons are "facing trials lasting for years on an Indictment that could easily qualify as novels and endless and continuous variations of witness lists." In this case, the Indictment runs into 80 pages and at the close of the Prosecution case, in the event that the Prosecutor does not seek to further vary its witness list, 63 witnesses will have been heard.

19. The Defence notes that the Prosecutor has himself shown the Chamber that of the 492 paragraphs in the Pre-Trial Brief, only 10 paragraphs give an indication of the paragraphs of the Indictment to which the witnesses will testify. Based on these paragraphs of the Pre-Trial Brief, the Defence has a clear idea of which witnesses will testify in support of paragraphs 6.20, 6.22, 6.25, 6.43, 6.45, 6.46, 6.54-6.56 of the Indictment. The Defence simply requests that the Prosecutor be required to carry out the same exercise in respect of the remainder of the Indictment.

20. The Defence further notes that the Prosecutor acknowledges that for the vast majority of the witnesses he intends to call, the points in the Indictment to which their evidence will relate were not specified. Moreover, some paragraphs of the Pre-Trial Brief refer only to witnesses, thus placing the Defence in a position where it has to guess which paragraphs of the Indictment these witnesses are testifying to. Other paragraphs of the Pre-Trial Brief refer only to paragraphs of the Indictment,

and therefore conversely require the Defence to guess which witnesses are being called to testify to those paragraphs.

21. As regards the Prosecutor's suggestion that he has met his obligations under the Rule in pages 98-150 of the Pre-Trial Brief, the Defence points out that nowhere in those 52 pages is a single paragraph of the Indictment linked to the anticipated testimony of the potential witnesses. The Defence reiterates that such document does not satisfy Rule 73 *bis* (B) (iv).

22. The Defence argues that the Prosecutor's exposition of the applicable law on this issue is wrong. In so arguing, the Defence recalls its citation of the *Bagosora* Decision which plainly shows that the Prosecutor's submission is not the law. It is submitted that Rule 73 *bis* (B) (iv) does in fact mean that the Prosecutor has to indicate the paragraphs of the Indictment to which each witness will testify.

23. With respect to the timing of the Motion, the Defence submits that the multiple changes to the witness list of the Prosecutor warrant that the Chamber order the Prosecutor to file a document that conforms with Rule 73 *bis* (B) (iv). The Defence contends that it has "never waived its right to obtain a Pre-Trial Brief that complies with Rule 73 *bis* (B) (iv), and that it needs one in order to adequately prepare not only the defence itself but the eventual motion for acquittal and the Defence Pre-Trial Brief."

24. Finally, the Defence also takes issue with the fact that the Prosecutor systematically asks the Court to order the non-payment of fees associated with the Defence Motions. The Defence prays that the Chamber consider issuing a warning to the Prosecutor under Rule 46 (A) so that it desists from making these "demands in such an arbitrary fashion."

DELIBERATIONS

25. Rule 73 *bis*, in the relevant part, provides that :

> (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;
>
> […]
>
> (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;

26. The Chamber recalls that at the Pre-Trial Conference of 7 October 2003, the Prosecutor undertook to file a list of witnesses which was to include "pseudonyms, and a summary of facts with which witnesses will testify, and all the matters contained in 73 *bis* (B) (iv) …" Upon this undertaking, the Chamber sought clarification on whether the document would also contain "the points in the indictment on which

each witnesses will testify."[3] The Prosecutor answered in the affirmative, and an Order was so entered.

27. As regards the interpretation of sub-paragraph (c) above, the Chamber concurs with the position stated in the *Bagosora* Decision. The Chamber holds the view that "points in the indictment" must mean more than just a recitation of the relevant counts. The issues and events to which each witness will testify must be stated in relation to the concise statements of facts alleged in the Indictment.

28. Based on the submission of the Parties and of the Chamber's own reading of the Pre-Trial Brief, the Chamber finds that the Prosecutor has not fully complied with the Initial Order of 7 October 2003, and the brief filed in compliance with that Order is deficient in that it does not cite the points in the Indictment that each witness will address.

29. The Chamber agrees with the view expressed by the Prosecutor that a Pre-Trial Brief is a road-map of the Prosecutor's case. The Chamber recalls that the Prosecutor has himself previously argued that the Pre-Trial Brief has adequately notified the Accused of the case against him, when the Defence have moved for the exclusion of certain evidence[4].

30. The analysis of the case in the Pre-Trial Brief by the Prosecutor serves as a tool for the Defence to properly anticipate the evidence, adequately prepare for the cross-examination of witnesses, and for effective preparation to meet the case against the Accused person. It also serves to guide the Chamber through the case, although it is not bound by the information contained in the Pre-Trial Brief in its eventual evaluation of the evidence against the Accused.

31. Be that as it may, the Chamber does question the timeliness of the present application, particularly with the regard to witnesses who have already testified. The evidence of these witnesses is already on the record, and the time for objections with regard to their evidence has passed. In this regard, the Chamber draws the attention of the Parties to the recent Decision in the *Bagosora* case which held that[5] :

> With regard to evidence that was actually presented, *the closing brief will serve the purpose for which the Defence seeks the update*. The Rules provide for this type of summation at the close of all the evidence, not the close of the Prosecution's case. It would not promote the interests of judicial economy to require the Prosecution to amend the Pre-Trial Brief at this late date. [Emphasis added]

32. The Chamber notes that the Prosecutor's Pre-Trial Brief was filed and served on the Defence in October 2003, and that the present Motion was not filed until 22 September 2004.

33. It follows, therefore, that up until that time, the Defence was satisfied with the rather inadequate brief that was provided. The Chamber notes that the Defence has

[3] T. 7 October 2003, p. 6.

[4] See, *inter alia*, *Bizimungu et. al*., ICTR-99-50-T, Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB and GAP, 6 October 2004, at para. 10.

[5] *Bagosora et..al*., ICTR-98-41-T, Decision on the Joint Defence Motion for an Update of the Prosecution's Pre-Trial Brief, 2 November 2004, para. 5.

not, until the filing of the instant Motion, objected to the Prosecution's inadequate Pre-Trial Brief. The Chamber observes that the Defence has not expressed inability to respond fully and effectively to the Prosecutor's case or to understand the testimony of the witnesses who have so far testified. The Chamber also expects that the Defence, having already heard the testimony and cross-examined the witnesses, is now in a position to relate the evidence to the points in the Indictment. Indeed, with regard to the witnesses who have already testified, it is expected that the Prosecutor's closing brief will address the issue and remedy the deficiency referred to above.

34. The Chamber, however, finds it necessary to re-emphasise, for the benefit of the Prosecutor, that a Pre-Trial Brief ordered to comply with Rule 73 *bis* of the Rules should, to be complete, indicate the specific points of the Indictment that the evidence of each witness shall relate to.

35. The Chamber, therefore, considers that in respect of the 12 Prosecution witnesses that are yet to be called, the Defence would benefit from an exemplification of the Pre-Trial Brief by indication of the points in the Indictment that the evidence of each remaining witness, other than the expert witnesses, would address. The Chamber takes the view that the Prosecution should comply with its undertaking to file a Pre-Trial Brief which includes the points of the Indictment on which each witness would testify. The Prosecution should not be permitted to resile from its undertaking, even at this stage. Moreover, compliance with the Initial Order would also assist the Trial Chamber in following the evidence of the remaining witnesses.

36. Finally, the Chamber notes with concern the objection raised by the Defence with regard to the conduct of the Prosecutor in response to Defence motions in general. The Chamber here wishes to remind the Parties of their obligation to conduct themselves in a manner befitting their respective roles, and to exercise their discretion in calling for sanctions against the opposing Party.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Defence Motion in part; and

ORDERS the Prosecutor to file, by 15 December 2004, a document containing a list of all remaining witnesses to be called, specifying the paragraphs of the Indictment to which each of these witnesses will testify.

Arusha, 24 November 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Casimir Bizimungu's Motion to Declare Part of the Testimony of Witness GTD Inadmissible 30 November 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bizimungu – witness testimony, admissibility – facts not alleged in the witness statements, mention of the Accused – right of the Accused to be informed in detail of the nature and cause of the charges against him – prejudice of the Accused – effective cross-examination – failure to object in a timely manner, satisfactory reason – motion denied

International instruments cited : Statute, art. 20 (2) and (4) (a), (b) and (e) – Rules of procedure and evidence, Rule 66, 67 (D) and 73 (A)

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka*, Judgement, 29 July 2004 (ICTR-96-14,* Reports 2004*, p. X)*

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 the "*Requête de Casimir Bizimungu visant à s'opposer aux extraits de la déposition du témoin GTD qui concernent André Ntagerura*", filed on 7 July 2004 (the "Motion");

HAVING RECEIVED

(i)The "Prosecutor's Response to the *Requête de Casimir Bizimungu visant à s'opposer aux extraits de la déposition du témoin GTD qui concernent André Ntagerura*", filed on 2 August 2004 (the "Response");

(ii) "*Réplique de Casimir Bizimungu à la Requête de Casimir Bizimungu visant à s'opposer aux extraits de la déposition du témoin GTD qui concernent André Ntagerura*", filed on 18 August 2004 (the "Reply");

HEREBY DECIDES the Motion on the basis of the written briefs of the Parties, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

SUBMISSIONS

Relief Sought by the Defence

1. The Defence requests the Chamber to declare inadmissible part of the testimony given by Prosecution Witness GTD, on 5 July 2004, in relation to events at a roadblock involving the Accused.

Supporting Arguments

2. The Defence submits that the objectionable part of Witness GTD's testimony supports facts related to the Accused that are not alleged in either of Witness GTD's two witness statements[1].

3. The Defence argues that to admit Witness GTD's testimony about new material facts that were not directly linked to facts related in Witness GTD's witness statements violates the Accused's fundamental right to be informed in detail of the nature and cause of the charges against him so as to adequately prepare his defence, as guaranteed by Article 20 (2) and (4) (a), (b), and (e) of the Statute of the Tribunal.

4. The Defence maintains that the Prosecution has failed to respect its obligation to disclose material facts relative to Witness GTD's testimony, in violation of Rules 66 and 67 (D) of the Rules. According to the Defence, no witness statements or a willsay statement indicated that Witness GTD would mention the Accused in his testimony. Consequently, "[t]this is why the Defence was taken by surprise"[2] and did not raise objections in court or conduct an adequate cross-examination of Witness GTD. Similarly, the Defence states that it did not object to the evidence of Witness GTD before his testimony, because "[t]he name of Minister André Ntagerura is never mentioned in the Witness Statements of Witness GTD."[3]

5. According to the Defence, the jurisprudence of the Tribunal is clear that a Party may raise an objection to the evidence of a witness even after the witness's testimony has been given. In the present case, Witness GTD was still testifying before the Chamber when the Defence filed its Motion, dated 7 July 2004, for exclusion of evidence.

7. The Defence submits that the Accused will suffer substantial prejudice, in relation to Paragraphs 5.1, 6.10, 6.18, 6.26, 6.27 of the Indictment, if the objectionable part of Witness GTD's testimony is not excluded from evidence. In its Reply, the Defence further states that the Prosecution's non-compliance with its disclosure obligations does not constitute a technical infringement of the Rules but a "substantial violation causing significant prejudice to the Accused."[4]

[1] Witness GTD's first witness statement is dated 2 and 4 December 2003 and 27 and 30 January 2004; his second witness statement is dated 3 and 8 July 2004.

[2] Motion, para. 13. The French text reads, "C'est pourquoi la défense a été prise par surprise."

[3] Motion, para. 13. The French text reads, "Le nom du ministre André Ntagerura n'est jamais mentionné dans les déclarations du témoin GTD."

[4] Reply, para. 19. The French text reads, "[La] présente situation ne constitue pas une violation simplement technique du Règlement, mais une violation substantielle qui cause un préjudice important à l'accusé."

The Prosecution Response

8. The Prosecution submits that the Defence had every opportunity in court to object to Witness GTD's testimony that André Ntagerura distributed weapons and uniforms at a roadblock and to cross-examine the witness about these alleged events but failed to do so at the appropriate time.

9. The Prosecution further argues that the Defence, by its conduct, has waived its right to raise any objection on the evidence presented by Witness GTD and, therefore, is now estopped from doing so. In support of its argument, the Prosecution refers to the recent Judgement, *Eliézer Niyitegeka v. The Prosecutor*[5], in which the Appeals Chamber held that a party who fails to object to evidence presented by a witness is precluded from raising an objection thereafter.

10. The Prosecution also submits that the Motion fails to indicate any prejudice that the Accused will suffer by the "mere mention of the name André Ntagerura giving uniforms at a roadblock."[6] The Prosecution asserts that, for the testimony of Witness GTD to qualify for exclusion, the Defence must clearly show any prejudice that the Accused will suffer, which has not been demonstrated in the present circumstance.

DELIBERATIONS

11. The Chamber has examined the arguments of the Defence for exclusion of a part of Witness GTD's testimony, on the basis of the Prosecution's failure to provide timely disclosure, pursuant to Rules 66 and 67 (D) of the Rules. However, a close review of the transcripts reveals that the Defence did not raise any objection to the admission of the testimony in the course of its being received.

12. After careful consideration, the Chamber is not satisfied with the Defence explanation for its failure to object in a timely manner to GTD's testimony, nor is it satisfied that the Defence was not able to conduct an effective cross-examination of the witness.

13. While the Chamber acknowledges that, in certain circumstances, objections to the evidence of a witness may be raised by Motion subsequent to the witness's testimony, such Motions, to be successful, should demonstrate that there was a satisfactory reason for failure to object timeously and that the accused has suffered prejudice because of the failure to give notice of the objectionable testimony. However, in the present case, the Chamber finds that the Defence has failed to demonstrate any prejudice suffered by the Accused sufficient to warrant the remedy requested.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 30 November 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[5] *Niyitegeka*, Judgement (AC), 29 July 2004, paras. 199, 200, 203, 206, and 208.
[6] Response, para. 4.

Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material 1 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka, Mugenzi – relevant material, disclosure – obligation of the Prosecutor to disclose copies of statements of witnesses that it intends to call at trial – interpretation of Rule 68, exculpatory and relevant material – frivolous motion – motion denied

International instruments cited : Rules of procedure and evidence, Rules 66 (A) (ii), 68 (A), 68 (B), 73 (F)

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 "Motion of the Defendants Bicamumpaka and Mugenzi for Disclosure of Relevant Material" filed on 6 July 2004 (the "Motion");

NOTING that the Prosecution did not file a response, even though it sought[1] and obtained leave for extension of time, until 17 September 2004, within which to file a response[2].

THE CHAMBER NOW DECIDES the Motion based solely on the written submissions of the Defence.

DEFENCE SUBMISSIONS

1. The Defence requests the Trial Chamber to order the Prosecution to grant the Defence "access to specific collections of relevant material held by the Prosecutor, together with the appropriate computer software to search such collections."[3]

2. Although the Defence requests access to "specific collections of relevant material", the only indication of the *specific* nature of the material to which it seeks access appears in paragraph 2 of the Motion as follows :

[1] See "Prosecutor's Motion Moving for Extension of Time Within Which to File a Response to the Defence Motion for Disclosure of Relevant Material" filed on 8 July 2004.

[2] See "Decision on Prosecutor's Motion for Extension of Time Within Which to File a Response to the Defence Motion for Disclosure of Relevant Material" dated 20 August 2004.

[3] Motion, para.4.

> During his testimony, M. Nkole [a commanding investigator in the Office of the Prosecutor] mentioned that the Prosecutor has collected during the course of its investigations, 35 000 documents, as well as 5000 witness statements[4].

3. On that basis, the Defence argues that under the newly introduced Rule 68 (B), all that material is "relevant material" which the Prosecution is obliged to grant access to the Defence. The Defence reinforces this submission by contending as follows :

> Considering the broad indictment on which the accused are being tried in this case, the Defence submits that there are probably no pieces of evidence without relevance to these proceedings[5].

DELIBERATIONS

4. The Defence based its Motion on the testimony of Commander Nkole indicating that the Investigation Section of the Office of the Prosecutor had in the course of its investigation collected 35,000 documents and 5,000 witness statements.

5. The Chamber has reviewed the portions of the transcripts of Commander Nkole's testimony referred to by the Defence in its Motion. Dealing first with the witness statements, it is clear to the Chamber that when the Witness testified that the investigators had "taken a large volume of statements, in thousands, maybe to -- close to 5,000 or so statements, which is currently available in our database," he was referring to the investigation of the entire event which the witness's examiner-in-chief characterised as "the 1994 Rwandan genocide."[6] In the circumstances described, it would be unreasonable to require access to all that material, which may not all have direct relevance to the Accused in this trial. In this regard, the Chamber recalls that Rule 66 (A) (ii) provides as follows :

> 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. [Emphasis added.]

6. This rule requires the Prosecution to disclose copies of statements of witnesses that it intends to call at trial. There is no wider obligation to disclose statements of persons not on the Prosecutor's List of Witnesses, except where such statements fall within the category of exculpatory materials under Rule 68.

7. The Defence has invoked only the provisions of Rule 68 (B), apparently in order to avoid contending that the material sought is exculpatory under Rule 68 (A). However, it is necessary to construe Rule 68 as a whole. Rule 68 (B) includes a specific reference to being "without prejudice" to Rule 68 (A) as can be seen as follows :

[4] Motion, para.10.
[5] Motion, para 17.
[6] T. 6 November 2003, pp 15-18 (English).

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.

8. Relying only on Rule 68 (B), the Defence argues that this provision is a new provision which requires the Prosecution to disclose "all relevant material." It further argues that this is apparent from the provision itself and from the fact that "Rule 68 now bears a new title, and is no longer dealing only with disclosure of Exculpatory material but rather with disclosure of both Exculpatory and Relevant material."

9. The Chamber is of the view that Rule 68 (B) creates no new disclosure obligation on the Prosecution, as suggested by the Defence. The Rule merely permits the Prosecution to use modern technology to discharge its disclosure obligations under Rule 68 (A) and any other Rule such as Rule 66. The use of the expression "relevant material" in Rule 68 (B) and the change in the title of the Rule can only refer to material which the Prosecutor is under an obligation to disclose under the Rules. The provision does not give the Defence the right to conduct an unrestricted search of the electronic databases of the Prosecution for material which the Prosecution is under no obligation to disclose under the Rules. Material which the Prosecutor is under no obligation to disclose cannot be "relevant" to the Defence.

10. The Chamber considers this Motion to be frivolous, and denies all fees associated with its preparation.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the motion in its entirety, and

DIRECTS the Registry, further to Rule 73 (F), to deny payment of all fees associated with the preparation and filing of this Motion.

Arusha, 1 December 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosecution Motion for Extension of Time Within Which to Comply with the Trial Chamber's Order of 24 November 2004
3 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Disclosure obligation of the Prosecutor – extension of time – logistical reasons – interest of the Defence, clear, accurate and exhaustive information – disclosure in electronic form – motion granted

International instruments cited : Rules of procedure and evidence, Rules 66 (A) (ii) and 68

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 the "Prosecutor's Motion for an Extension of Time Within Which to Comply With the Orders Dated 24 November 2004 in the 'Decision on Prosper Mugiraneza's Motions to Order the Prosecution to Disclose All Statements of Jean Kambanda'" filed on 1 December 2004 (the "Motion");

HAVING RECEIVED electronic correspondence from the Defence for Mugiraneza informing the Trial Chamber that it does not intend to oppose the Motion, under certain conditions[1];

NOW DECIDES THE MOTION

1. On 24 November 2004 the Chamber issued the following Order[2] :

> ORDERS the Prosecution to file with the Registry a summary providing clear, accurate and exhaustive information in relation to all materials currently within their possession regarding the status of disclosure of statements and exculpatory materials involving Prosecution Witness Jean Kambanda, in accordance with their disclosure obligations under Rules 66 (A) (ii) and 68 of the Rules. This should be filed no later than Wednesday 1 December 2004. Any remaining disclosure relating to this list should be made concurrently.

2. The Chamber notes that Motion was filed on the last day of the expiration of the abovementioned deadline. In the Motion, the Prosecution explains that it is unable

[1] Email from Tom Moran to Roger Kouambo-Tchinda and Paul Ng'arua, dated 2 December 2004.

[2] *Prosecutor v, Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motions to Order the Prosecution to Disclose All Statements of Jean Kambanda [TC], 24 November 2004 (the "Order of 24 November 2004").

to comply with the deadline, as several materials are yet to be scanned into their database ("EDS"). Until this is done, the Prosecution indicates that it will have difficulty identifying and disclosing them.

3. The Chamber finds that it is in the best interests of the Defence that the Prosecution provides "clear, accurate and exhaustive information" in accordance with its Order of 24 November 2004. It is also desirable to end the cycle of Motions and Responses on this particular issue. The Chamber accepts the Prosecution's assertion that it has not been logistically possible to comply with the Order of 24 November 2004 in the prescribed time.

4. The Motion was filed within the deadline set by the Trial Chamber. The Defence has indicated that it does not intend to oppose the Motion, provided that the following conditions can be met :

(i) That all statements by Jean Kambanda, including statements made to Stephen Rapp and other representatives of the Office of the Prosecutor are delivered to it by close of business on 31 December 2004, and;

(ii) That all statements are delivered in electronic form in all languages and in all forms in which the Office of the Prosecutor possesses them.

5. The Trial Chamber accepts that it is a logistical problem that has prevented the Prosecution from complying with its order within the timescale given. Furthermore, the Trial Chamber finds that the Defence's task will be facilitated with "clear, accurate and exhaustive information."

6. The Trial Chamber notes that the Prosecution requests the Chamber to extend the deadline for compliance until 30 December 2004. The Defence agrees to this request provided that the disclosure can be made in electronic form on a DVD-ROM in Houston, Texas by 31 December 2004. The Trial Chamber appreciates the spirit of cooperation shown by the Defence, although it is unlikely that the possible materials envisioned can be delivered from Arusha, Tanzania to Houston, Texas in one day, perhaps especially considering the rather unique logistical delays that can occur at that time of year.

7. The Trial Chamber accepts the date proposed by the Prosecution to comply with its obligations in full. If the Prosecution can make disclosure sooner that would facilitate everyone's task. The Registry will do its best to facilitate disclosure to Houton, Texas as soon as possible after it receives the documentation, if any, from the Prosecution.

8. Lastly, the Prosecution has indicated that all documentation will be scanned into their database and stored in an electronic format. The Defence has requested that disclosure be made in electronic format. The Trial Chamber considers that it will save on both the time and resources of the Tribunal to make disclosure in electronic form. Thus it should so be done.

CONSEQUENTLY THE TRIAL CHAMBER

GRANTS the Motion, and

ORDERS the Prosecution to file with the Registry a summary providing clear, accurate and exhaustive information in relation to ail materials currently within its possession regarding the status of disclosure of statements and exculpatory materials involving Prosecution Witness Jean Kambanda, in accordance with its disclosure obligations under Rules 66 (A) (ii) and 68 of the Rules. This should be filed no later

than Thursday December 2004. Any remaining disclosure relating to this list should be made concurrently.

Arusha, 3 December 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on the Prosecutor's Extremely Urgent Motion for the Review and Clarification of the Trial Chamber's Decision Dated 24 November 2004 on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief 6 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka, Mugenzi – list of witnesses to be called – Prosecutor's request for clarification as to which witnesses the Order applies to, all factual witnesses yet to testify

International instruments cited : Rules of procedure and evidence, Rule 73 (A)

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

SITTING as Trial Chamber II composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthogand Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of the "Prosecutor's Extremely Urgent Motion for the Review And Clarification Of The Trial Chamber's Decision Dated 24 November 2004 On Bicamumpaka And Mugenzi's Motion For Specificity In The Pre-Trial Brief," filed on 30 November 2004 (the "Motion"), in which the Prosecutor seeks clarification as to which witnesses the Order of 24 November 2004 applies to;

RECALLING the "Decision on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief," rendered on 24 November 2004, in which the Prosecutor was Ordered "to file, by 15 December 2004, a document containing a list of all remaining witnesses to be called, specifying the paragraphs of the Indictment to which each of those witnesses will testify" (the "Order");

CONS1DERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the matter solely on the Prosecutor's brief of the parties pursuant to Rule 73 (A) of the Rules.

HEREBY CLARIFIES that the Order of 24 November 2004 applies to all factual witnesses who are yet to testify.

Arusha, 6 December 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence or in the Alternative, Motion for Subpoena to the Government of the United States of America 8 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – disclosure of exculpatory evidence – Prosecution in a better position to obtain information, prior efforts of the Defence – reasonable efforts of the Prosecutor to obtain the information, unreasonable burden on the Prosecution – request for subpoena to the Government of the United Stated States of America to obtain the information, premature and incomplete – motion denied

International instruments cited : Rules of procedure and evidence, Rule 68

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al.*, Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 26 February 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 25 March 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 April 2004 (ICTR-99-50-T,* Reports 2004*, p. X)*

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 Reply to the Prosecutor's Response to Trial Chamber's Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for

Exculpatory Evidence or in the Alternative, Motion for Subpoena to the United States of America" filed on 10 August 2004, (the "Motion");

NOTING the Confidential "Prosecutor's Response to Trial Chamber's Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence" filed on 28 July 2004, (the "Response");

PROCEDURAL HISTORY

1. On 26 February 2004, the Defence for Prosper Mugiraneza filed a Motion moving the Trial Chamber to order the Prosecution to disclose information related to "Witness CD," who, according to the Defence, is in possession of exculpatory material[1]. According to the Defence, the Prosecution had already disclosed an "investigator's summary of an interview conducted on or about 23 September 1994 in Kibungo Prefecture with CD."[2] The Defence submits that, in making this disclosure, the Prosecution neither mentioned the name or other identifying information of Witness CD, nor did the Prosecution specify the identity of the investigator who conducted the interview or the circumstances leading to it.

2. In its Response dated 25 Match 2004[3], the Prosecution submitted that it did not possess the documents requested by the Defence.

3. On 25 May 2004, the Trial Chamber granted the Defence Motion and ordered the Prosecution "to take all necessary measures to obtain the requested information and to thereafter disclose to the Defence ail information related to "Witness CD"."[4]

4. Following that Decision, the Prosecution filed a confidential Response stating that, after investigating the matter, it was unable to provide the Defence with either the identity of "Witness CD" or the identity of the person who interviewed him. In support of this assertion, the Prosecution attached an Affidavit by a Commander of Investigations in the Office of the Prosecutor, who stated that the only information in his possession is that the statement of "Witness CD" was received by the Office of the Prosecutor on 24 June 1998 from a source described as "USDOS", and labelled "Privileged Criminal Investigative Material Protected Against Disclosure."

5. The Prosecution therefore submits that it has done everything to comply with the directions given in the Decision, dated 25 May 2004, in accordance with Rule 68 of the Rules.

[1] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 26 February 2004.

[2] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 26 February 2004, para. 2.

[3] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Prosecutor's Response to Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 25 March 2004.

[4] *The Prosecutor v. Casimir Bizimungu et al*, Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence [TC], 25 May 2004.

ARGUMENTS OF THE PARTIES

Defence Submissions

6. The Defence contends that the Prosecution is trying to avoid complying with the Trial Chamber's Order of 25 May 2004. According to the Defence, the acronym "USDOS" is a standard abbreviation for "United States Department of State". It submits that the Prosecution should request from the United States Department of State the identifying information of "Witness CD."

7. Alternatively, the Defence moves the Trial Chamber to issue a summons or subpoena to the Government of the United States of America, in order to obtain the necessary information, including the identifying information of "Witness CD" as well as the name of the investigator who received the statement.

DELIBERATIONS

8. Rule 68 (A) of the Rules reads as follows :

> 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.

9. The Trial Chamber recalls the Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence of 23 April 2004, where it stated that :

> The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does hot mean that the Prosecution should be forced to hunt for materials that it bas no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, where, as a practical reality, the Prosecution enjoys greater leverage than the Defence[5].

[5] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence [TC], 23 April 2004, para. 9.

10. The Trial Chamber considers that the Defence has not shown in what way the Prosecutor would be in a better position than the Defence to obtain the material sought. Neither has it demonstrated any attempt made to obtain the material by its own endeavours. Recourse by the Defence to the efforts of the Prosecution cannot be had simply as a matter o f convenience. The criteria set out above must be satisfied. Where, as it seems here, both Parties are equally placed to obtain the requested material, it is the Party seeking the information that should first attempt to secure it.

11. The Prosecution has provided sufficient information to convince the Trial Chamber that, in view of the available information, it has made a reasonable effort to obtain the material as requested. To require more at this stage would place an unreasonable burden on the Prosecution. The Defence is, of course, at liberty to investigate the matter further, using its own resources, should it choose to do so.

12. The request contained in the Motion for a subpoena served on the United States of America is premature. Based on the limited information available, the Trial Chamber cannot be certain that "USDOS" can only mean the Department of State of the Government of the United States of America. Neither is the Trial Chamber convinced that the Defence has made all possible efforts to obtain this information, before resorting to the Trial Chamber with its alternative application, which is premature and incomplete.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER j

DENIES the Motion in its entirety.

Arusha, 8 December 2004.

[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 4 October 2004 8 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – certification to appeal – Accused treated differently in similar situations – conspiracy, complicity – prior responsibility of the Trial Chamber to determine the which evidence to admit during the course of trial, certification of an appeal has to be the absolute exception – discretion of the Trial Chamber – motion denied

International instruments cited : Rules of procedure and evidence, Rules 5 (B), 73 (B)

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., *Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA, 23 January 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony in View of the Trial Chamber's Decision of 23 January 2004 and For Other Appropriate Relief, 5 February 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – 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-97-21-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Trial Chamber's Decision of 5 February 2004, 24 March 2004 (ICTR-99-50-T,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir 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 (ICTR-99-50-T,* Reports 2004*, p. X) – Appeals Chamber,* The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Pauline Nyiramsuhuko's Appeal on Admissibility of Evidence, 4 October 2004 (ICTR-98-42-AR73.2,* Reports 2004*, p. X)*

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 Leave to Appeal from the Trial Chamber's Decision of 4 October 2004 on Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004" filed on 11 October 2004 (the "Motion").

CONSIDERING :

(i) The "Prosecutor's Response to Prosper Mugiraneza's Motion for Certification Appeal from the Trial Chamber's Decision of 4 October 2004 on Reconsideration of the Trial Chamber's Decision of 15th February 2004 Pursuant to the Appeals Chamber Decision of 15 July 2004 [*sic*]" filed on 18 October 2004 (the "Response");

(ii) "Prosper Mugiraneza's Reply to the Prosecutor's Response for Certification Appeal from the Trial Chamber's Decision of 4 October 2004 on Reconsideration of the Trial Chamber's Decision of 15th February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 [*sic*]" filed on 25 October 2004 (the "Reply");

RECALLING the Trial Chamber's Decision of 4 October 2004 (the "Impugned Decision")[1];

[1] *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-T, Decision - Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004 (TC), 4 October 2004.

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence for Mugiraneza seeks certification to appeal the Impugned Decision pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (the "Rules"). It submits that the Trial Chamber (i) failed to comply with the Appeals Chamber's remand order of 15 July 2004; or alternatively, (ii) the Trial Chamber abused its discretion in granting the Accused lesser relief than it granted his co-accused Bizimungu on the same issues.

2. The Defence argues that the distinction given by the Trial Chamber in explaining the difference in treatment as between the Accused[2] and Bizimungu[3] is artificial ("[...] the Trial Chamber's holding in paragraph 21 of the impugned decision is factually incorrect and simply creates a distinction without a legal difference")[4] and does not comply with the Appeals Chamber's mandate[5].

3. The Defence submits that the Trial Chamber's assertion that it made wrong findings in the *Bizimungu* Decisions is in itself wrong, since when the Appeals Chamber affirmed the *Bizimungu* Decisions on Appeal, it "infallibly" held that the Trial Chamber exercised its discretion properly[6]. Furthermore, according to the Defence, the distinction drawn by the Trial Chamber between the Impugned Decision and the *Bizimungu* Decisions is inadequate. The Trial Chamber stated that upon further reflection on the *Bizimungu* Decisions it might have exercised its discretion differently, and this does not satisfy the Trial Chamber's obligation pursuant to the Appeals Chamber's Order to explain the difference in treatment between the two Accused[7].

4. The Defence argues that the Impugned Decision contains findings based upon the factual proposition that the Prosecution did not argue conspiracy and/or complicity in the *Bizimungu* motions, and that this factual proposition is incorrect. It accepts that there is a legitimate argument that the Prosecution did not raise the issue of conspiracy in any great detail, nevertheless asserts that the issue was still before the Trial Chamber, evidenced by the fact that the Presiding Judge questioned both the Prosecution and the Defence on the issue of Conspiracy[8].

5. In relation to the Trial Chamber's given reasons for denying the requested Rule 5 (B) relief to the Defence in the Impugned Decision, the Defence states that although superficially plausible, they are actually wrong, and without merit and basis in law[9].

[2] *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Exclude Testimony of Witnesses Whose Testimony in View of the Trial Chamber's Decision of 23 January 2004 and For Other Appropriate Relief(TC), 5 February 2004.

[3] *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA (TC), 23 January 2004.

[4] Motion, para. 14.

[5] Motion, para. 16.

[6] Motion, para. 19.

[7] Motion, para. 20.

[8] Motion, paras. 27-31.

[9] Motion, para. 33.

The Defence further submits that the Chamber has "attempted to create distinctions" which are unsupported by the record[10]. In the Defence's reasoning, it follows that the Trial Chamber abused its discretion.

6. Accordingly, the Defence submits that the issues it seeks to appeal are important and could determine the outcome of the proceedings. Furthermore, an immediate resolution by the Appeals Chamber would materially advance the proceedings[11].

7. The Defence states that a similar issue has in the finding of the Trial Chamber already satisfied the requirements of Rule 73 (B) for certification to appeal[12], thus the Trial Chamber should automatically grant certification in this instance[13].

Prosecution Submissions

8. The Prosecution opposes the Motion, and requests the Trial Chamber not to grant certification to appeal the Impugned Decision.

9. 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 at Trial level in the *Nyiramasuhuko* case to support his contention[14]. According to the Prosecution's interpretation of this Decision, the factors that tribunals have taken into account in determining whether to allow recourse to an interlocutory appeal are (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[15].

10. It is submitted by the Prosecution that the Defence's first appeal issue is a procedural one, namely whether or not the Trial Chamber followed the instructions given to it by the Appeals Chamber. It submits that the Defence would be unlikely to prevail on that issue.

11. The Prosecution submits that the Defence has failed to show that the Trial Chamber committed an error of law or an abuse of discretion in the Impugned Decision. In such a case, the Prosecution submits that it is extremely unlikely that the Defence could meet the requirements of Rule 73 (B) for certification to appeal.

12. The Prosecution argues that the sole directive given to the Trial Chamber by the Appeals Chamber was to reconsider Mugiraneza's request in light of the guidance given, and that there can be little doubt that the Trial Chamber complied with this straightforward direction. It argues that the Trial Chamber, in acknowledging the desire

[10] Motion, para. 36.

[11] Motion, para.37.

[12] The Defence cites *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Trial Chamber's Decision of 5 February 2004 (TC), 24 March 2004.

[13] Motion, paras. 9, 38.

[14] *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case N° ICTR-97-2l-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" (TC), 18 March 2004, paras. 14-15.

[15] Response, para. 10.

of the Appeals Chamber for a more detailed explanation for the distinction between Bizimungu and Mugiraneza, provided such explanation and subsequently adhered to its earlier decision. The Prosecution notes that whilst the original Decision of 5 February 2004 ran to only four pages, the Impugned Decision runs to fourteen pages[16].

13. The Prosecution suggests that although the Defence is relying on the procedural aspects of its first appeals, its real grievance is its dissatisfaction with the Decision of the Trial Chamber. This reason is irrelevant to the determination by the Trial Chamber of whether or not certification to appeal should be granted[17].

14. As to the Defence's contention that the Trial Chamber should automatically grant certification based upon its determination in a previous application by the Accused[18], the Prosecution submits that such an argument is unpersuasive. It draws a distinction between the two cases : On 24 March 2004 the Trial Chamber allowed certification to determine whether its Decision of 5 February 2004 was an abuse of discretion. In contrast the instant Motion seeks to determine whether the Trial Chamber implemented the guidelines of the Appeals Chamber in reaching its decision of 4 October 2004.

15. The Prosecution further submits that when the Accused sought leave to appeal the 5 February Decision, the Trial Chamber lacked guidance from the Appeals Chamber as to whether and to what degree an explanation is required when an accused is treated differently from his co-accused[19]. Now that such guidance has been provided by the Appeals Chamber, and subsequently implemented by the Trial Chamber, a second appeal reviewing the same issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Thus, the Prosecution submits that the Defence's second appeal issue does not meet the requirements of Rule 73 (B).

HAVING DELIBERATED

16. The Trial Chamber recalls the Appeals Chamber's Decision in *Nyiramasuhuko*[20] restating the requirements of Rule 73 (B) for the granting of certification for interlocutory appeal :

> [i]t 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[21].

[16] Response, para. 14.

[17] Response, paras. 15-16.

[18] *The Prosecutor v. Casimir Bizimungu et al.*, Case N° ICTR-99-50-T, Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Trial Chamber's Decision of 5 February 2004 (TC), 24 March 2004.

[19] Response, para. 19.

[20] *Nyiramasuhuko v. The Prosecutor*, Case N°ICTR-98-42-AR73.2, Decision on Pauline Nyiramsuhuko's Appeal on Admissibility of Evidence (AC), 4 October 2004.

[21] *Idem*, para. 5, footnote omitted.

17. The Trial Chamber has considered the two issues the Defence raises. The first is largely procedural- whether or not the Trial Chamber has complied with the directions of the Appeals Chamber. The second is substantive – whether the Trial Chamber abused its discretion in granting (as the Defence maintains) different relief to identically situated accused persons.

18. It is clear that the Trial Chamber is under no obligation to certify an interlocutory appeal simply because either Party is unhappy with a Decision of the Trial Chamber. Furthermore, all Decisions of the Trial Chamber potentially affect the fairness of the proceedings. It is the role of the Trial Chamber to determine matters affecting the admissibility of evidence and, as the jurisprudence of the Appeals Chamber demonstrates, certification to appeal should be the absolute exception on matters relating to the admission of evidence. In this case, both the Appeals Chamber and the Trial Chamber have already dealt with the substance of this dispute, which relates to the admission of evidence. The question of whether and why two Accused have been treated differently in similar situations – the main concern of the Appeals Chamber – has already been answered by the Trial Chamber, and any further deliberation on this matter will serve no useful purpose.

19. Both the Parties and the Trial Chamber have spent considerable time and resources resolving this issue, and it is now resolved. Another interlocutory appeal would not materially advance the proceedings, and the Trial Chamber does not find that the conditions for certification under Rule 73 (B) have been met.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 8 December 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Bicamumpaka's Motion for Disclosure of Existing Comprehensive List of Radio Broadcasts 10 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka – disclosure of material, list of radio broadcasts of RTLM and Radio Rwanda – supporting material does not include all the evidence which the Indictment directly refers to, should be material to the preparation of the defence, intended for use by the Prosecution as evidence at trial, or obtained from or belonged to the Accused – defence failed to prove that the documents sought suggest the innocence

or mitigate the guilt of the accused or affect the credibility of Prosecution evidence – sanctions against the opposing Party – motion denied

International instruments cited : Rules of procedure and evidence, Rules 66 (A) (i), 66 (B), 66 (C), 68 and 73

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 Apri12004 (ICTR-99-50-T,* Reports 2004*, p. X)*

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 "Bicamumpaka's Motion for Disclosure" filed on 18 March 2004, (the "Motion");

NOTING the "Prosecutor's Response to Jérôme Bicamumpaka's Motion for Disclosure" filed on 23 March 2004, together with the "Corrigendum to Prosecutor's Response to Jérôme Bicamumpaka's Motion for Disclosure" filed on 25 March 2004 (the "Response");

NOTING ALSO "Jérôme Bicamumpaka's Reply to Prosecutor's Response to Jérôme Bicamumpaka's Motion for Disclosure" filed on 1 April 2004 (the "Reply");

NOW DECIDES the Motion on the basis of the written submissions of the Parties only pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence requests the Trial Chamber to order the Prosecution to disclose to the Defence the list(s) of all radio broadcasts of RTLM and Radio Rwanda, which list(s) are already in existence within the Office of the Prosecutor.

2. The Defence argues its Motion on the basis of the provisions of Rules 66 (A) (i), 66 (B), 68 and 73 of the Rules.

3. The Defence argues that the expression supporting material of Rule 66 (A) (i) should be understood to mean all evidence to which the Indictment directly refers. While the Prosecution did not include the totality of the radio broadcasts of 1993 and 1994 in Rwanda, there is indication in the indictment that these formed part of its supporting material (Paragraphs 5.7, 5.8, 5.11, 5.12, 5.23, 6.12, 6.20, 6.28, 6.29 and 6.32).

4. The Defence submits that it has already received disclosure of 80 radio broadcasts in the form of CD-Roms, tapes and/or transcripts. The Defence further submits that other information revealed by the Prosecution in the course of the proceedings has led the Defence to conclude that there are far more than 80 tapes of radio broad-

casts in the possession of the Prosecution. In this regard, the Defence attaches as "Annex A" two lists marked, respectively "Audio Tape Identifcation - Radio Rwanda - Box 24", and "Audio Tape Identification - Box 27."

5. The Defence asserts that the tapes would be material to the preparation of the defence under Rule 66 (B) and that a clear indication of the materiality can be found the allegations made in the Indictment, the Pre-Trial Brief and the Prosecution's Opening Statement.

6. The Defence further argues that the evidence is also material as it is potentially exculpatory under Rule 68 although the Defence admits that the list of tapes does not precisely qualify as exculpatory evidence. The Defence submits that the radio broadcasts are potentially exculpatory insofar as they mention, among others, the Accused whereabouts, speeches and interviews which would allow the Defence to rebuke certain Prosecution witnesses.

7. The Defence seeks disclosure of the list(s) of all radio broadcasts in the Prosecution's possession. These list(s) will assist the Defence to determine whether there are other broadcasts which the Prosecution had omitted to disclose, but which are either material to the defence of the Accused or provide exculpatory information.

8. The Defence submits that it filed the instant Motion because prior requests to the Prosecution had proved futile.

Prosecution Submissions

9. The Prosecution does not admit or deny the existence of the list(s) requested by the Defence. Rather, the Prosecution opposes the Motion on the basis on the fact that the Defence had not sufficiently demonstrated how the Rules or the case law assist the Defence in its claim.

10. The Prosecution asserts that it has complied with its disclosure obligations under the Rules. Specifically the Prosecution indicates that its disclosure obligation of supporting materials at the time of confirmation of the indictment under Rule 66 (A) (i) has long been discharged and is separate from disclosure obligation at the post confirmation stage of the proceedings as stated in the *Media* case.

11. With respect to the Motion under Rule 66 (B), the Prosecution indicates that the Defence has failed to identify the broadcast with "specificity", that they are material to the Defence and concludes that the Defence is engaging in a fishing expedition.

12. With respect to the Motion under Rule 68, the Prosecution argues that the Defence has the duty to indicate with specificity which material is exculpatory and in the possession or control of the Prosecutor. The request for a list of all tapes of broadcasts equals a fishing expedition.

13. The Prosecution submits that the Motion is frivolous and constitutes an abuse of process. The Prosecution requests that the fees and costs be denied to the Defence.

Defence Reply

14. In its reply, the Defence essentially reiterates that it is only seeking disclosure of lists of radio broadcasts at this stage, and not of the actual broadcasts.

DELIBERATIONS

15. The Chamber notes that the Defence bases its Motion on the provisions of Rules 66 (A) (i), 66 (B) and 68 and will review it under these different legal basis.

16. Rule 66 (A) (i) provides as follows :

> […]
>
> (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 ail prior statements obtained by the Prosecutor from the accused, and
>
> (ii) [...]

17. The Chamber is of the opinion that the documents disclosed to the Defence 30 days following the initial appearance of the Accused are "copies of the supporting material which accompanied the indictment", and which were submitted to the confirming judge before the Indictment was confirmed-and nothing else. The Chamber finds that the Defence allegations that the "supporting material should be construed as including all the evidence which the Indictment directly refers to" to be unfounded in law. Therefore, the Chamber rejects the Defence Motion, pursuant to Rule 66 (A) (i) of the Rules.

18. Rule 66 (B) provides as follows :

> 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.

19. Rule 66 (C) which, qualifies the foregoing, provides as follows :

> 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-Rules (A) and (B). When making such an application Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.

20. For the Chamber to compel inspection of documents under Rule 66 (B), it must satisfied that what is sought to be inspected is something that is material to the preparation of the defence, or intended for use by the Prosecution as evidence at trial, or was obtained from or belonged to the Accused.

21. The Chamber notes that the Defence submits that the list of broadcasts is material to the preparation of the Defence. However, the Chamber is not persuaded by the Defence submissions that there is "clear indication of the materiality of the evidence."[1] Even if the paragraphs of the Indictment quoted by the Defence in support refer to the medias in Rwanda, their alleged role and to some speeches made, the

[1] Motion, para. 16.

Chamber fails to see how a list of all radio broadcasts in the Prosecution's possession can be material to the preparation of the Defence without any further specification under Rule 66 (B) of the Rules.

22. Rule 68 (A) on Disclosure of Exculpatory and Other Relevant Material reads as follows :

> (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.

23. The Chamber has previously interpreted Rule 68 (A) as follows :

> The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, where, as a practical reality, the Prosecution enjoys greater leverage than the Defence[2].

24. The Chamber stands by this interpretation and finds that the Defence has not shown in what way the list of radio broadcasts "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." The Chamber has further noted the Defence's own admission that the list of tapes "does not *per se* qualify as exculpatory evidence." Therefore, the Chamber rejects the Defence's Motion pursuant to Rule 68 of the Rules.

25. Finally, the Chamber notes again[3] with concern the Defence objection about the Prosecution's response to Defence motions in general. The Chamber reminds the Parties of their obligation to conduct themselves in a manner befitting their respective roles, and to exercise discretion in calling for sanctions against the opposing Party.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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[2] *The Prosecutor v. Casimir Bizimungu et al*., Case N° ICTR-99-50-T, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence [TC], 23 Apri12004, para. 9.

[3] Decision on Bicamumpaka and Mugenzi's Motion for specificity in the Pre-trial Brief, 24 November 2004, par. 36.

Decision on the Prosecutor's Motion and Notice of Adjudicated Facts. Rule 94 (B) of the Rules of Procedure and Evidence 10 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Judicial notice – discretionary power of the Trial Chamber – judicial economy, consistency of case law – facts must have been adjudicated in other proceedings and be relevant – adjudicated facts, fact in issue – an historical context does not contain 'facts' for the purposes of Rule 94 (B) – a motion for judicial notice should specify exactly which facts the Chamber is asked to judicially notice and how each of these relate to the matter at issue – the Chamber cannot take judicial notice of facts which are admissions or which have not been contested by the opposing Party – single, clearly identifiable fact, factual rather than legal findings – the Chamber take judicial notice proprio motu – motion denied

International instruments cited : Rules of procedure and evidence, Rules 73 (A), 94

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu*, Judgment, 2 September 1998 (ICTR-96-4-T,* Reports 1998*, p. 44) – Trial Chamber II,* The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, 21 May 1999 (ICTR-95-1T,* Reports 1999*, p. 824) – Trial Chamber III,* The Prosecutor v. Laurent Semanza*, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000 (ICTR-97-20-T,* Reports 2000*, p. 2386) – Trial Chamber,* The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Decision on Prosecutor's Notice for Judicial Notice of Adjudicated Facts, 22 November 2001 (ICTR-96-10-T,* Reports 2001*, p. 3030) – Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko*, Decision on the Prosecutor's Motion of Judicial Notice and Admission of Evidence, 15 May 2002 (ICTR-97-21-T,* Reports 2004*, p. X) – Trial Chamber III,* The Prosecutor v. Laurent Semanza*, Judgment, 15 May 2003 (ICTR-97-20-T,* Reports 2003*, p. 3622) – Trial Chamber II,* The Prosecutor v. Juvénal Kajelijeli*, Judgment, 1 December 2003 (ICTR 98-44A-T,* Reports 2003*, p. 1746)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Miroslav Kvocka et al*, Decision on Judicial Notice, 8 June 2000 (IT-98-30/1-T)*

Décision relative à la requête du Procureur en constat judiciaire de faits admis Article 94 (B) du Règlement de procédure et de preuve 10 décembre 2004 (ICTR-99-50-T)

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Président de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

Constat judiciaire – pouvoir d'appréciation de la Chambre de première instance – économie judiciaire, cohérence de la jurisprudence – faits doivent avoir été admis lors d'autres affaires et être pertinents à l'espèce – faits admis, faits litigieux – le contexte historique d'un jugement ne contient pas de faits au sens de l'article 94 (B) – une requête de constat judiciaire doit indiquer clairement les faits dont le constat judiciaire est demandé ainsi que leurs rapports avec l'affaire – la Chambre ne peut dresser le constat judiciaire de faits qui sont des aveux de culpabilité ou qui n'ont pas été contestés par la partie adverse au procès – fait unique, clairement identifiable, conclusions factuelles et non juridiques – la Chambre dresse d'office constat judiciaire – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73 (A), 94

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Jean-Paul Akayesu*, Jugement, 2 septembre 1998 (ICTR-96-4-T,* Recueil 1998*, p. 45) – Chambre de première instance II,* Le Procureur c. Clément Kayishema et Obed Ruzindana*, Jugement, 21 mai 1999 (ICTR-95-1T,* Recueil 1999*, p. 825) – Chambre de première instance III,* Le Procureur c. Laurent Semanza*, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles conformément aux articles 94 et 54, 3 novembre 2000 (ICTR-97-20-T,* Recueil 2000*, p. 2387) – Chambre de première instance I,* Le Procureur c. Elizaphan et Gérard Ntakirutimana*, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 22 novembre 2001 (ICTR-96-10-T,* Recueil 2001*, p. 3031) – Chambre de première instance,* Le Procureur c. Pauline Nyiramasuhuko*, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles, rendue le 15 mai 2002 (ICTR-97-21-T,* Recueil 2002*, p. X) – Chambre de première instance III,* Le Procureur c. Laurent Semanza, Jugement*, 15 mai 2003 (ICTR-97-20-T,* Recueil 2003*, p. X) – Chambre de première instance II,* Le Procureur c. Juvénal Kajelijeli*, Jugement, 1er décembre 2003 (ICTR-98-44-A-T,* Recueil 2003*, p. 1747)*

T.P.I.Y. : Chambre de première instance, Le Procureur c. Miroslav Kvocka et consorts, Décision relative au constat judiciaire, rendue le 8 juin 2000 (IT-98-30-11-T)

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 the "Prosecutor's Motion for Judicial Notice of Adjudicated Facts", filed on 28 June 2004 (the "Motion");

CONSIDERING

(i) The "Response of Defendants Bicamumpaka and Mugenzi to the Prosecutor's Motion for Judicial Notice" filed on 22 July 2004,

(ii) "Prosper Mugiraneza's Response to the Prosecutor's Motion to Take Judicial Notice" filed on 29 July 2004,

(iii) "*Réponse de Casimir Bizimungu à la requête du Procureur pour constat judiciaire*" filed on 30 July 2004,

(iv) "*Duplique de Casimir Bizimungu à la réplique du Procureur relativement au constat judiciaire*", filed on 30 August 2004,

HAVING RECEIVED the "Prosecutor's Reply to the Defence Responses to the Prosecutor's Motion for Judicial Notice" filed on 20 August 2004 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 94 (B) 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 Prosecutor's Motion and Reply

1. The Prosecutor moves for a list of 65 paragraphs of "adjudicated facts" to be judicially noticed pursuant to Rule 94 (B).

2. The Prosecutor, relying on the decision in *Prosecutor v. Kvocka*[1], submits that under Rule 94 (B), the Chamber has the power to take judicial notice of legal conclusions reached in other proceedings, provided that these conclusions do not go to the guilt of the Accused.

[1] *Prosecutor v. Kvocka et al*, IT-98-30/1-T, Decision on Judicial Notice, 8 June 2000. The Prosecutor claimed that this was followed in *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001 at para. 9.

LE TRIBUNAL PÉNAL 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 du Procureur en en constat judiciaire de faits admis déposée le 28 juin 2004, (la «requête»),

i) La réponse des accusés Bicamumpaka et Mugenzi intitulée *Response of Defendants Bicamumpaka and Mugenzi to the Prosecutor's Motion for Judicial Notice*, déposée le 22 juillet 2004,

ii) La réponse de Prosper Mugiraneza intitulée *Prosper Mugiraneza's Response to the Prosecutor's Motion to Take Judicial Notice*, déposée le 29 juillet 2004,

iii) La réponse de Casimir Bizimungu à la requête du Procureur pour constat judiciaire, déposée le 30 juillet 2004, et

iv) La duplique de Casimir Bizimungu à la réplique du Procureur relativement au constat judiciaire, déposée le 30 août 2004,

AYANT REÇU la réplique du Procureur intitulée *Prosecutor's Reply to the Defence Responses to the Prosecutor's Motion for Judicial Notice*, déposée le 20 août 2004, (la «réplique»),

VU le Statut du Tribunal pénal international pour le Rwanda (le «Statut») et le Règlement de procédure et de preuve, (le «Règlement»), notamment le paragraphe (B) de l'article 94 dudit Règlement,

REND la décision suivante sur la seule base des mémoires déposés par les partis conformément à l'article 73 (A) du Règlement.

ARGUMENTS DES PARTIES

La requête et la réplique du Procureur

1. Le Procureur demande que soit dressé le constat judiciaire des «faits admis» décrits dans 65 paragraphes, en application du paragraphe (B) de l'article 94 du Règlement.

2. Se fondant sur la décision rendue dans l'affaire *Le Procureur c. Kvocka*[1], le Procureur soutient qu'aux termes du paragraphe (B) de l'article 94 du Règlement, la Chambre est habilitée à dresser le constat judiciaire de conclusions juridiques dégagées dans d'autres affaires, pour autant qu'elles ne portent pas sur la culpabilité de l'accusé.

[1] *Le Procureur c. Kvocka et consorts*, affaire IT-98-30-11-T, Décision relative au constat judiciaire, rendue le 8 juin 2000. Selon le Procureur, cette décision a été suivie dans *Le Procureur c. Musema*, affaire n° ICTR-97-20-T, Décision relative à la requête supplémentaire du Procureur en constat judiciaire, en application des articles 94 et 54 du Règlement, rendue le 15 mars 2001, para. 9.

3. The Prosecutor points out that in the *Prosecutor v. Kayishema and Ruzindana*[2] and *Prosecutor v. Akayesu*[3] cases, the Chamber took judicial notice of certain generally accepted facts relating to the commission of genocide in Rwanda in 1994.

4. The Prosecutor further assures the Chamber that all proposed facts have been adjudicated before the Tribunal and have been finally decided on appeal. The Prosecutor states that those facts originating from the *Prosecutor v. Kajelijeli*[4] and *Prosecutor v. Semanza*[5] cases which are sought to be judicially noticed in this case have not been contested in the appeals arising from those cases.

The Defence Response

5. The Defence for Bicamumpaka and Mugenzi do not object to Facts 22, 32 and 33 being judicially noticed, but oppose the remainder of the Motion on the following grounds :

a) Taking judicial notice of relevant facts will force the Defence to refute such facts which will lengthen the Trial, contrary to the objective of judicial economy.

b) Facts 1-9, 12-15, 18-21, 23-31, 34-37, 39-50, 52-63 are not distinct, concrete and identifiable.

c) Facts 28, 39, 40, 41, 42, 43, 47, 50-65 include legal characterizations, and therefore cannot be subject to judicial notice. The Defence asserts that there is ample precedent in both this Tribunal and the ICTY which support this contention.

d) Facts 1,3, 5, 7-13, 15-18, 20-21, 24, 25, 30-31, 37, 39-41, 44-47, 50-55, 57, 58 (a)-(d), 60 (a)-(c), 61-65, cannot be judicially noticed because they emanate from the Judgement in the case of *Prosecutor v. Kajelijeli*, which is currently under appeal. Additionally, some of these "facts" are partially based on admissions made by Accused in other trials.

e) Facts 1-9, 12-15, 18-20, 26-30, 34-35, 37-45, 47-50, 52-63 cannot be judicially noticed as they are reasonably disputed by the Defence, which stresses that this case involves four high-ranking government Ministers whose positions, powers and responsibilities were completely different from any other Accused tried previously by this Tribunal and that therefore, facts adjudicated in other, inappropriate contexts cannot be applied in this case.

f) Facts 3, 4, 7, 13, 14, 26-31, 34-50, 54-63 bear on the guilt of the Accused. If judicially noticed they would create a rebuttal presumption and compromise

[2] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1T, Judgment, 21 May 1999 at para. 273.
[3] *Prosecutor v. Akayesu*, ICTR- 96-4-T, Judgment, September 1998 at para. 2.
[4] *Prosecutor v. Kajelijeli*, ICTR 98-44A-T, Judgment, 1 December 2003.
[5] *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment, 15 May 2003.

3. Le Procureur souligne que dans les affaires *Le Procureur c. Kayishema et Ruzindana*[2] et *Le Procureur c. Akayesu*[3], la Chambre a dressé le constat judiciaire de certains faits généralement admis relatifs au génocide commis au Rwanda en 1994.

4. Le Procureur affirme en outre que tous les faits cités ont été admis devant le Tribunal et ont fait l'objet de décisions de la Chambre d'appel. Ces faits, qui émanent des affaires *Le Procureur c. Kajelijeli*[4] et *Le Procureur c. Semanza*[5] et dont le constat judiciaire est sollicité en la présente cause, n'ont pas été contestés lors des recours formés dans les affaires susmentionnées.

La réponse de la défense

5. Les conseils de Bicamumpaka et de Mugenzi ne s'opposent pas à ce que soit dressé un constat judiciaire des faits mentionnés aux paragraphes 22, 32 et 33, mais font objection au reste de la requête pour les raisons suivantes :

a) Un constat judiciaire des faits en question obligerait la défense à les réfuter ce qui prolongerait le procès et irait à l'encontre de l'objectif d'économie judiciaire.

b) Les faits figurant aux paragraphes 1 à 9, 12 à 15, 18 à 21, 23 à 31, 34 à 37, 39 à 50 et 52 à 63 ne sont pas distincts, concrets et identifiables.

c) Les faits mentionnés aux paragraphes 28, 39, 40, 41, 42, 43, 47 et 50 à 65 comportent des qualifications juridiques et ne peuvent donc faire l'objet d'un constat judiciaire. La défense fait valoir que le Tribunal de céans comme le Tribunal pénal international pour l'Ex-Yougoslavie (TPIY) ont produit une jurisprudence abondante qui étaie cette affirmation.

d) Les faits mentionnés aux paragraphes 1, 3, 5, 7 à 13, 15 à 18, 20 et 21, 24, 25,30 et 31, 37, 39 à 41,44 à 47, 50 à 55, 57, 58 (a) à (d), 60 (a) à (c) et 61 à 65 ne peuvent être l'objet d'un constat judiciaire parce qu'ils découlent du jugement *Kajelijeli*, qui est actuellement pendant devant la Chambre d'appel. De plus, certains de ces «faits» reposent en partie sur des faits reconnus par des accusé dans d'autres procès.

e) Les faits figurant aux paragraphes 1 à 9, 12 à 15, 18 à 20, 26 à 30, 34 et 35, 37 à 45, 47 à 50 et 52 à 63 ne peuvent faire l'objet d'un constat judiciaire car ils sont contestés à bon droit par la défense, laquelle souligne que la présente cause concerne quatre ministres de haut rang exerçant des fonctions et des responsabilités fort différentes de celles des accusés qui ont déjà été jugés par le Tribunal de céans et que, par conséquent, les faits admis dans d'autres contextes ne peuvent être considérés comme tels en l'espèce.

f) Les faits mentionnés aux paragraphes 3, 4, 7, 13, 14, 26 à 31, 34 à 50, 54 à 63 ont trait à la culpabilité de l'accusé. Un constat judiciaire de ces faits don-

[2] *Le Procureur c. Kayishema et Ruzindana*, affaire n° ICTR-95-1T, Jugement du 21 mai 1999, para. 273.

[3] *Le Procureur c. Akayesu*, affaire n° ICTR-96-4-T, Jugement de septembre 1998, para. 2.

[4] *Le Procureur c. Kajelijeli*, affaire n° ICTR-98-44-A-T, Jugement du 1er décembre 2003.

[5] *Le Procureur c. Semanza*, affaire n° ICTR-97-20-T, Jugement du 15 mai 2003.

the presumption of innocence in favour of the Accused as guaranteed by Article 20 (3) of the Statute.

g) Facts 1-9, 12-16, 18-21, 23-31, 34-50, 60-63 are too broad, and Facts 3-5, 7-9, 13, 15, 26-31, 37-43, 48-50, 60 (a)-(e) are tendentious, and therefore must not be judicially noticed.

6. The Defence for Prosper Mugiraneza argues that the Chamber should adhere to the Tribunal's normal practice of caution in judicially noticing facts under Rule 94 (B), especially when the supporting judgments only approximate the facts submitted for judicial notice. The Defence for Mugiraneza opposes the Motion on the following grounds :

a) Facts 28, 29, 39 and 48 are either irrelevant or overbroad or reasonably disputed.

b) Facts 13, 27, 30, 38 and Fact 3 of Annex A and Facts 5, 8, 9, 13, 29, 30, 32, 39, 41, 60, 62 are contradicted by Prosecution evidence already on the record.

c) According to the Defence, Facts 13, 27, 30, 38 of the Prosecutor's Motion are contradicted either in a different judgment or within the same judgment. The Defence also contends that that several facts including Facts 5, 8, 9, 13, 29, 30, 32 39, 41, 60, 62 seek to have the fact that there were different ethnic groups in Rwanda judicially noticed. However, according to the Defence, this is contrary to the testimony of Prosecution Witness Prosper Higiro who testified that ethnicity in Rwanda was a political creation not a scientific fact.

d) The Defence further contends that certain facts sought to be judicially noticed either do not constitute facts or were not treated by the earlier Chambers as adjudicated facts. The Defence claims that Facts 1, 2, 3, 4, 5, 7, 11, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 29, 36, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 60, 61 of the Motion ought not to be judicially noticed for these reasons.

e) The Defence submits that Facts 1, 2, 3, 4, 5, 7, 11, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 29, 36, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 60 and 61 are not supported by the sources cited by the Prosecution. The Defence believes that the Prosecution has often taken facts out of their context or has unjustifiably generalised specific facts.

f) The Defence states that facts arising from the Trial Judgement in *Prosecutor v. Kajelijeli* cannot be judicially noticed since it is currently under appeal.

7. The Defence for Casimir Bizimungu opposes the Motion on the following grounds :

a) The Defence argues that the Prosecutor's Reply brings up a new and different legal issue from the one in the original Prosecution Motion.

b) The Prosecutor is not entitled to change the legal basis of his Motion in his Reply. The original Motion was exclusively based on Rule 94 (B) and the Response of the Accused was framed accordingly. The Defence submits that the

nerait lieu à une présomption réfutable et irait à l'encontre de la présomption d'innocence garantie à l'article 20.3 du Statut.

g) Les faits mentionnés aux paragraphes 1 à 9, 12 à 16, 18 à 21, 23 à 3 1, 34 à 50, et 60 à 63 revêtent un caractère trop général et ceux qui figurent aux paragraphes 3 à 5, 7 à 9, 13, 15, 26 à 31,37 à 43, 48 à 50, 60 (a) à (e) sont tendancieux et ne peuvent donc pas faire l'objet d'un constat judiciaire.

6. Les conseils de Prosper Mugiraneza estiment que la Chambre devrait s'en tenir à la circonspection habituelle du Tribunal lorsqu'il s'agit de dresser un constat judiciaire en application du paragraphe (B) de l'article 94 du Règlement, d'autant que les jugements invoqués à l'appui de la requête ne traitent pas à fond des faits dont le constat judiciaire est sollicité. Elle s'oppose à la requête pour les raisons suivantes :

a) Les faits mentionnés aux paragraphes 28, 29, 39 et 48 sont, soit sans rapport avec la cause, soit de caractère trop général, soit contestés à bon droit.

b) Les faits mentionnés aux paragraphes 13, 27, 30, 38, le fait mentionné au paragraphe 3 de l'annexe A ainsi que les faits mentionnés aux paragraphes 5, 8, 9, 13, 29, 30, 32, 39, 41, 60 et 62 sont contredits par des éléments de preuve à charge déjà versés au dossier.

c) Les faits mentionnés aux paragraphes 13, 27, 30 et 38 de la requête du Procureur sont contredits dans un autre jugement, voire dans le même jugement. Plusieurs faits dont le constat judiciaire est demandé, à savoir ceux qui figurent aux paragraphes 5, 8, 9, 13, 29, 30, 32, 39, 41, 60 et 62, visent à faire confirmer l'existence au Rwanda de différents groupes ethniques. Or, cette assertion est contraire à la déposition du témoin à charge Prosper Higiro selon laquelle la question ethnique au Rwanda était fondée sur des considérations politiques et non des vérités scientifiques.

d) Certains faits dont le constat judiciaire est demandé ne constituent pas des faits en tant que tels ou n'ont pas été considérés comme admis par les Chambres concernées. C'est pourquoi les faits mentionnés aux paragraphes 1, 2, 3, 4, 5, 7, 11, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 29, 36, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 60 et 61 de la requête ne devraient pas faire l'objet d'un constat judiciaire.

e) Les faits mentionnés aux paragraphes 1, 2, 3, 4, 5, 7, 11, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 29, 36, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 60 et 61 ne sont pas étayés par les sources citées par le Procureur. Celui-ci a souvent extrait les faits de leur contexte ou a donné sans raison un caractère général à des faits spécifiques.

f) Enfin, les faits issus du jugement en première instance rendu dans l'affaire *Le Procureur c. Kajelijeli* ne peuvent faire l'objet de constat judiciaire, l'affaire étant actuellement en appel

7. Les conseils de Casimir Bizimungu s'opposent à la requête pour les raisons suivantes :

a) Dans sa réplique, le Procureur évoque une question juridique qui est nouvelle et différente de celle contenue dans sa requête initiale.

b) Le Procureur n'est pas fondé à modifier le fondement juridique de sa requête dans sa réplique. La requête initiale était exclusivement fondée sur le paragraphe B) de l'article 94 du Règlement et c'est sur cette base que repose la

Prosecutor is now seeking to change the basis for the Motion to one under Rule 94 (A) which is fundamentally different from the Motion the Chamber has been seized of.

c) The Defence submits that the facts the Prosecutor seeks to have judicially noticed form part of the Indictment and judicially noticing them would not only have an impact on the rights of the Accused but would also reverse the burden of proof which would amount to a violation of the rights of the Accused.

d) The Defence points to the decisions in *Prosecutor v. Nyiramasuhuko et al.*[6] and *Prosecutor v. Ntakirutimana*[7] in support of its contention that Rules 94 (A) and (B) cannot be substituted for one another and the Motion must thus be rejected for legal imprecision.

DELIBERATIONS

8. The Chamber recalls Rule 94, which reads as follows :

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.

9. The Chamber wishes to note at the outset that while Rule 94 (A) is mandatory, sub-Rule (B) confers a discretionary power on the Chamber to decide whether or not to take judicial notice of adjudicated facts or documentary evidence.

10. The Chamber notes that a substantial body of jurisprudence has developed on the meaning and application of Rule 94, stressing that judicial economy and consistency of case law are the two grounds upon which the exercise of the discretion to take judicial notice is based. In this regard, the Chamber recalls a Decision in the *Semanza* case, in which the Trial Chamber opined that :

> First, resort to judicial notice expedites the trial by dispensing with the need to formally submit proof on issues that are patently indisputable. Second, the doctrine fosters consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair.[8]

[6] *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on the Prosecutor's Motion of Judicial Notice and Admission of Evidence, 15 May 2002.

[7] *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on Prosecutor's Notice for Judicial Notice of Adjudicated Facts, 22 November 2001.

[8] *The Prosecutor v. Semanza*, ICTR-97-20-T, "Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54", 3 November 2000, at para. 20.

réponse de l'accusé. Le Procureur cherche maintenant à fonder sa requête sur le paragraphe A) de l'article 94 du Règlement, modifiant ainsi radicalement le fondement juridique de la requête dont la Chambre a été saisie.

c) Les éléments pour lesquels le Procureur demande un constat judiciaire sont dans l'acte d'accusation et en dresser le constat judiciaire influerait non seulement sur les droits de l'accusé mais renverserait la charge de la preuve, en violation des droits de l'accusé.

d) La défense évoque les décisions rendues dans les affaires L*e Procureur c. Nyirumusuhuko et consorts*[6] et *Le Procureur c. Ntukirutimuna*[7] à l'appui de son affirmation selon laquelle les paragraphes A) et B) de l'article 94 du Règlement ne peuvent se substituer l'un à l'autre; elle soutient donc que la requête doit être rejetée en raison du caractère imprécis de son fondement juridique.

DÉLIBÉRATION

8. La Chambre rappelle l'article 94, qui est libellé comme suit :

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.

9. La Chambre fait d'emblée observer que le paragraphe (A) de l'article 94 du Règlement a force obligatoire tandis que le paragraphe (B) confère à la Chambre un pouvoir d'appréciation s'agissant du constat judiciaire de faits ou de moyens de preuve documentaires admis.

10. Notant qu'il existe une jurisprudence abondante concernant le sens et l'application de l'article 94 du Règlement, la Chambre souligne que l'objectif d'économie judiciaire et la cohérence de la jurisprudence sont les deux critères sur lesquels repose l'exercice de son pouvoir d'appréciation en la matière. À cet égard, elle rappelle la décision rendue dans l'affaire *Semanza*[8], dans laquelle la Chambre a estimé ce qui suit :

> En premier lieu, le recours au constat judiciaire accélère le cours du procès en dispensant de l'obligation d'établir formellement des faits indiscutables. En deuxième lieu, cette doctrine encourage la cohérence et l'uniformité des décisions relatives à des questions factuelles dans les cas où le manque d'uniformité serait injuste.

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[6] *Le Procureur c. Nyiramasuhuko*, affaire n° ICTR-97-21-T, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles, rendue le 15 mai 2002.

[7] *Le Procureur c. Ntakirutimana*, affaire n° ICTR-96-10-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, rendue le 22 novembre 2001.

[8] *Le Procureur c. Semanza*, affaire nº ICTR-97-20-T, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles conformément aux articles 94 et 54, rendue le 3 novembre 2000, par. 20.

11. The Chamber further recalls that the Decision in *Prosecutor v. Ntakirutimana* stipulated two requirements for the exercise of discretion as conferred by Rule 94 (B)[9]. First, the facts proposed for notice under Rule 94 (B) must have been adjudicated in other proceedings before the Tribunal; facts contained in judgments based on guilty pleas, or admissions voluntarily made by the Parties cannot be the subject matter of judicial notice under the above Rule. Second, the proposed adjudicated facts must relate to the matters at issue in the current proceedings-in that the facts must be relevant-and not just remotely connected to the current proceedings, so that judicial notice of such facts must advance judicial economy.

12. The Chamber takes the view that, properly construed, Rule 94 (B) confers it with the discretion to decide whether or not to judicially notice adjudicated facts. In other words, the Chamber must have a reason to decide to take judicial notice of facts adjudicated upon in prior proceedings before the Tribunal. The Chamber's decision under the Rule might be based on the consideration that judicial notice would advance consistent case law, judicial economy, or is otherwise in the interests of justice.

13. The Prosecutor must clearly indicate which facts he wishes to have judicially noticed. This is especially important if the fact for judicial notice forms part of a paragraph containing several facts or statements. The clear intention under the Rule is that in certain circumstances, the Chamber may decide to take judicial notice of 'adjudicated facts' instead of requiring such facts to be proved by evidence. It is the view of the Chamber that 'adjudication' denotes a process in which a Chamber has considered a fact in issue in the trial and made a finding thereon. Facts in issue are those over which the Parties dispute and on which an adjudicator must make a finding. Clarity as to the specific fact which the Prosecutor seeks to have noticed is therefore essential.

14. It follows from the foregoing analysis that the only facts that the Chamber may decide to take judicial notice of are those that constitute part of the factual findings in previous proceedings of the Tribunal. The Chamber may not take judicial notice of facts contained in the "introductory" part of a judgment since such facts would not have been adjudicated upon in the sense discussed above. Similarly, the Chamber understands the "historical context" laid out in some judgments of the Tribunal to be essentially introductory. The judgment in *Prosecutor v. Kayishema*[10] makes it clear that the "historical context" is essentially a brief explanation of events in deliberately neutral language aimed at allowing the Trial Chamber to form some idea of the historical backdrop within which the events of 1994 took place.

[9] *The Prosecutor v. Ntakirutimana*, ICTR-96-10-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts", 22 November 2001.

[10] *Prosecutor v. Kayishema*, ICTR-95-1-T, Judgement, 21 May 1999 at paras. 31-33.

11. La Chambre rappelle en outre que, dans la décision rendue dans l'affaire *Le Procureur c. Ntakirutimana*, deux conditions doivent être réunies pour qu'elle puisse exercer son pouvoir d'appréciation en vertu du paragraphe (B) de l'article 94 du Règlement[9]. En premier lieu, les faits proposés aux fins de constat judiciaire en vertu du paragraphe (B) de l'article 94, doivent avoir été admis lors d'autres affaires portées devant le Tribunal de céans; les jugements rendus à la suite d'un aveu de culpabilité fait à l'audience ou d'une reconnaissance volontaire de faits obtenue de l'accusé au cours de l'instance ne peuvent faire l'objet d'une demande en constat judiciaire en vertu de l'article ci-dessus. Deuxièmement, les faits proposés aux fins de constat judiciaire doivent être en rapport avec l'instance c'est-à-dire qu'ils doivent être pertinents à l'espèce et non avoir un lien lointain avec elle, de sorte que leur constat judiciaire assure l'économie de ressources du Tribunal.

12. La Chambre est d'avis que, correctement interprété, le paragraphe (B) de l'article 94 lui confire le pouvoir d'apprécier s'il y a lieu ou non de dresser le constat judiciaire de faits admis lors d'affaires antérieures portées devant le Tribunal. En d'autres termes, elle doit avoir une raison pour le faire, qui peut être que le constat judiciaire sollicité serait de nature à promouvoir la cohérence de la jurisprudence et l'économie des ressources judiciaires ou servirait de manière générale l'intérêt de la justice.

13. Le Procureur doit clairement indiquer pour quels faits il souhaite un constat judiciaire, surtout lorsque le fait en question figure dans un paragraphe contenant plusieurs faits ou déclarations. L'intention manifeste qui sous tend l'article 94 (B) est que, dans certaines circonstances, la Chambre peut dresser le constat judiciaire de «faits admis» sans exiger qu'ils soient étayés par des éléments de preuve. Le terme «admis» qualifie, selon la Chambre, tout fait litigieux qui a été examiné par une Chambre et fait l'objet d'une conclusion. Les faits litigieux sont ceux qui sont contestés par les parties et sur lesquels un juge doit se prononcer. Il est donc essentiel que le Procureur indique précisément le fait pour lequel il sollicite un constat judiciaire.

14. Il appert de l'analyse ci-dessus que les seuls faits dont la Chambre peut dresser le constat judiciaire sont ceux qui font partie des conclusions factuelles dégagées dans d'autres affaires portées devant ce Tribunal. La Chambre ne peut dresser le constat judiciaire de faits contenus dans l'«Introduction» d'un jugement puisqu'ils ne sauraient avoir été admis au sens évoqué plus haut. Ainsi, elle considère la rubrique «Contexte historique» qui figure dans certains jugements rendus par le Tribunal comme ayant essentiellement un caractère introductif. Il ressort clairement du jugement rendu dans l'affaire *Le Procureur c. Kayishema*[10] que le «Contexte historique» est en substance une brève explication des faits, rédigée à dessein en termes neutres, pour permettre à la Chambre de première instance de se faire une idée de la toile de fond historique sur laquelle s'inscrivent les événements de 1994.

[9] *Le Procureur c. Ntakirutimana*, affaire n° ICTR-96-10-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, rendue le 22 novembre 2001.

[10] *Le Procureur c. Kayishema*, affaire n° ICTR-95-1-T, Jugement rendu le 21 mai 1999, paras. 31 à 33.

15. The Chamber therefore understands that the "historical context" is essentially a simplified summary of evidence presented before the Chamber in a manner which allows the Chamber to form a background regarding the events of 1994 in Rwanda. The Chamber's emphasis on the usage of "neutral language" shows that these do not amount to legal or factual findings. Therefore, the Chamber holds that the contents of this portion of the judgment cannot be said to contain "facts" for the purposes of Rule 94 (B).

16. The Chamber notes that Rule 94 (B) allows the Chamber to take judicial notice of adjudicated facts. The Chamber shares the opinion expressed in *Prosecutor v. Nyiramasuhuko* that it is preferable that legal conclusions are arrived at during the trial rather than judicially noticed[11]. The Chamber therefore concludes that it will not take judicial notice of legal conclusions under Rule 94 (B).

17. Having stated the law governing judicial notice before this Tribunal, the Chamber now turns to the Prosecutor's Motion. The Chamber notes that although the cover page of the Motion states that the Motion is for judicial notice of adjudicated facts, the first page clarifies this further and adds that the Prosecution asks the Chamber to take judicial notice of 65 "adjudicated facts", pursuant to Rule 94 (B). Thus, the Chamber will examine the facts submitted by the Prosecutor within the prism of "adjudicated facts" under Rule 94 (B) rather than "facts of common knowledge" under Rule 94 (A) since the Motion clearly refers to "judicial notice of adjudicated facts" as part of its title.

18. The Chamber notes that the majority of the facts sought to be judicially noticed are essentially paragraphs, either taken as a whole from a judgment or made up by putting together extracts from two or more judgments. As discussed above, the Chamber considers that there is no scope within Rule 94 (B) to take judicial notice of extracts from judgments if the facts sought to be judicially noticed cannot be clearly ascertained from these extracts. The Rule only confers discretion on the Chamber to judicially notice "adjudicated facts" where the exercise of this discretion would advance consistent case law, judicial economy, or is otherwise in the interests of justice.

19. Having examined the paragraphs that form the subject matter of the Motion, the Chamber notes that each paragraph invariably contains more than one fact. A Motion properly brought under Rule 94 (B) should specify exactly which of those facts the Chamber is asked to judicially notice and how each of these relate to the matter at issue in the current proceedings. In the instant application, the Prosecutor has failed to do so. The Chamber reminds the Prosecutor that the mere reproduction of whole paragraphs of a previous judgment is insufficient to trigger the exercise of the Chamber's discretion under Rule 94 (B). The Chamber considers that the problem is compounded further when entire paragraphs from different judgments are put

[11] *Prosecutor v. Nyiramasuhuko et. al*., ICTR-97-21-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, at para. 127. This decision followed the decision in *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, at paras. 35 and 36.

15. La Chambre estime donc qu'il faut voir en substance dans le «Contexte historique» un résumé simplifié des éléments de preuve, qui lui est présenté pour qu'elle puisse comprendre le contexte dans lequel les événements de 1994 se sont déroulés. L'accent qu'elle met sur l'emploi de «termes neutres» prouve bien qu'il ne s'agit pas de conclusions factuelles ni juridiques. On ne saurait par conséquent affirmer que le contenu de cette partie du jugement contient des «faits» au sens du paragraphe (B) de l'article 94 du Règlement.

16. La Chambre relève que le paragraphe (B) de l'article 94 du Règlement l'autorise à dresser le constat judiciaire de faits admis. Elle partage l'opinion exprimée dans l'affaire *Le Procureur c. Nyiramasuhuko* selon laquelle il est préférable de tirer les conclusions juridiques au cours du procès que d'en dresser le constat judiciaire[11]. Elle ne dressera donc pas le constat judiciaire de conclusions juridiques en se fondant sur le paragraphe (B) de l'article 94 du Règlement.

17. Après avoir rappelé le droit régissant le constat judiciaire devant ce Tribunal, la Chambre se penche sur la requête du Procureur. Alors que la page de couverture indique que la requête tend à obtenir le constat judiciaire de faits admis, la première page précise que le Procureur demande à la Chambre de dresser le constat judiciaire de 65 «faits admis» en vertu du paragraphe (B) de l'article 94 du Règlement. La Chambre examinera donc les faits soumis par le Procureur sous l'angle des «faits admis» visés au paragraphe (B) plutôt que sous celui des «faits de notoriété publique» visés au paragraphe (A) de l'article 94, puisque le titre de la requête indique qu'elle porte sur un «constat judiciaire de faits admis».

18. La Chambre relève que les faits dont le constat judiciaire est demandé sont pour la plupart des paragraphes entiers extraits d'un jugement ou des paragraphes constitués de passages tirés de deux ou plusieurs jugements. Comme elle l'a dit plus haut, elle estime qu'en vertu du paragraphe (B) de l'article 94, il ne peut être dressé de constat judiciaire d'extraits de jugements si les faits dont le constat judiciaire est sollicité ne ressortent pas clairement des extraits en question. L'article 94 du Règlement confère uniquement à la Chambre le pouvoir discrétionnaire de dresser le constat judiciaire de «faits admis» si l'exercice d'un tel pouvoir permet d'assurer la cohérence de la jurisprudence et l'économie de ressources judiciaires ou si il sert de manière général l'intérêt de la justice.

19. Après avoir examiné les paragraphes qui constituent l'essentiel de la requête, la Chambre relève qu'ils concernent invariablement plus d'un fait. Or, toute requête formée en vertu du paragraphe (B) de l'article 94 devrait indiquer clairement les faits dont le constat judiciaire est demandé ainsi que leurs rapports avec l'affaire. En l'espèce, le Procureur ne s'est pas conformé à cette exigence. La Chambre lui rappelle que le simple fait de reproduire des paragraphes entiers d'un jugement antérieur ne suffit pas pour qu'elle exerce son pouvoir d'appréciation en vertu du paragraphe (B) de l'article 94. Le problème se complique encore quand des paragraphes entiers tirés de jugements différents sont combinés pour constituer un nouveau paragraphe, les

[11] *Le Procureur c. Nyiramasuhuko et consorts*, affaire n° ICTR-97-21-T, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles, rendue le 15 mai 2002, para. 127. Elle fait suite à celle rendue dans Le Procureur c. Ntakirutimana, affaire n° ICTR-96-10-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, rendue le 22 novembre 2001, paras. 35 et 36.

together to form a new paragraph as the contexts in which they arise may have been completely different. Accordingly, the Chamber finds that Facts 34, 35, 36, 39, 42, 43, 47, 48 and 49 cannot be judicially noticed.

20. The Chamber finds that Facts 1-27 and Facts 29-37, 41, 44, 51(c), 51(d), 52, 55, 56, 58(a), 58(b), 58(c), 58(d) and 58(e) of the Motion are either wholly or partly dependent either on the "introductory" portions of Trial Chamber judgments or on the portions which deal with the "historical context" within which the events in Rwanda in 1994 took place. As discussed in paragraphs 14 and 15 above, these do not amount to factual findings and cannot be treated as "adjudicated facts' for the purposes of Rule 94 (B).

21. The Chamber declines to judicially notice facts which would have a bearing upon the guilt or innocence of the Accused or which are central to the Prosecution case. Further, and in light of the existing jurisprudence of the International Criminal Tribunal Rwanda (ICTR) cited previously, the Chamber will not take judicial notice of facts which are essentially legal conclusions. The Chamber thus rejects Facts 28, 37, 38, 40, 41, 42, 43, 44, 45, 46, 60(a), 60(b), 60(c), 60(d), 60(e), 61, 62 and 63 of the Prosecutor's Motion as being unsuitable for judicial notice on these grounds.

22. The Chamber notes that the Prosecutor has already adduced evidence as part of the trial on some of the facts that he now seeks to have judicially noticed. The Chamber considers that it would be improper to pre-judge the evaluation of this evidence by taking judicial notice of these facts at this juncture instead of allowing them to be proved during the trial. As stated earlier, the jurisprudence shows that certain facts are more suitable to being proved in the normal course of the proceedings instead of being judicially noticed either because they go directly to the guilt or innocence of the Accused or because they are reasonably disputed by the Parties. Consequently, the Chamber therefore declines to judicially notice Facts 32, 37, 38, 51(a), 51(b), 51(c), 51(d), 52, 53, 54, 55, 56, 57, 58(a), 58(b), 58(c), 58(d), 58(e), 59, 60(a), 60(b), 60(c), 60(d), 60(e) and 62.

23. Similarly, the Chamber cannot take judicial notice of facts which are admissions or which have not been contested by the opposing Party in that case. Thus, Facts 18, 32, 33 and 63 which are wholly or partly based on paragraphs from the judgment in *Prosecutor v. Musema* cannot be judicially noticed.

24. It is settled law that adjudicated facts in cases under appeal must not be judicially noticed as they have not been finally adjudicated. The Prosecutor's submission that these facts can be judicially noticed as they are not the subject of the appeal in the cited cases is incorrect. The basis upon which the Appeals Chamber may finally admit or reject the appeal and the extent to which it may do so are not matters which this Chamber can presume to know and indeed pronounce upon. As the cases of *Prosecutor v. Kajelijeli* and *Prosecutor v. Semanza* are under appeal, Facts 47, 50, 51(a), 51(b), 51(c), 51(d), 52, 53, 54, 55, 56, 57, 58(a), 58(b), 58(c) and 58(d) of the Prosecutor's Motion will not be judicially noticed.

contextes dans lesquels ils s'inscrivent peuvent être complètement différents. Elle ne peut donc dresser le constat judiciaire des faits mentionnés aux paragraphes 34, 35, 36, 39, 42, 43, 47, 48 et 49.

20. Quant aux faits mentionnés aux paragraphes 1 à 27, 29 à 37, 41, 44, 51 (c), 51 (d), 52, 55, 56, 58 (a), 58 (b), 58 (c) 58 (d) et 58 (e) de la requête, ils sont en tout ou en partie, tirés de l'introduction de jugements rendus par la Chambre de première instance ou des parties traitant du «Contexte historique» dans lequel s'inscrivaient les événements survenus au Rwanda en 1994. Comme indiqué plus haut aux paragraphes 14 et 15, ces faits ne constituent pas des conclusions factuelles et ne sauraient être considérés comme des «faits admis» au sens du paragraphe (B) de l'article 94 du Règlement.

21. La Chambre ne dressera pas le constat judiciaire de faits qui pouvaient déterminer la culpabilité ou l'innocence des accusés ou qui sont au coeur de l'argumentation du Procureur. De plus, et conformément à la jurisprudence constante du Tribunal pénal international pour le Rwanda (TPIR) précitée, elle ne dressera pas le constat judiciaire de faits qui sont en substance des conclusions juridiques. Elle rejette donc les paragraphes 28, 37, 38, 40, 41, 42, 43, 44, 45, 46, 60 (a), 60 (b), 60 (c), 60 (d), 60 (e), 61, 62 et 63 de la requête du Procureur, qui mentionnent des faits qui ne peuvent faire l'objet d'un constat judiciaire pour les raisons susmentionnées.

22. La Chambre relève que le Procureur a déjà produit des éléments de preuve dans le cadre du procès qui concerne certains faits dont il demande le constat judiciaire. Il ne siérait pas qu'elle préjuge de l'évaluation qui en sera faite en cours de procès en dressant le constat judiciaire des faits en question au stade actuel. Comme indiqué plus haut, il ressort de la jurisprudence qu'il est préférable que certains faits soient établis dans le cours normal du procès, soit parce qu'ils portent directement sur la culpabilité ou sur l'innocence des accusés, soit parce qu'ils peuvent raisonnablement faire l'objet d'une contestation par les parties. C'est pourquoi la Chambre refuse de dresser le constat judiciaire des faits mentionnés aux paragraphes 32, 37, 38, 51 (a), 51 (b), 51 (c), 51 (d), 52, 53, 54, 55, 56, 57, 58 (a), 58 (b), 58 (c), 58 (d), 58 (e), 59, 60 (a), 60 (b), 60 (c), 60 (d), 60 (e) et 62.

23. De même, la Chambre ne peut dresser le constat judiciaire de faits qui sont des aveux de culpabilité ou qui n'ont pas été contestés par la partie adverse au procès. Dès lors, les faits mentionnés aux points 18, 32, 33, et 63 qui sont entièrement ou partiellement fondés sur des paragraphes du jugement rendu en l'affaire *Le Procureur c. Musema* ne peuvent faire l'objet de constat judiciaire.

24. Il est bien établi en droit qu'on ne peut dresser le constat judiciaire de faits admis dans des affaires pendantes devant la Chambre d'appel puisqu'un jugement définitif n'a pas été rendu. C'est à tort que le Procureur affirme que ces faits peuvent faire l'objet d'un constat judiciaire parce que, dans les affaires citées, ils n'ont pas été frappés d'appel. La Chambre ne peut présumer connaître les points sur lesquels la Chambre d'appel peut se fonder pour admettre ou rejeter le recours et la mesure dans laquelle elle peut le faire et encore moins se prononcer en la matière. Les affaires *Le Procureur c. Kajelijeli* et *Le Procureur c. Semanza* étant actuellement en appel, les faits mentionnés aux paragraphes 47, 50, 51 (a), 51 (b), 51 (c) 51 (d), 52, 53, 54, 55, 56, 57, 58 (a), 58 (b), 58 (c) et 58 (d) de la requête du Procureur ne peuvent faire l'objet d'un constat judiciaire.

25. The Chamber wishes to add that in addition to the quoted paragraphs failing to qualify as "adjudicated facts" within the meaning of Rule 94 (B), the Prosecutor has singularly failed to show how any of the requested facts relate to the current proceedings so as to qualify them for judicial notice under the sub-Rule. The Prosecutor has failed to demonstrate that they are facts in issue in the current proceedings. Thus, the threshold requirement of relevance under the Rule is not met.

26. The Defence for Bicamumpaka and Mugenzi argue that Facts 64 and 65 of the Prosecutor's Motion are too broad and have been put together from paragraphs from a number of judgments and as such are not concrete or distinct and that these facts are in the nature of legal conclusions. The Defence for both Mugiraneza and Bizimungu do not raise any specific allegations with regard to these facts.

27. In the Chamber's view, Facts 64 and 65, unlike several other paragraphs in the Prosecutor's Motion, are specific rather than general and raise a single, clearly identifiable fact for judicial notice, particularly in their amended form. Further, the Chamber considers that they are factual rather than legal findings.

28. However, the Chamber notes that there are certain differences between the facts presented in the Motion and in the sources cited. The Chamber also notes certain inaccuracies in some of the facts presented by the Prosecution. Nevertheless, the Chamber has decided to exercise its power under Rule 94 (B) to judicially notice the following facts *proprio motu* with the necessary amendments :

(i) At the time of the events in 1994, Rwanda was a state party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) having acceded to it on 12th February 1975.

(ii) At the time of the events in 1994, Rwanda was a contracting party to the Geneva Conventions of 12th August 1949 and Additional Protocol II of 8th June1977 having acceded to the Geneva Conventions of 12th August 1949 on 5th May 1964 and acceded to Protocols additional thereto of 8th June1977 on 19th November 1984.

29. The Chamber notes that it is compelled to reject all the facts which the Prosecutor seeks to have judicially noticed because of the inadequate consideration and thought that went into the preparation of the Motion. The result is that the Parties and the Chamber have expended valuable time and resources in a substantially fruitless exercise. The Chamber urges the Prosecutor, in future, to give much more serious consideration and thought to the manner in which he formulates his Motions to the Chamber so as to foster judicial economy for the benefit of all Parties.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

TAKES JUDICIAL NOTICE *proprio motu* and pursuant to Rule 94 (B) of the Rules of the following facts :

25. La Chambre voudrait ajouter qu'outre le fait que les passages cités ne peuvent être considérés comme des «faits admis» au sens du paragraphe (B) de l'article 94, le Procureur a singulièrement omis d'établir comment l'un quelconque d'entre eux a trait à la présente espèce pour qu'un constat judiciaire soit dressé en vertu de ce paragraphe. Le Procureur n'a pas établi l'existence de faits litigieux en l'espèce. La condition minimale de pertinence requise n'est donc pas remplie.

26. Les conseils de Bicamurnpaka et de Mugenzi affirment que les faits mentionnés aux paragraphes 64 et 65 de la requête du Procureur ont un caractère trop général et ne sont qu'un amalgame de paragraphes extraits de plusieurs jugements et que, comme tels, ils ne sont ni concrets ni distincts et revêtent le caractère de conclusions juridiques. Ils n'ont toutefois formulé aucune allégation précise à leur sujet.

27. De l'avis de la Chambre, les faits mentionnés aux paragraphes 64 et 65, contrairement à de nombreux autres paragraphes de la requête du Procureur, sont précis et ne revêtent pas un caractère général; ils portent sur un fait unique, clairement identifiable, qui peut faire l'objet d'un constat judiciaire, notamment dans leur version modifiée. De plus, elle estime qu'il s'agit de conclusions factuelles et non juridiques.

28. La Chambre note certaines différences entre les faits présentés dans la requête et ceux mentionnés dans la source citée. Elle relève également des inexactitudes dans certains faits présentés par le Procureur. Elle a cependant décidé d'exercer le pouvoir d'appréciation que lui confère le paragraphe (B) de l'article 94 du Règlement et décide de dresser d'office le constat judiciaire des faits suivants avec les modifications utiles :

> i) Au moment des événements de 1994, le Rwanda était partie à la Convention pour la prévention et la répression du crime de génocide (1948), à laquelle il a adhéré le 12 février 1975.
>
> ii) Au moment des événements de 1994, le Rwanda était partie aux Conventions de Genève du 12 août 1949 et au Protocole additionnel II du 8 juin 1977, ayant adhéré auxdites Conventions le 5 mai 1964 et au Protocole II le 19 novembre 1984.

29. La Chambre note qu'elle est dans l'obligation de rejeter tous les faits dont le Procureur sollicite le constat judiciaire en raison du peu d'attention et de réflexion que celui-ci a consacré à l'élaboration de la requête. De ce fait, les parties et la Chambre ont dû s'investir dans un exercice essentiellement stérile ayant occasionné un gaspillage de temps et de ressources précieuses. Elle invite le Procureur, à réfléchir à l'avenir, plus sérieusement à la formulation des requêtes qu'il lui adresse de manière à assurer l'économie de ressources judicaires dans l'intérêt de toutes les parties.

PAR CES MOTIFS,

LA CHAMBRE DE PREMIÈRE INSTANCE

DRESSE d'office et en vertu du paragraphe (B) de l'article 94 du Règlement LE CONSTAT JUDICIAIRE des faits suivants :

At the time of the events in 1994, Rwanda was a state party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) having acceded to it on 12th February 1975.

At the time of the events in 1994, Rwanda was a contracting party to the Geneva Conventions of 12th August 1949 and Additional Protocol II of 8th June1977 having acceded to the Geneva Conventions of 12th August 1949 on 5th May 1964 and acceded to Protocols additional thereto of 8th June1977 on 19th November 1984.

DENIES the Motion in its entirety.

Arusha, 10 December 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Au moment des événements de 1994, le Rwanda était partie à la Convention pour la prévention et la répression du crime de génocide (1948), à laquelle il a adhéré le 12 février 1975.

Au moment des événements de 1994, le Rwanda était partie aux Conventions de Genève du 12 août 1949 et au Protocole additionnel II du 8 juin 1977 ayant adhéré auxdites Conventions le 5 mai 1964 et au Protocole II le 19 novembre 1984.

REJETTE la requête dans son intégralité.

Fait à Arusha, le 10 décembre 2004

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's Motion to Remove Confidentiality from Portions of the Prosecutor's Pre-Trial Brief 10 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Juges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – removal of confidentiality, portions of the Prosecution Pre-Trial Brief, legal propositions, legal theories, statements of fact and expected witness testimonies – publicity, safety of victims and witnesses – imprecise motion, more precise description of the relief requested and the justification thereto – motion denied

International instruments cited : Statute, art. 19 (A) – Rules of procedure and evidence, Rules 54, 73 (A), 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 SEISED OF "Prosper Mugiraneza's Motion to Remove Confidentiality from Portions of the Prosecutor's Pre-trial Brief" filed on 24 September 2004 (the "Motion");

NOTING THAT the Prosecution has not filed any response to the Motion;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules");

HEREBY DECIDES the Motion on the basis of the written submissions of the Defence pursuant to Article 73 (A) of the Rules.

SUBMISSIONS

1. Relief Sought

2. The Defence for Mugiraneza requests the Chamber to remove confidentiality from those portions of the Prosecution Pre-Trial Brief which do not identify witnesses, relate only to legal issues, or to the expected testimony of witnesses without revealing identifying information.

Supporting Arguments

3. The Defence asserts that in October 2003, the Prosecution filed its Pre-Trial Brief as a confidential document and that this was necessary to protect the identities of various Prosecution witnesses.

4. The Defence however argues that since the Prosecution case is drawing to a close, it is undesirable to maintain the confidential status of some parts of the Pre-Trial Brief.

5. The Defence informs the Chamber that it is preparing a motion for judgment of acquittal pursuant to Rule 98 *bis* and that it is its wish to file this motion as a public document. However, the Defence notes that since it would need to quote from the Pre-Trial Brief, it would be impossible for it to file the Rule 98 *bis* motion as a public document or it will have to be broken into public and confidential parts.

6. The Defence argues that it will be simpler for both the Prosecution and the Defence if the Motion was filed as a single document. The Defence further argues that it is in the interests of both the Tribunal and the public for the motion to be a public document.

7. The Defence also submits that most of the portions of the Prosecution Pre-Trial Brief that it intends to quote in its Rule 98 *bis* Motion will be legal propositions or factual assertions not involving any possibility of identifying witnesses. According to the Defence assertion, there is no reason to keep these portions confidential, and there is a great public interest in having the press and the public review the respective positions of the Parties.

8. For the above reasons, the Defence prays that the Chamber remove confidentiality from those portions of the Prosecution Pre-Trial Brief which relate to :

(i) Propositions of law made by the Prosecutor;

(ii) The Prosecution legal theories;

(iii) General statements of fact which the Prosecution purported to prove;

(iv) The expected testimony of witnesses provided those witnesses are identified only by pseudonym.

DELIBERATIONS

9. As a preliminary matter, the Chamber observes that the Defence has not cited any Rule in support of the relief sought. The Chamber will therefore consider the Motion under the general provisions of Rule 73 (A) and the power conferred upon it under Rule 54.

10. The Chamber is cognisant of the provisions of Article 19 (4) of the Statute. In principle, it is preferable that hearings are conducted in public, and this includes making public as much of the written pleadings and Decisions as is possible. However, it is of primary importance that in doing so, the Chamber does not compromise the safety of victims and witnesses involved in the proceedings.

11. The Defence requests that those portions of the Pre-Trial Brief involving legal propositions, legal theories, statements of fact and expected witness testimonies are made public. The Defence does not wish to have those portions which reveal confidential identifying information made public.

12. Apart from this general guidance, the Defence does not provide exact guidance on the portions of the Pre-Trial Brief to remain confidential and the portions to be made public. The Chamber observes that the Prosecution Pre-Trial Brief, together with its annexes and tables, cover two hundred and sixteen (216) pages. Pages 1 to 95,

which contain the main part of the Pre-Trial Brief, are divided into two hundred and fifty two (252) paragraphs.

13. The Chamber is mindful of the rights of the Accused, but recalls that it must exercise caution in taking measures that are likely to affect the protection afforded to witnesses who appear before the Tribunal. It is the responsibility of the Defence to provide the Chamber with all the information that is necessary to enable it to reach a reasoned decision in the interests of justice. The Chamber considers that in the instant application, the Defence has not adequately discharged this responsibility.

14. Therefore, the Chamber considers that the Motion as currently formulated is imprecise and should be dismissed. This dismissal is however made without prejudice to the filing of a reformulated request containing a more precise description of the relief requested and the justification thereto.

FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Motion in its entirety.

Arusha, 10 December 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94 (B) 10 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – judicial notice, findings based upon Rwandan law and practice – discretion of the Trial Chamber – facts previously adjudicated in prior litigation, contained in a Judgement that is not subject to appeal, not the result of a guilty plea or an admission made by an accused in the prior trial, facts at stake in the current trial, interest of Justice – judicial economy, consistency of case law, good reason – lack of precision of the request – facts and request do not fulfil the requirements for judicial notice – motion denied

International instruments cited : Rules of procedure and evidence, Rules 73 and 94 (B)

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu, Judgment*, 2 September 1998 (ICTR-96-4-T,* Reports 1998*, p. 44) – Trial Chamber III,* The Prosecutor v. Laurent Semanza*, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000 (ICTR-97-20-I,* Reports 2000*, p. 2386) – Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu*, Appeals Judgement, 1st June 2001 (ICTR-96-4-A,* Reports 2001*, p. 16) – Trial Chamber I,* The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001 (ICTR-96-10-T and ICTR-96-17-T,* Reports 2001*, p. 3030)*

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");

SEISED OF "Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94 (B)" filed on 24 September 2004 (the "Motion");

NOTING that the Prosecution did not file any response to the Motion;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 73 and 94 (B);

Décision relative à la requête intitulée **First Prosper Mugiraneza's Motion for Judicial Notice Pursuant to Rule 94 (B)** *10 décembre 2004 (ICTR-99-50-T)*

(Original : Anglais)

Chambre de première instance II

Juges : Khalida Rachid Khan, Président de Chambre; Lee Gacuiga Muthoga; Emile Francis Short

Mugiraneza – constat judiciaire, conclusions basées sur les lois et pratiques judiciaires rwandaises – pouvoir d'appréciation de la Chambre de première instance – faits déjà admis en preuve dans le cadre d'affaires antérieures, contenus dans un jugement non susceptible d'appel, ne résultant pas d'un aveu de culpabilité ou d'une reconnaissance de faits par un accusé dans un précédent procès, faits en jeu dans l'instance, intérêt de la justice – économie judiciaire, cohérence de la jurisprudence, bon motif – manque de précision de la requête – les faits et la requête ne répondent pas aux critères requis pour donner lieu à un constat judiciaire – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73 et 94 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Jean-Paul Akayesu*, Jugement, 2 septembre 1998 (ICTR-96-4-T,* Recueil 1998*, p. 45) – Chambre de première instance III,* Le Procureur c. Laurent Semanza*, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles conformément aux articles 94 et 54, 3 novembre 2000 (ICTR-97-20-1,* Recueil 2000*, p. 2387) – Chambre d'appel,* Le Procureur c. Jean-Paul Akayesu*, Arrêt, 1er juin 2001 (ICTR-96-4-A,* Recueil 2001*, p. 17) – Chambre de première instance I,* Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 22 novembre 2001 (ICTR-96-10-T et ICTR-96-17-T,* Recueil 2001*, p. 3031)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II (la «Chambre») composée des juges Khalida Rachid Khan, Président de Chambre, Lee Gacuiga Muthoga et Emile Francis Short,

SAISI de la requête intitulée *Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94 (B)* déposée le 24 septembre 2004 (la «requête»),

ATTENDU QUE le Procureur n'a déposé aucune réponse à ladite requête,

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), notamment ses articles 73 et 94 (B),

HEREBY DECIDES the Motion on the basis of the Defence submissions only, pursuant to Rule 73 (A) of the Rules;

SUBMISSIONS

Relief Sought

1. The Defence requests the Trial Chamber, pursuant to Rule 94 (B) of the Rules, to take judicial notice of paragraphs 58 to 77 of the Trial Chamber Judgement in the *Akayesu* case[1], which has been affirmed by the Appeals Chamber[2].

Supporting Arguments

2. The Defence submits that Rule 94 (B) of the Rules gives the Trial Chamber the discretion to take judicial notice of facts previously adjudicated in prior litigation before the Tribunal. According to its submissions, the Trial Chamber can exercise such discretion when, in relation to the facts sought to be judicially noticed, the following conditions are met :

i) They are contained in a Judgement that is not subject to appeal;

ii) They are not the result of a guilty plea or an admission made by an accused in the prior trial;

iii) They are at stake in the current trial;

iv) The Trial Chamber determines that justice is best served by taking judicial notice of them.

3. The Defence argues that the paragraphs cited above from the *Akayesu* Judgement reflect findings that are generally based upon Rwandan law and practice, since they deal with the powers, authority and influence of the *bourgmestre* in Rwanda during the temporal period relevant to the current proceedings.

DELIBERATIONS

4. The Trial Chamber recalls Rule 94 of the Rules, which reads as follows :

Rule 94 : Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

[1] *Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-T, Judgement, 2 September 1998 (the "*Akayesu* Judgment").

[2] *Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-A, Judgement on Appeal, 1 June 2001.

STATUANT, sur la seule base des mémoires soumis par la défense conformément à l'alinéa A de l'article 73 du Règlement, ainsi qu'il suit :

ARGUMENTS

Mesure sollicitée

1. La défense demande à la Chambre, en se fondant sur l'article 94 (B) du Règlement, de dresser le constat judiciaire des paragraphes 58 à 77 du jugement rendu en l'affaire *Akayesu*[1] par la Chambre de première instance et confirmé par la Chambre d'appel[2].

Arguments de la défense

2. La défense soutient que l'article 94 (B) susvisé laisse toute latitude à la Chambre pour ce qui est de dresser le constat judiciaire de faits déjà admis en preuve dans le cadre d'affaires antérieures portées devant le Tribunal. Elle estime à cet égard que la Chambre peut exercer un tel pouvoir d'appréciation lorsque les faits dont le constat judiciaire est sollicité satisfont aux conditions suivantes :

i) Ils sont contenus dans un jugement non susceptible d'appel ;

ii) Ils ne résultent pas d'un aveu de culpabilité ou d'une reconnaissance de faits par un accusé dans un précédent procès ;

iii) Ils sont en jeu dans l'instance en cours ;

iv) La Chambre est d'avis que l'intérêt de la justice commande le constat judiciaire.

3. Du point de vue de la défense, les paragraphes susmentionnés qui sont tirés du jugement *Akayesu* comportent des conclusions basées d'une manière générale sur les lois et pratiques judiciaires rwandaises, en ce qu'elles portent sur les pouvoirs, l'autorité et l'influence du bourgmestre au Rwanda pendant la période de référence de la présente instance.

DÉLIBÉRATION

4. La Chambre rappelle les dispositions de l'article 94 du Règlement, qui est libellé comme suit :

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.

[1] *Le Procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, jugement du 2 septembre 1998 (le «jugement *Akayesu*»).

[2] *Le Procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-A, arrêt du 1er juin 2001.

(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.

5. As a preliminary matter, the Trial Chamber wishes to note that unlike Rule 94 (A) which mandates recognition of facts of common knowledge, Rule 94 (B) confers a discretionary power on the Trial Chamber to decide whether or not to take judicial notice of adjudicated facts or documentary evidence.

6. The Trial Chamber notes the elaborate body of jurisprudence on the meaning and application of Rule 94. In the *Semanza* case for example, the Trial Chamber noted that two reasons are usually given to justify the application of the doctrine of judicial notice : "First, resort to judicial notice expedites the trial by dispensing with the need to formally submit proof on issues that are patently indisputable. Second, the doctrine fosters consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair."[3] Thus, judicial economy and consistency of case law are two principal grounds upon which the exercise of the discretion to take judicial notice may be based.

7. The Chamber also notes the Decision in the *Ntakirutimana* case, which stipulated two requirements for the exercise of the discretion conferred under Rule 94 (B)[4]. First, the facts proposed for notice under Rule 94 (B) must have been "adjudicated" in other proceedings before the Tribunal : facts contained in judgements based on guilty pleas, or admissions voluntarily made by the parties cannot be the subject matter of judicial notice under the above Rule. Second, the proposed adjudicated facts must relate to the matters at issue in the current proceedings : the facts must be relevant; they must not be only remotely connected to the current proceedings; and judicial notice of such facts must advance judicial economy.

8. The Chamber notes that properly construed, Rule 94 (B) confers discretion on the Chamber to make a decision whether or not to judicially notice adjudicated facts. In other words, the Chamber must have a reason to decide to take judicial notice of facts adjudicated upon in prior proceedings before the Tribunal. The Chamber's decision might be based on a consideration that judicial notice would advance consistent case law, judicial economy, or otherwise promote the interests of justice.

9. The Chamber notes that there is no provision under Rule 94 (B) to take judicial notice of paragraphs as such. The clear intention under the Rule is that in certain circumstances, the Chamber may decide to take judicial notice of 'adjudicated facts' instead of requiring such facts to be proved by evidence. It is the view of the Chamber that 'adjudication' implies that the Chamber has considered a disputed fact in the

[3] *The Prosecutor v. Laurent Semanza*, Case N° ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 20.

[4] *The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Case N° ICTR-96-10-T and Case N° ICTR-96-17-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts", dated 22 November 2001.

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.

5. D'emblée, la Chambre tient à faire remarquer que, contrairement à l'alinéa A qui prescrit la reconnaissance des faits de notoriété publique, l'alinéa B confère à la Chambre de première instance le pouvoir discrétionnaire de déterminer s'il y a lieu ou non de dresser le constat judiciaire de faits admis ou de preuves documentaires.

6. La Chambre note l'abondance de la jurisprudence relative à l'interprétation et à l'application de l'article 94. Dans l'affaire *Semanza*, par exemple, la Chambre de première instance a relevé deux raisons souvent citées à l'appui de l'application de la doctrine du constat judiciaire : «En premier lieu, le recours au constat judiciaire accélère le cours du procès en dispensant de l'obligation d'établir formellement des faits manifestement indiscutables. En deuxième lieu, cette doctrine encourage la cohérence et l'uniformité des décisions relatives à des questions factuelles dans les cas où le manque d'uniformité serait injuste.»[3] Ainsi, l'économie judiciaire et la cohérence de la jurisprudence sont les deux principaux motifs pouvant fonder l'exercice de la discrétion en matière de constat judiciaire.

7. La Chambre retient aussi une décision rendue dans l'affaire *Ntakirutimana*, qui énonce deux préalables à l'exercice du pouvoir discrétionnaire conféré par l'article 94 (B)[4]. Premièrement, les faits proposés aux fins de constat judiciaire conformément à l'article 94 (B) doivent a voir été «admis» dans le cadre d'autres affaires portées devant le Tribunal : les faits contenus dans des jugements rendus à la suite d'un aveu de culpabilité ou d'une reconnaissance volontaire de faits obtenue des parties ne peuvent faire l'objet d'un constat judiciaire en vertu de cette disposition. Deuxièmement, les faits admis proposés doivent être «en rapport» avec l'instance : ils doivent être pertinents et ne pas avoir simplement une influence indirecte sur la cause, et le constat judiciaire doit être de nature à favoriser l'économie des ressources du Tribunal.

8. La Chambre est d'avis qu'une interprétation judicieuse de l'article 94 (B) donne toute latitude à la Chambre de première instance pour statuer sur l'opportunité de dresser le constat judiciaire de faits admis. En d'autres termes, celle-ci doit avoir un bon motif pour ordonner le constat judiciaire de faits admis en preuve dans le cadre d'autres affaires portées devant le Tribunal. Sa décision peut être fondée sur le fait qu'un tel constat favoriserait la cohérence de la jurisprudence, l'économie judiciaire ou, d'une manière ou d'une autre l'intérêt de la justice.

9. La Chambre constate que rien dans l'article 94 (B) ne prévoit le constat judiciaire de paragraphes d'un document en tant que tels. L'intention réelle qui sous-tend cet article est de permettre à la Chambre de première instance, dans certaines circonstances, d'opter pour le constat judiciaire de «faits admis», plutôt que d'exiger que de tels faits soient étayés par des preuves. Selon la Chambre, l'«admission» signifie

[3] *Le Procureur c. Laurent Semanza*, affaire n° ICTR-97-20-1, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles conformément aux articles 94 et 54, 3 novembre 2000, para. 20.

[4] *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaires n° ICTR-96-10-T et n° ICTR-96-17-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 22 novembre 2001.

trial and has made a finding on it. Facts in issue are those which the Parties dispute and an adjudicator is called upon to make a finding.

10. It follows from the foregoing analysis that the only facts which the Chamber may take judicial notice of, are facts that constitute part of the 'findings' in the prior proceedings. The Chamber may not take judicial notice of facts contained in the "Introductory" part of a judgement since such facts would not have been adjudicated upon in the sense discussed above.

11. The Chamber notes that the Defence "moves the Trial Chamber to take judicial notice of paragraphs 58-77 of the affirmed Trial Chamber Judgement in *Prosecutor v. Akayesu*."[5] It is the Chamber's view that there is no scope within Rule 94 (B) to take judicial notice of 'paragraphs' except where those paragraphs contain clearly identified facts of which judicial notice could be taken under the sub-Rule. Rule 94 (B) only confers discretion to judicially notice adjudicated facts where the exercise of this discretion would advance consistent case law, promote judicial economy, or otherwise serve the interests of justice.

12. Having recalled the grounds upon which a Trial Chamber may exercise discretion under Rule 94 (B), the Chamber will now consider whether the paragraphs of the *Akayesu* Judgement of which the Defence seeks judicial notice, can be the subject of this Chamber's discretion.

13. Having examined the paragraphs that form the subject matter of the Motion, the Chamber notes that they contain a myriad of facts. A Motion properly brought under Rule 94 (B) would require the Defence to enumerate exactly which facts it is requesting the Chamber to judicially notice. In the instant case, the Defence has failed to do so. The Chamber reminds the Defence that the mere reproduction of whole paragraphs of a previous judgement is insufficient to trigger the exercise of the Chamber's discretion under Rule 94 (B).

14. After careful review of the paragraphs of the *Akayesu* Judgement submitted for judicial notice, the Trial Chamber finds that Paragraph 58, which outlines the structure of local government in Butare, contains a number of factual statements such as : "A commune is governed by a *bourgmestre*…"; "…the communal council is composed of representatives of the different sectors…"; "Below the sectors are the cellules…"; "…at the lowest level are the units of ten households." It is apparent that this paragraph contains a number of facts that potentially could be the subject of judicial notice under Rule 94 (B). The Defence has not indicated which of these facts it wishes to be judicially noticed. Moreover, it has not shown how the facts relate to the current proceedings. Therefore, the Chamber will not take judicial notice of Paragraph 58.

[5] *The Prosecutor v. Bizimungu et al*, "Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94 (B)", filed 24 September 2004, paragraph 5.

que la Chambre de première instance a examiné un fait contentieux et a abouti à une conclusion à ce sujet. Les faits concernés sont ceux qui sont contestés par les parties et pour lesquels il est fait appel à un arbitre pour tirer une conclusion spécifique.

10. Il appert de l'analyse qui précède que les seuls faits dont la Chambre peut dresser le constat judiciaire sont ceux qui font partie de «conclusions» arrêtées dans le cadre de procès antérieurs. La Chambre ne peut dresser le constat judiciaire de faits contenus dans l'introduction d'un jugement, car de tels faits ne sont pas censés a voir été admis selon la procédure décrite ci-dessus.

11. La Chambre prend acte de ce que la défense «demande à la Chambre de première instance de dresser le constat judiciaire des paragraphes 58 à 77 du jugement rendu en première instance et confirmé en appel dans l'affaire *Le Procureur c. Akayeszu*.»[5] Elle est d'avis que l'alinéa B de l'article 94 ne prévoit pas la possibilité de dresser le constat judiciaire de «paragraphes» d'un document, à moins que ceux-ci ne portent sur des faits précis dont le constat judiciaire peut-être dressé sur le fondement de cette disposition. La liberté d'appréciation prévue en matière de constat judiciaire de faits admis ne s'applique qu'aux cas où son exercice favoriserait la cohérence de la jurisprudence et l'économie judiciaire ou serait, d'une manière ou d'une autre, dans l'intérêt de la justice.

12. Après ce rappel des motifs pouvant justifier l'exercice, par une Chambre de première instance, de la liberté d'appréciation prévue à l'alinéa B de l'article 94, la Chambre se penchera à présent sur la question de savoir si les paragraphes du jugement *Akayesu* dont la défense sollicite le constat judiciaire peuvent faire l'objet d'une décision discrétionnaire.

13. Après examen des paragraphes visés dans la requête, la Chambre constate que ceux-ci contiennent une multitude de faits. Pour former une requête en bonne et due forme sur le fondement de l'article 94 (B), la défense aurait dû énoncer avec précision les faits dont elle souhaiterait le constat judiciaire. En l'espèce, la défense a failli à cette obligation, et la Chambre tient à lui rappeler que le simple fait de reproduire des paragraphes entiers d'un précédent jugement ne suffit pas pour déclencher l'exercice du pouvoir discrétionnaire qui lui est conféré par l'article 94 (B).

14. À la suite d'un examen minutieux des paragraphes soumis aux fins de constat judiciaire, la Chambre note que le paragraphe 58, qui décrit sommairement la structure de l'administration locale à Butare, contient des déclarations factuelles telles que celles-ci : «La commune est administrée par le bourgmestre …»; «… le conseil communal [qui] est composé … d'autant de membres que la commune comporte de secteurs»; «Les secteurs se subdivisent en cellules …»; «… l'unité de dix ménages étant la subdivision administrative de base». Il apparaît ainsi qu'il contient un certain nombre de faits qui pourraient éventuellement faire l'objet d'un constat judiciaire en vertu de l'article 94 (B). Or, la défense n'a pas précisé les faits dont elle sollicite le constat judiciaire. Qui plus est, elle n'a pas indiqué de quelle manière de tels faits influent sur l'instance en cours. En conséquence, la Chambre ne peut dresser le constat judiciaire du paragraphe 58.

[5] *Le Procureur c. Bizimungu et consorts*, requête intitulée «Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94 (B)», déposée le 24 septembre 2004, para. 5.

15. Paragraph 59 addresses, among others, the manner of appointment and removal of the *bourgmestre* and lists the various functions attached to this office. Although this paragraph contains a number of factual statements, the Defence has not specified which facts are subject to its application. The Chamber will therefore not take judicial notice of Paragraph 59.

16. Paragraph 60 discusses the effect introduction of multiparty politics in Rwanda in 1991 had on local and national power structures, including the powers of the *bourgmestre*. This paragraph contains a large number of facts, including some inferential or conclusive statements. For example, the paragraph states : "The subsequent local government elections were a clear victory for the opposition. Other *bourgmestres* were simply ousted by militia of an opposition party." Such evaluations of the political situation in Rwanda are not the appropriate subject matter of judicial notice under Rule 94 (B). Accordingly, the Chamber will not take judicial notice of Paragraph 60.

17. Paragraph 61 draws a parallel between the office of *bourgmestre* in Rwanda and the office of *maire* in France and *bourgmestre* in Belgium. It goes on to detail the functions of the office. The Chamber will not take judicial notice of Paragraph 61 as it contains a number of factual and non-factual statements and the Defence has neither identified which facts it invites the Chamber to judicially notice, nor have it demonstrated the relation of the facts to the current proceedings.

18. Paragraph 62 describes the relationship between the *bourgmestre* and the communal workforce as established in the administrative law. The paragraph concludes that since the *bourgmestre* has the power to hire and fire such employees, an employer/employee relationship existed. The Chamber notes that this paragraph contains a number of facts, legal inferences and conclusions which are not the appropriate subject of judicial notice under Rule 94 (B).

19. Paragraphs 63-66 discuss the legal relationship between the *bourgmestre* and the communal police. These paragraphs stipulate that the *bourgmestre* is ultimately responsible for the organization, functioning and control of the communal police. However, by law, the communal police fall under the direct command of the brigadier, who works under the authority of the *bourgmestre*. The Chamber has considered each of these paragraphs and is of the view that they contain a number of facts and interpretations of law. Judicial notice of this paragraph is therefore inappropriate.

20. Paragraphs 67-69 describe the relationship between the *bourgmestre* and the *Gendarmerie Nationale*. These paragraphs contain a number of facts. In addition, the Chamber considers that the legal relationship between the *bourgmestre* and the national *gendarmerie* can be readily ascertained by reference to the relevant laws of Rwanda. In the Chamber's opinion, even if one were to consider taking judicial notice of the relationship between the *bourgmestre* and the *Gendarmerie Nationale*, it would be more appropriate to take judicial notice of the existence of the relevant Rwandan laws which delineate the relationship, rather than a description of the legal situation contained in paragraphs of a prior judgement. For these reasons, the Chamber will not take judicial notice of Paragraphs 67-69.

15. Le paragraphe 59 traite, entre autres questions, des modalités de désignation et de révocation des bourgmestres et énumère les tâches liées à cette fonction. Bien qu'il contienne un certain nombre d'éléments de fait, la défense a omis de préciser sur quels faits porte sa requête. En conséquence, la Chambre ne peut procéder au constat judiciaire de ce paragraphe.

16. Le paragraphe 60 est une analyse des effets de l'instauration du pluralisme politique au Rwanda en 1991 sur les structures du pouvoir aux échelons national et local, notamment les pouvoirs du bourgmestre. Ce paragraphe comporte un grand nombre de faits, y compris des présomptions et des faits établis. Il y est indiqué par exemple que «[l]'opposition s'adjuge une nette victoire aux élections au niveau local qui s'ensuivent. D'autres bourgmestres sont simplement déposés par les milices d'un parti d'opposition.» De telles appréciations d e la scène politique rwandaise ne se prêtent pas à un constat judiciaire au sens de l'article 94 (B). En conséquence, la Chambre ne peut procéder au constat judiciaire du paragraphe 60.

17. Le paragraphe 61 établit une comparaison entre la fonction de bourgmestre au Rwanda et celles de maire en France et de bourgmestre en Belgique. Y figure une énumération des tâches incombant au titulaire de la fonction. La Chambre ne saurait dresser le constat judiciaire de ce paragraphe qui contient des indications factuelles et non factuelles, dans la mesure où la défense n'a ni précisé les faits qu'elle entend faire constater, ni démontré l'existence d'un lien entre ceux-ci et l'instance en cours.

18. Le paragraphe 62 indique que les rapports entre le bourgmestre et les employés communaux sont définis par des textes de droit administratif. Il y est expliqué que le fait que le bourgmestre ait le pouvoir d'engager et de licencier le personnel communal implique l'existence d'un rapport d'employeur à employé. La Chambre relève que ce paragraphe contient un certain nombre de faits, ainsi que des présomptions et des conclusions d'ordre juridique, qui ne se prêtent pas à un constat judiciaire au sens de l'article 94 (B).

19. Les paragraphes 63 à 66 consistent en une analyse des liens existant entre le bourgmestre et la police communale. Il y est indiqué que le bourgmestre assume, en dernier ressort, la responsabilité de l'organisation, du fonctionnement et du contrôle de la police communale. Cependant, la loi précise que le commandement de cette police est assuré par un brigadier placé sous l'autorité du bourgmestre. Après avoir examiné successivement les trois paragraphes susvisés, la Chambre estime qu'ils contiennent un certain nombre de faits et d'interprétations de la loi. Il ne serait donc pas bien avisé d'en dresser le constat judiciaire.

20. Les paragraphes 67 à 69 décrivent les liens entre le bourgmestre et la gendarmerie nationale. Ces paragraphes contiennent un certain nombre de faits. De plus, la Chambre estime que les liens juridiques entre le bourgmestre et la gendarmerie nationale peuvent être vérifiés directement dans les lois rwandaises pertinentes. De son point de vue, même si un constat judiciaire de la relation entre le bourgmestre et la gendarmerie nationale était à envisager, il serait plus judicieux de dresser celui des lois rwandaises qui fixent une telle relation, au lieu de procéder à une description du cadre juridique présenté dans des paragraphes d'un précédent jugement. La Chambre ne saurait donc dresser le constat judiciaire des paragraphes 67 à 69.

21. Paragraphs 70-71 describe the powers conferred by Rwandan law on the *bourgmestre* in times of war or national emergency. The Chamber considers that these paragraphs are not a proper subject of judicial notice under Rule 94 (B) as they contain inferences or interpretations of the law.

22. Paragraphs 72-76 recall the testimony of witnesses and describe the *de facto* powers of the particular *bourgmestre* who was on trial in the *Akayesu* case. The Chamber notes that the *de facto* powers of *bourgmestres* may differ from one case to another and, therefore, are appropriate matter for proof by evidence, rather than the subject of judicial notice.

23. Paragraph 77 summarises the findings of the Trial Chamber with respect to the powers and functions of Jean Paul Akayesu, as well as his relationship with the communal police and the *Gendarmerie Nationale*. It is the Chamber's view that since these findings relate specifically to *Bourgmestre* Akayesu, they are not an appropriate subject of judicial notice under Rule 94 (B).

24. In addition to the reasons given in support of the Chamber's finding on each paragraph, the Chamber notes that paragraphs 58 to 77 of the *Akayesu* Judgement come under the "Introduction" section of the Judgement, especially pages 40-46. The "Factual Findings" are contained in pages 78 to 191. Therefore Paragraphs 58 to 77 do not constitute "adjudicated facts" within the meaning of that term discussed above and cannot be the subject of judicial notice under Rule 94 (B).

25. The Chamber wishes to add that not only do the quoted paragraphs fail as "adjudicated facts" within the meaning of Rule 94 (B), the Defence has not shown how those facts relate to the current proceedings to qualify for judicial notice under the sub-Rule. The Defence has failed to demonstrate that they are facts in issue in the current proceedings.

26. Accordingly, the Chamber finds that the Motion does not fulfil the requirements for judicial notice under Rule 94 (B), and therefore lacks merit. Judicial Notice of paragraphs 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 and 77 of the *Akayesu* Judgement is therefore inappropriate.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 10 December 2004

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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21. Les paragraphes 70 et 7 1 décrivent les pouvoirs que la législation rwandaise confère aux bourgmestres en période de guerre et d'état d'urgence sur le plan national. La Chambre estime que ces paragraphes ne se prêtent pas à un constat judiciaire au sens de l'article 94 (B), car ils contiennent des présomptions et des interprétations de la loi.

22. Les paragraphes 72 à 76 reprennent les dépositions de divers témoins et décrivent les pouvoirs *de facto* du bourgmestre mis en cause dans l'affaire *Akayesu*. La Chambre relève que de tels pouvoirs peuvent différer d'une instance à l'autre, et doivent donc être établis par des preuves et non faire l'objet d'un constat judiciaire.

23. Le paragraphe 77 est une récapitulation des conclusions de la Chambre de première instance en ce qui concerne les pouvoirs et les attributions de Jean-Paul Akayesu, ainsi que les liens qu'il avait avec la police communale et la gendarmerie nationale. La Chambre est d'avis que ces conclusions, qui se rapportent spécifiquement au bourgmestre *Akayesu*, ne se prêtent pas à un constat judiciaire au sens de l'article 94 (B).

24. Outre les motifs qu'elle a invoqués à l'appui de ses conclusions sur chacun des paragraphes examinés, la Chambre relève que les paragraphes 58 à 77 du jugement *Akayesu* font partie de l'«Introduction», notamment aux pages 40 à 46, tandis que les conclusions factuelles figurent aux pages 78 à 191. En conséquence, les paragraphes 58 à 77 ne constituent pas des «faits admis» selon la définition donnée à ce terme plus haut, et ne sauraient emporter constat judiciaire sur le fondement de l'article 94 (B).

25. La Chambre tient à préciser non seulement que les faits énoncés dans les paragraphes cités ne répondent pas aux critères requis pour être considérés comme des «faits admis» au sens de l'alinéa B de l'article 94, mais ainsi que la défense n'a pas montré de quelle manière ces faits sont liés à l'instance en cours, ce que prescrit ledit alinéa. En fait, la Défense n'a pas réussi à démontrer que ces faits sont en cause dans l'instance en cours.

26. En conséquence, la Chambre juge que la requête ne satisfait pas aux conditions requises pour donner lieu à un constat judiciaire en vertu de l'article 94 (B), et qu'elle est dénuée de fondement. Le constat judiciaire des paragraphes 58 à 77 du jugement *Akayesu* est donc inopportun.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la défense en tous ses points.

[Signé] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

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Decision on Jérôme-Clément Bicamumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence 15 December 2004 (ICTR-99-50-T)

(Original : English)

Trial Chamber II

Judges : Khalida Rachid Khan, Presiding; Lee Gacuiga Muthoga; Emile Francis Short

Bicamumpaka – judicial notice, Rwandan judgement – existence or authenticity of the judgement is not in issue since it has been introduced into evidence before the Chamber with the concurrence of both Parties – findings of "adjudicated facts" regarding the credibility of three persons in a national judgement, the Tribunal cannot take judicial notice of any national judgement – Prosecution's duty to disclose any exculpatory material within its possession, Prosecution in a better position to obtain the documents, prior efforts of the Defence, requested material specifically identified, the Prosecution should attempt to bring such documents within its control or possession – motion denied

International instruments cited : Statute, art. 8, 9 and 23 – Rules of procedure and evidence, Rules 2, 54, 68, 94 (B)

International cases cited :

I.C.T.R. : Trial Chamber III, The Prosecutor v. Joseph Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003 (ICTR-98-44-I,* Reports 2003*, p. 1382) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 April 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September 2004 (ICTR-99-50,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Joseph Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2004 (ICTR-98-44,* Reports 2004*, p. X)*

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 the "Motion of Defendant Bicamumpaka for Judicial Notice of 8th December 2000 Rwandan Judgement and in the Alternative Order Disclosure of Exculpatory Evidence", filed on 1 October 2004 (the "Motion");

HAVING RECEIVED

(i) The "Prosecutor's Response to Defendant Bicamumpaka for Judicial Notice of 8th December 2000 Rwandan Judgement and in the Alternative Order Disclosure of Exculpatory Evidence", filed on 11 October 2004 (the "Response");

(ii) "Reply to Prosecutor's Response to Motion of Defendant Bicamumpaka for Judicial Notice of 8th December 2000 Rwandan Judgement and in the Alternative Order Disclosure of Exculpatory Evidence", filed on 18 October 2004 (the "Reply");

HEREBY DECIDES the Motion on the basis of the written briefs of the Parties, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

ARGUMENTS OF THE PARTIES

Defence Submissions

Request for Judicial Notice, Pursuant to Rule 94 (B) of the Rules

1. The Motion seeks judicial notice of the existence and authenticity of the Judgement rendered by the Court of First Instance of Kigali on 8 December 2000 (the "Rwandan Judgement")[1]. The Motion also requests that the Trial Chamber take judicial notice of the Rwandan Judgement's findings concerning the credibility of Witnesses DCH, GHY, and GHT, who testified before the Tribunal during the period 16 September 2004 through 1 October 2004[2]. The Defence submits that the Trial Chamber should recognize the findings of the Rwandan Judgement for the purposes of impeachment and not for the truth of the matters contained in the findings.

2. The Motion asserts that the word "Tribunal" in the text of Rule 94 (B) of the Rules should be "construed to mean any national court with jurisdiction concurrent to that of the ICTR"[3]. The Defence maintains that the Rwandan Judgement is "legitimate material for judicial notice"[4] because it was rendered by a national court that has concurrent jurisdiction with the Tribunal to prosecute serious violations of international humanitarian law committed in Rwanda in 1994. The Defence cites Articles 8 and 9 of the Statute of the Tribunal as authority for this proposition.

3. The Defence argues that "the laws of Rwanda enjoy a special status before the ICTR."[5] In support of this argument, the Defence refers to Article 23 of the Statute, which directs the ICTR Trial Chambers, in imposing prison sentences, to consider the general sentencing practice of the courts of Rwanda.

4. The Defence asserts, in accordance with the doctrine of issue estoppel, that the findings of the Rwandan Judgement, regarding the credibility of Witnesses DCH, GHY, and GHT, should apply to the present case for the purpose of impeachment, though not for the truth of the matters asserted therein.

[1] Motion, para. 10.
[2] Motion, para. 11.
[3] Motion, paras. 8 and 14.
[4] Motion, para. 10.
[5] Motion, para. 15.

5. The Defence further submits that only a few individuals accused of serious crimes committed during the 1994 events in Rwanda will be tried by the ICTR. The great majority of cases will be tried by the Rwandan Courts. Therefore, the Defence argues, judicial notice of findings in the Rwandan Judgement of 8 December 2000, regarding witness credibility, will promote judicial economy and avoid inconsistent judgements rendered by the Rwandan Courts and the ICTR.

Request for an Order for the Disclosure of Exculpatory Material, Pursuant to Rules 54 and 68 of the Rules

6. The Defence, in the alternative, seeks an order from the Trial Chamber to direct the Prosecution to produce "copies of all transcripts and witness statements before the Rwandan Court of First Instance of Kigali in the trial proceeding culminating in the Judgement of 8 December 2000."[6] The Defence indicates that the material requested includes, but is not limited to, the transcripts of all witnesses who testified in the Rwandan trial, witness statements given by Witness GHY and Witness DCH, notes of interviews, records of court proceedings, and any correspondence from witnesses that may be contained in the case file.

7. The Motion submits that the Rwandan Judgement was disclosed by the Prosecution to the Defence on 3 June 2004 and admitted into evidence on 30 September 2004, as Exhibit 3D8, in the present case. The Motion further acknowledges that the Defence used the Rwandan Judgement in its cross-examination of Prosecution Witnesses GHY and DCH.

8. The Defence asserts that it has specifically identified the transcripts and other material related to the Rwandan Judgement rendered on 8 December 2000. According to the Defence, the requested material will verify the findings of the Rwandan Judgement, regarding inconsistencies in the testimonies of Witnesses DCH, GHT, and GHY, and will impeach the credibility of these witnesses.

9. The Defence, citing two Decisions rendered by the Trial Chamber[7], argues that it is the Prosecution's duty, pursuant to Rule 68 of the Rules, to obtain the requested material from the Rwandan Court and disclose it to the Defence. The Defence asserts that the Prosecution's obligation to secure evidence is not limited to documents currently within its control or custody. This obligation applies to exculpatory material, covered by Rule 68, which is specifically indicated by the Defence and which the Prosecution is in a better position to obtain.

The Prosecution Response

Request for Judicial Notice

10. The Prosecution submits that the Chamber, pursuant to Rule 94 (B) of the Rules, is authorized to take judicial notice only of adjudicated facts from proceedings

[6] Motion, para. 20.

[7] *Casimir Bizimungu et al*., Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004, para. 9; *Joseph Nzirorera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2004, para.11.

of the ICTR. Therefore, judicial notice of the findings of the Court of First Instance of Kigali is inappropriate.

Request for an Order for Disclosure of Exculpatory Material, Pursuant to Rules 54 and 68 of the Rules

11. The Prosecution asserts that the Defence, by its conduct, has waived its right to further disclosure of material insofar as Witnesses GHT, DHY, and DCH have completed their evidence and the Chamber has discharged them, without reservation. According to the Prosecution, the Defence used the contents of the Rwandan Judgement to cross-examine Witnesses GHT, GHY, and DCH and failed to raise the issue of the requested material before these witnesses gave testimony. Therefore, the Prosecution argues, the Defence is precluded from seeking further disclosure in regard to the witnesses' evidence.

12. The Prosecution submits that it is not in possession of the material requested by the Defence and that, pursuant to Rule 68 of the Rules, it has no obligation to seek and disclose the requested material.

13. According to the Prosecution, the Defence has not demonstrated that it has made any prior efforts to obtain the requested material from the Rwandan authorities by its own means. The Prosecution submits that the Defence has been in possession of the Rwandan Judgement, in both Kinyarwanda and in French, since June 2004, and could have obtained the requested documents through an order of *Subpoena Duces Tecum*, before the witnesses testified in September and October 2004. The Prosecution argues, therefore, that the Defence Motion for disclosure of material related to the Rwandan Judgement should be denied.

The Defence Reply

14. In its Reply, the Defence first states that it made no attempt to obtain the requested material, prior to cross-examination, because it received no advance notice that the testimonies of Witnesses of GHY and GHT would contradict the Rwandan Judgement. According to the Defence, a second reason that no prior efforts were made to obtain the material is because of the "long administrative process"[8] involved in obtaining any public document from the Rwandan authorities. In view of these circumstances, the Defence requests the Trial Chamber, pursuant to Rules 54 and 68 of the Rules, to order the Prosecution to seek the requested material and, upon receipt, to disclose it to the Defence.

[8] Reply, para. 10.

The Request for Judicial Notice

Facts Agreed Upon Through the Admissions Process : Existence and Authenticity of the Rwandan Judgement

15. The Motion seeks judicial notice of the "existence and authenticity" of a Rwandan Judgement rendered by the Court of First Instance of Kigali on 8 December 2000[9]. The Chamber notes that the Rwandan Judgement was introduced into evidence, as Exhibit 3D8, with the concurrence of both Parties. As such, it constitutes evidence in the trial, and its existence or authenticity therefore is not in issue.

Contested Findings in the Rwandan Judgement

16. The Motion, relying on Rule 94 (B) of the Rules, also asserts that the Chamber should recognize the findings of the Rwandan Judgement in relation to the credibility of Prosecution Witnesses GHT, DCH, and GHY, who have already testified in this case. Rule 94 of the Rules states :

> 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 of *propio 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.

17. Pursuant to Rule 94 (B), a Chamber may decide to take judicial notice of "adjudicated facts" or "documentary evidence from other proceedings of the Tribunal". In the present case, the Defence refers only to the findings of "adjudicated facts", regarding the credibility of three persons, in a judgement rendered by a Rwandan National Court. The Defence submits, as a basis for its Motion, that the reference to the "Tribunal" in Rule 94 (B) "should be construed to mean any court with jurisdiction concurrent to that of the ICTR."[10]

18. The Chamber observes that "the Tribunal" is defined in Rule 2 of the ICTR Rules of Procedure and Evidence as :

> The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Terri34tory of Rwandan 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;

19. Accordingly, "the Tribunal" cannot be interpreted to include a Rwandan national court or any other national court, tribunal, or body. The Chamber therefore cannot

[9] Motion, para. 11.
[10] Motion, para. 8.

take judicial notice of the Rwandan Judgement of 8 December 2000, and discussion of further arguments submitted by the Defence in support of its Motion for judicial notice is unnecessary.

Request for an Order for Disclosure of Exculpatory Material, Pursuant to Rules 54 and 68 of the Rules

20. Rule 68 (A) of the Rules provides :

> 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.

21. In its Decision in *Bizimungu et al.,* this Trial Chamber interpreted the Prosecution's obligations, pursuant to Rule 68 (A), as follows :

> The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, where, as a practical reality, the Prosecution enjoys greater leverage than the Defence[11].

22. In accordance with the above interpretation of Rule 68 (A), the Trial Chamber has carefully reviewed the Parties' submissions for disclosure of material related to the proceedings of the Rwandan Judgement of 8 December 2000. Specifically, the Chamber notes the Prosecution's duty to disclose any exculpatory material within its possession to the Defence. However, if the Prosecution does not have in its custody this material, it should still "attempt to bring such documents within its control or possession"[12], provided that the Defence specifically identifies the requested material, demonstrates that it has made prior efforts to obtain the material, and shows that the Prosecution is in a better position than the Defence to procure the material. Thus, the Prosecution's duty to disclose exculpatory material, which is not currently within its possession, does not arise until the Defence satisfies the above conditions.

[11] *Bizimungu et al*., Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004, para. 9.

[12] *Bizimungu et al*., Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004, para. 9.

23. In the Chamber's view, the Defence in this case has failed to define the material sought with the requisite precision. Nor has it demonstrated in what way the Prosecution would be in a better position than the Defence to obtain the material requested or what efforts, if any, the Defence has made to obtain the material by its own means. These criteria must be satisfied before the Defence seeks recourse to the efforts of the Prosecution[13].

24. According to the Tribunal's jurisprudence, a Chamber may not order the disclosure of material which "contradicts or calls into doubt the information provided by any prosecution witness, or which affects their credibility", unless such material is specifically identified[14].

25. In the present case, the Defence has requested "copies of all transcripts and witness statements before the Rwandan Court of First Instance in Kigali in the trial proceedings culminating in the Judgement of 8th December 2000."[15] In the Chamber's view, the Defence has failed to specify, in terms of date, witness, or nature of the event, the evidence sought and appears to be merely "embarking on a fishing expedition to obtain exculpatory material."[16]

26. In conclusion, the Chamber reiterates that Rule 68 (A) does not impose an obligation on the Prosecution to hunt for and disclose materials which are not in its possession or control, unless the Defence satisfies the requisite criteria specified above. According to the submissions of both Parties, the Prosecution disclosed the Rwandan Judgement to the Defence on 3 June 2004, in Kinyarwanda, and on 18 June 2004, in French. In the Trial Chamber's view, the Defence was informed of the source of the material at that time and could have made a reasonable effort to obtain the evidence presently requested, before the testimonies of Prosecution Witnesses DCH, GHY, and GHT, in September and October 2004.

27. The Trial Chamber therefore is not satisfied that the Defence has demonstrated sufficient grounds, pursuant to Rule 68 (A) of the Rules or any other Rule, for the Chamber to order the Prosecution to seek and disclose the requested material.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the motion in its entirety.

Arusha, 15 December 2004.

[Signed] : Khalida Rachid Khan; Lee Gacuiga Muthoga; Emile Francis Short

[13] *Nzirorera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, paras. 11 and 12.

[14] *Nzirorera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 12.

[15] Motion, para. 26.

[16] *Bizimungu et al*., Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, para. 10.

The Prosecutor v. Simon BIKINDI

Case N° ICTR-2001-72

Case History

- Name : BIKINDI
- First Name : Simon
- Date of Birth : 1954
- Sex : male
- Nationality : Rwandan
- Former Official Function : Composer, singer and director of the performance group *Irindiro* Ballet
- Counts : Conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (murder and persecution)
- Date of Indictment's Amendments : 22 October 2003
- Date and Place of Arrest : 12 July 2001, in Leiden, The Netherlands
- Date of Transfer : 27 March 2002
- Date of Initial Appearance : 4 April 2002
- Date Trial Began : 18 September 2006
- Date of Judgement and content of the Sentence : 2 December 2008, Sentenced to 15 years of imprisonment
- Case on Appeal

Le Procureur c. Simon BIKINDI

Affaire N° ICTR-2001-72

Fiche technique

- Nom : BIKINDI
- Prénom : Simon
- Date de naissance : 1954
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : chanteur-compositeur et directeur du ballet *Irindiro*
- Chefs d'accusation : entente en vue de commettre le génocide, complicité dans le génocide, incitation directe et publique à commettre le génocide, crimes contre l'humanité (assassinat et persécution)
- Date de modification subséquente portée à l'acte d'accusation : 22 octobre 2003
- Date et lieu de l'arrestation : 12 juillet 2001, à Leiden, aux Pays-Bas
- Date du transfert : 27 mars 2002
- Date de la comparution initiale : 4 avril 2002
- Date du début du procès : 18 septembre 2006
- Date du jugement et contenu du prononcé de la peine : 2 décembre 2008, condamné à 15 ans d'emprisonnement
- Procès en appel

Decision on Defence Urgent Application for Stay of Proceedings and for Suspension of the 30-Day Period Pursuant to Rule 50 (C) of the Rules of Procedure and Evidence 24 March 2004 (ICTR-2001-72-I)

(Original : English)

Trial Chamber III

Judges : Lloyd G. Williams, Q.C., Presiding; Andrésia Vaz; Khalida Rachid Khan

Bikindi – stay of proceedings – filing of preliminary motions, suspension – amendment of indictment, confirmation – good cause – motion denied

International instruments cited : Statute, Art. 1, 18 (2), 19 (1)-(3), and 20 – Rules of procedure and evidence, Rules 50 (C), 72 (G) and 73 (A)

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

SITTING as Trial Chamber III composed of Judges Lloyd G. Williams, Q.C., Presiding, Judge Andrésia Vaz, and Judge Khalida Rachid Khan ("Chamber");

BEING SEIZED of the Defence "Urgent Application for Stay of Proceedings and for Suspension of the Running of the Period of 30 Days Pursuant to Rule 50 (C) of the Rules of Procedure and Evidence" ("Motion") filed on 16 March 2004;

CONSIDERING the Prosecutor's Response filed on 17 March 2004;

RECALLING the Decision rendered by the Presiding Judge sitting as the Trial Chamber for the further initial appearance on 8 March 2004[1];

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules");

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

[1] T. 8 March 2004, pp. 2-3.

Décision relative à la demande intitulée «Defence Urgent Application for Stay of Proceedings and for Suspension of the 30-Day Period Pursuant to Rule 50 (C) of the Rules of Procedure and Evidence» 24 mars 2004 (ICTR-2001-72-I)

(Original : Anglais)

Chambre de première instance III

Juges : Lloyd G. Williams, Q.C., Pr6sident de Chambre; Andrésia Vaz; Khalida Rachid Khan

Bikindi – sursis à la procédure – exceptions, suspension de délai – acte d'accusation modifié, confirmation – légalité de la comparution initiale – exception préjudicielle – requête rejetée

Intruments internationaux cités : Statut, art. 1, 18 (2), 19 (1) à (3) et 20 – Règlement de procédure et de preuve, art. 50 (C), 72 (G) and 73 (A)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»)

SIEGEANT en la Chambre de première instance III composée des juges Lloyd G. Williams, Q.C., Président de Chambre, Andrésia Vaz et Khalida Rachid Khan (la «Chambre»),

SAISI de la demande de la défense intitulée «Urgent Application for Stay of Proceedings and for Suspension of the Running of the Period of 30 Days Pursuant to Rule 50 (C) of the Rules of Procedure and Evidence» (la «requête»), déposée le 16 mars 2004,

VU la réponse du Procureur déposée le 17 mars 2004,

RAPPELANT la décision rendue par la Chambre de première instance en la personne du Président de Chambre le 8 mars 2004 dans le cadre de la nouvelle comparution initiale[1],

VU le Statut du Tribunal (le «Statut» et le Règlement de procédure et de preuve (le «Règlement»),

STATUANT sur la seule base des mémoires déposés par les parties conformément à l'article 73 (A) du Règlement,

[1] Compte rendu de l'audience du 8 mars 2004, pp. 2 et 3.

ARGUMENTS OF THE PARTIES

Defence

1. Relying on Articles 1, 18 (2), 19 (1)-(3), and 20 of the Statute, the Defence is requesting the Trial Chamber to order a stay of the proceedings and accordingly a suspension of the 30-day period for the filing of preliminary motions, pursuant to Rule 50 (C) of the Rules. The Defence argues that the Amended Indictment has not been confirmed, and therefore submits that the subsequent plea by the Accused during the further initial appearance is irregular and unlawful. The Defence contends that it will file a substantive motion raising weighty issues of law in this regard. In light of the Defence's position on the validity of an unconfirmed Amended Indictment, it moves for the Trial Chamber to suspend the 30-day time-limit to file preliminary motions until such time that a decision is rendered on its "substantive motion."

Prosecution

2. The Prosecution submits that the relief being sought had already been decided upon during the further initial appearance of the Accused on the 8 March 2004, at which the Presiding Judge held that the Indictment was amended pursuant to a Court Order, and therefore does not need further confirmation. The Prosecution accordingly moves that the present Motion be dismissed.

DELIBERATIONS

3. The Chamber holds the view that where leave is granted to amend an indictment, or where such an amendment is made following an order of the Court, the Rules do not require such an amendment to be further confirmed.

4. Regarding the 30-day period for the filing of preliminary motions, Rule 72 (G) states that "The Trial Chamber may […] grant relief from the waiver upon showing good cause".

5. In the present case, the Chamber is of the view that the preparation of a substantive motion regarding the need for confirmation of an amended indictment and challenging the lawfulness of the further initial appearance cannot be considered as good cause for a stay of the 30-day time-limit for the filing of preliminary motions. The Chamber considers the present and, any further substantive motion, to fall within the category of preliminary motions. The Accused is therefore required to comply with the provisions of Rule 50 (C). The Application therefore falls to be dismissed.

ARGUMENTS DES PARTIES

La défense

1. Sur le fondement des articles 1, 18 (2), 19 (1) à (3) et 20 du Statut conformément à l'article 50 (C) du Règlement, la défense prie la Chambre de première instance de rendre une décision aux fins de sursis à la procédure et, en conséquence, de suspension du délai de 30 jours prescrit pour permettre à l'accusé de soulever des exceptions. La défense fait valoir que l'acte d'accusation modifié n'a pas été confirmé et soutient qu'il résulte de cela que le plaidoyer fait subséquemment par l'accusé au cours de la nouvelle comparution initiale est irrégulier et illégal. Elle déclare qu'elle entend déposer une adéquate substantielle et l'effet de soulever d'importantes questions de droit relativement à ce point. Sur la base de la position par elle articulée sur la validité d'un acte d'accusation modifié non confirmé, la défense demande à la Chambre de première instance de suspendre le dé1ai de 30 jours prescrit pour soulever des exceptions, jusqu'à ce qu'une décision soit rendue relativement à sa «requête substantielle».

Le Procureur

2. Le Procureur soutient que la Chambre a déjà statué sur la mesure sollicitée, au cours de la nouvelle comparution initiale de l'accusé qui a eu lieu le 8 mars 2004 et durant laquelle le Président de Chambre a déclaré que l'acte d'accusation avait été modifié conformément à une ordonnance du Tribunal et que, par conséquent, une autre confirmation n'était pas nécessaire. Cela étant, le Procureur demande à la Chambre de rejeter la présente requête.

DÉLIBÉRATION

3. La Chambre estime que lorsque l'autorisation de modifier un acte d'accusation est accordée ou lorsqu'une telle modification est faite suite à une décision du Tribunal, une nouvelle confirmation de la modification n'est pas de droit en vertu du Règlement.

4. S'agissant du dé1ai de 30 jours prescrit pour permettre à l'accusé de soulever des exceptions, l'article 72 (G) dispose que «la Chambre de première instance peut [...] déroger à ces dé1ais pour des raisons jugées valables».

5. En l'espèce, la Chambre est d'avis que la préparation d'une proposition de fond concernant la nécessité de la confirmation d'un acte d'accusation modifié et contestant la légalité de la nouvelle comparution ne peut être considérée comme une raison valable pour suspendre le délai de 30 jours prescrit pour soulever des exceptions préjudicielles. La Chambre estime que la présente requête et toute requête substantielle à venir relèvent de la catégorie des exceptions préjudicielles. Cela étant, elle prescrit à l'accusé de se conformer aux dispositions de l'article 50 (C) du Règlement. La demande de la défense doit de ce fait être rejetée.

FOR THE ABOVE-MENTIONED REASONS,

THE CHAMBER

DENIES the Motion; and

ORDERS the Defence to file any further preliminary motions within the prescribed time limit, which expires on 7 April 2004.

Arusha, 24 March 2004

[Signed] : Lloyd G. Williams, Q.C.; Andrésia Vaz; Khalida Rachid Khan

***

PAR CES MOTIFS,

LA CHAMBRE

REJETTE la requête; et

ORDONNE à la défense de soulever toutes autres exceptions préjudicielles requises dans les limites du délai prescrit qui expire le 7 avril 2004.

Fait à Arusha, le 24 mars 2004

[Signé] : Lloyd G. Williams, Q.C.; Andrésia Vaz; Khalida Rachid Khan

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Acte d'accusation modifié 31 août 2004 (ICTR-2001-72-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs à lui conférés par l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut du Tribunal»), accuse

Simon BIKINDI

d'entente en vue de commettre le génocide, de génocide, ou subsidiairement de complicité dans le génocide, d'incitation directe et publique à commettre le génocide, de crimes contre l'humanité (Assassinat et persécution), par l'application des Articles 2 et 3 du Statut du Tribunal et tel qu'indiqué ci-après :

II. L'ACCUSÉ :

Simon Bikindi est né le 28 septembre 1954 dans la commune de Rwerere, préfecture de Gisenyi (Rwanda). A l'époque des faits visés dans le présent acte d'accusation, Simon Bikindi était un célèbre compositeur et chanteur de musique populaire et le directeur du Ballet lrindiro. Simon Bikindi était également fonctionnaire au Ministère de la jeunesse et des sports du Gouvernement rwandais et membre du parti politique MRND.

III. ACCUSATIONS ET RELATION CONCISE DES FAITS

Chef I : Entente en vue de commettre le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Simon Bikindi d'entente en vue de commettre le génocide, sous l'empire de l'article2 (3) (b) du Statut, en ce que entre les 1er janvier 1994 et 31 décembre 1994, Simon Bikindi s'est effectivement entendu avec d'autres personnes, y compris, mais sans s'y limiter, les responsables politiques du MRND aux niveaux régional et national, y compris, mais sans s'y limiter, Callixte Nzabonimana, Juvénal Habyarimana, Joseph Nzirorera; des chefs de l'*Interahamwe*, dont Robert Kajuga; et d'autres personnes chargées de la programmation et du fonctionnement des organes de presse, y compris, mais sans s'y limiter, Jean-Bosco Barayagwiza, Ferdinand Nahimana, Joseph Serugendo et Félicien Kabuga, en vue de tuer des membres de la population tutsie ou de porter une atteinte grave à leur intégrité physique ou mentale, dans l'intention de détruire, en tout ou en partie :, un groupe racial ou ethnique, comme suit :

En vertu de l'article 6 (1) du Statut «par ses actes positifs, en ce que l'accusé a planifié, incité à commettre, ordonné de commettre, commis ou de toute autre manière

aidé et encouragé à planifier, préparer ou exécuter l'infraction retenue contre lui, en ce que :

1. Entre le 1er janvier et le 31 décembre 1994, les citoyens rwandais étaient individuellement identifiés selon les classifications ethniques ou raciales suivantes : Tutsi, Hutu et Twa.

2. Entre le 1er janvier 1994 et le 17 juillet 1994, le Rwanda a été déchiré par un conflit armé ne présentant pas un caractère international.

Relation concise des faits :

3. Simon Bikindi s'est entendu ou a collaboré avec le chef d'État Juvénal Habyarimana, le Ministre de la jeunesse et des sports Callixte Nzabonimana, le chef des *lnterahamwe* au niveau national Robert Kajuga, les responsables politiques nationaux du MRND tels que Mathieu Ngirumpatse et Joseph Nzirorera, et les chefs militaires affiliés au MRND tels que Théoneste Bagosora, en vue de militariser l'aile jeunesse du MRND, les *Interahamwe*, de leur inculquer une idéologie anti-tutsie et de faire de la propagande anti-tutsie, tel que décrit ci-après :

4. Au début des années 90, le cercle restreint de chefs militaires et de responsables du MRND qui entouraient le Président Habyarimana a conçu et mis en place une stratégie visant à renforcer sa mainmise sur le Gouvernement face à la montée d'une opposition politique interne et devant la menace d'une attaque militaire du FPR. Cette stratégie visait à inciter à la haine et à la peur des Tutsis ainsi qu'à les faire passer pour des *ibityso*, c'est-à-dire les complices de l'intérieur d'une armée étrangère d'envahisseurs. Cette stratégie visait également à mettre sur pied des milices civiles alignées exclusivement sur l'idéologie du MRND et armées, entraînées et conditionnées pour exterminer la population tutsie.

5. Particulièrement, en décembre 1991, Juvénal Habyarimana, à l'époque commandant en chef des Forces armées rwandaises (FAR) et chef d'État, a mis place une commission militaire chargée d'élaborer un programme visant à vaincre l'ennemi sur les plans militaire, médiatique et politique. Cette commission a produit un rapport définissant l'ennemi comme étant : «... Les Tutsis de l'intérieur ou de l'extérieur, extrémistes nostalgiques du pouvoir, qui n'ont jamais reconnu et ne reconnaissent toujours pas les acquis de la révolution sociale de 1959, et qui cherchent à récupérer le pouvoir au Rwanda par tous les moyens, y compris par les armes». Le chef d'état-major de l'armée, Deogratias NSABIMANA, a distribué des extraits de ce rapport aux commandants de secteur militaires.

6. Par la suite, les chefs militaires affiliés au MRND ont donné aux milices *Interahamwe* une formation militaire et les ont initiées au maniement des armes. Ils ont également mobilisé l'aile jeunesse du MRND pour qu'elle s'attaque aux Tutsis et aux membres de l'opposition politique considérés comme des complices de l'ennemi. Cet entraînement militaire a été organisé partout au Rwanda, surtout dans des camps militaires à Kigali, à Mutara et à Gisenyi.

7. Avant les événements d'avril 1994, Simon Bikindi a participé à la campagne visant à vaincre militairement l'ennemi en organisant des tournées destinées à attirer de nouveaux adhérents dans les rangs du MRND et en participant au recrutement et à la formation militaire des milices *lnterahamwe*, sachant pertinemment et dans un

tel dessein, que ces éléments seraient déployés dans des opérations d'extermination dirigées contre les Tutsis.

8. À titre d'exemple, en janvier 1994, Simon Bikindi a pris part à une formation militaire organisée à l'intention des milices *Interahamwe* à Kigali.

9. Simon Bikindi a participé à la campagne visant à vaincre médiatiquement l'ennemi en collaborant avec Ferdinand Nahimana, Jean-Bosco Barayagwiza, Félicien Kabuga, André NTAGERURA, Georges RUTAGANDA et Joseph Nzirorera, notamment, dans le but de lancer la Radio-Télévision Libre des Milles Collines, SA (RTLM), une station de radio privée alignée sur les courants politiques extrémistes du MRND et de la CDR. En partie conçue comme une alternative à Radio Rwanda, puis soumise aux restrictions de programmation imposées par I'ORINFOR et le Ministère de l'information nouvellement mis en place, la RTLM diffusait de la musique populaire entrecoupée d'émissions faisant appel à la participation des auditeurs, de bulletins d'information et d'éléments véhiculant de la propagande anti-tutsie.

10. Bien qu'il résulte du préambule au statut portant création de la RTLM qu'elle a pour objectif de faciliter la diffusion d'idées diverses et d'informations objectives, la RTLM a en fait été mise sur pied pour véhiculer la propagande anti-tutsie. Ses émissions anti-tutsies étaient souvent entrecoupées d'intermèdes durant lesquels des sélections musicales composées et interprétées par Simon Bikindi étaient diffusées. Les programmes diffusés par la RTLM et les enregistrements musicaux interprétés par Simon Bikindi avaient les mêmes objectifs : mobiliser les auditeurs, notamment, les miliciens civils, les forces armées gouvernementales et les masses paysannes hutues rwandaises, prôner la solidarité entre Hutus et faire passer les Tutsis pour les complices de l'ennemi.

11. La RTLM a reçu un soutien logistique de la part de Radio Rwanda, radio officielle, avec laquelle elle a, à ses débuts, partagé les mêmes fréquences, permettant ainsi à la radio d'Etat d'émettre à tout moment sur les ondes de la radio privée. Le Ministre des transports et des communications, André NTAGERURA, l'un des responsables historiques du MRND, a encouragé le Gouvernement à accorder à la RTLM ce soutien apparent en l'autorisant de continuer à émettre en dépit des violations de la législation rwandaise en vigueur en matière de médias qu'elle commettait.

12. Callixte Nzabonimana, membre du MRND, a, par l'intermédiaire du Ministère de la jeunesse et des sports, autorisé et parrainé les répétitions et les enregistrements des compositions musicales produites par Simon Bikindi ainsi que les représentations données par le BALLET IRINDIRO, sa troupe de danse. Simon Bikindi a monté et répété ses compositions au niveau des communes avec des groupes de jeunes, en bénéficiant également du concours du Ministère de la jeunesse et des sports, qui a mis à la disposition des jeunes des fonds affectés à cet effet, par l'intermédiaire des bourgmestres.

13. Simon Bikindi consultait le Président Juvénal Habyarimana, le Ministre de la jeunesse et des sports Callixte Nzabonimana et les autorités militaires affiliées au MRND au sujet des paroles de ses chansons; il enregistrait ses compositions dans les studios de Radio Rwanda avec l'aide de Joseph Serugendo; il faisait don de ses bandes à la RTLM; et il interprétait ses compositions lors de réunions de l'*Interahamwe* et aux réceptions du MRND et de la CDR, dont bon nombre attiraient un public considérable.

14. La RTLM passait plusieurs fois par jour les compositions de Simon Bikindi, diffusées en général aux informations tôt le matin, à l'heure du déjeuner et en début de soirée. Après la reprise de la guerre civile qui s'est déroulée au Rwanda, entre avril et juillet 1994, dans le cadre d'un conflit armé à caractère non international, la RTLM a diffusé toute la journée sans arrêt les compositions de Simon Bikindi. À cette occasion, les chansons les plus diffusées étaient *Bene sebahinzi* et *Naga abahutu*, qui appelaient à la solidarité hutue face à un ennemi commun, à savoir les Tutsis et les Hutus modérés.

15. Au cours des mois d'avril, de mai, de juin ainsi que pendant les premiers jours de juillet 1994, des centaines de milliers de civils, hommes, femmes, enfants et personnes âgées d'origine tutsie ont été persécutés, attaqués, y compris sous la forme d'attentats à la pudeur accompagnés de violences, torturés, séquestrés et tués dans les préfectures de Kigali-ville et de Gisenyi, et partout ailleurs au Rwanda. Ces attaques et ces massacres étaient la conséquence de la campagne orchestrée par le Gouvernement en vue de vaincre l'ennemi, en s'assurant le concours des autorités administratives locales et des civils, organisés au sein de milices civiles ou agissant individuellement, dans le but d'exterminer les Tutsis.

16. Il résulte de l'efficacité avec laquelle les paysans hutus rwandais ont été mobilisés pour s'attaquer aux Tutsis entre le 7 avril 1994 et la mi-juillet 1994, ainsi que du caractère systématique des attaques perpétrées par les forces militaires du Gouvernement intérimaire, y compris les milices civiles équipées, entraînées et conditionnées pour s'en prendre aux civils tutsis, qu'il y a eu planification et entente au plus haut niveau de l'élite politique et militaire, ainsi que des milieux d'affaires, des médias et des autorités gouvernementales affiliées au MRND. À l'instar de ses compositions musicales et des représentations en direct qu'il donnait, les activités menées par Simon Bikindi aux fins du recrutement et de l'entraînement des *Interahamwe* de même que l'autorité qu'il exerçait sur ceux-ci constituaient des éléments du plan de mobilisation des milices civiles visant à détruire, en tout ou en partie, les Tutsis.

17. À la suite de la défaite militaire des FAR et du repli du Gouvernement intérimaire sur le Zaïre voisin, Simon Bikindi a continué à composer et à interpréter des chansons anti-tutsies, de même qu'à collaborer avec les chefs militaires des ex-FAR et les anciens responsables du Gouvernement affiliés au MRND, afin de poursuivre la campagne anti-tutsie en vue de reconquérir le pouvoir.

Chef 2 : Génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Simon Bikindi de GÉNOCIDE, sous l'empire de l'article 2 (3) (a) du Statut, en ce que entre le 7 avril 1994 et le 14 juillet 1994 ou à ces dates, à travers tout le territoire du Rwanda, notamment dans les préfectures de Kigali-ville et de Gisenyi, Simon Bikindi a été responsable de meurtre ou d'atteintes graves à l'intégrité physique ou mentale de membres de la population tutsie, commis dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique ;

En vertu de l'article 6 (1) du Statut : par ses actes positifs, en ce que l'Accusé a planifié, incité à commettre, ordonné de commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer et exécuter l'infraction retenue contre lui ; et

En vertu de l'article 6 (3) du Statut : du fait que l'accusé avait effectivement eu connaissance ou avait des raisons d'être instruit des actes ou omissions de ses subordonnés, parmi lesquels figuraient des *Interahamwe* et des éléments des milices civiles, notamment des *Interahamwe* membres de son Ballet *Irindiro*, et qu'il n'a pas pris les mesures nécessaires et raisonnables pour les faire cesser ou les prévenir, pour en punir les auteurs à raison de leur participation à la planification, à la préparation et à l'exécution de l'infraction retenue contre lui ;

Ou subsidiairement,

Chef 3 : Complicité dans le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Simon Bikindi de COMPLICITÉ DANS LE GÉNOCIDE, sous l'empire de l'article 2 (3) (e) du Statut, en ce que entre le 1er janvier 1994 et le 14 juillet 1994 ou à ces dates, partout au Rwanda, notamment dans les préfectures de Kigali-ville et de Gisenyi, Simon Bikindi a été responsable de meurtre et d'atteintes graves à l'intégrité physique ou mentale de membres de la population tutsie, commis dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique, comme suit :

En vertu de l'article 6 (1) du Statut : par ses actes positifs, en ce que l'accusé a planifié, incité à commettre, ordonné de commettre, commis et aidé et encouragé à planifier, préparer et exécuter l'infraction retenue contre lui en ce que :

Relation concise des faits aux chefs 2 et 3 :

18. Les paragraphes 1 à 17 ci-dessus sont inclus ci-après à titre de référence.

19. Lors des événements visés dans le présent acte d'accusation, notamment du 6 avril 1994 aux premiers jours de juillet 1994, les milices *Interahamwe* ont entrepris une campagne d'extermination de la population tutsie du Rwanda. Des centaines de milliers d'hommes, de femmes et d'enfants tutsis ont été tués.

20. Simon Bikindi, agissant de concert avec d'autres, a planifié, incité à commettre et préparé ces massacres en recrutant pour les milices *lnterahamwe*, en organisant des entraînements militaires à leur intention et en y prenant part, en leur inculquant une idéologie anti-tutsie, en lançant une campagne de propagande visant à faire passer les citoyens civils tutsis pour les complices d'une armée d'envahisseurs et en encourageant spécifiquement les milices à faire de la population tutsie la cible de leurs attaques.

21. Dans le courant du mois de juin et au début de juillet 1994, particulièrement dans la préfecture de Gisenyi, Simon Bikindi a dirigé, en y participant et en encourageant d'autres à y prendre part, une campagne de violence visant les civils tutsis et les Hutus considérés comme des opposants politiques du MRND et des partis politiques affiliés au MRND, laquelle s'est soldée par de nombreuses pertes en vies humaines.

22. Tout particulièrement, vers la fin du mois de juin 1994, Simon Bikindi et un groupe d'*Interahamwe* arrivés à Gisenyi en provenance de Kigali ont lancé une attaque contre des Tutsis vivant dans la commune de Nyamyumba. Peu avant l'attaque, Simon Bikindi avait fait savoir à des *Interahamwe* qui se trouvaient à un

barrage routier dans la ville de Gisenyi qu'ils devaient rechercher les Tutsis et les tuer, et que les Hutus qui aidaient les Tutsis à fuir au Zaïre devaient également être tués. Sur ces mots, Simon Bikindi a pris la tête d'une caravane d'*Interahamwe* armés, parmi lesquels le colonel BUREGEYA et NOEL, et s'est rendu avec eux à Nyamyumba dont ils ont tué les habitants tutsis et pillé leurs biens.

23. De même, vers la fin de juin 1994, Simon Bikindi a pris la parole à une réunion du MRND tenue au stade Umuganda à Gisenyi où il a dit publiquement que : «Les Hutus doivent savoir qui est l'ennemi, et que l'ennemi est le Tutsi» et que «les Hutus doivent traquer les Tutsis et les tuer». À la suite de cette réunion, les opérations de recherche lancées contre les Tutsis qui se cachaient encore s'étaient intensifiées.

24. Par ailleurs, en juin 1994, à la frontière entre Gisenyi et le Zaïre, suite à des instructions données par le lieutenant-colonel Anatole Nsengiyumva, Simon Bikindi a ordonné à ses *lnterahamwe* de conduire derrière un kiosque appelé Poste de commandement un groupe de femmes tutsies qui essayaient de fuir au Zaïre et de les tuer. Ces femmes sont tombées derrière le Poste de commandement sous des balles tirées par des armes à feu de marque UZI. Peu après, Simon Bikindi a fait la remarque suivante : «Voyez où nous en sommes maintenant avec ces Tutsis».

25. En juin 1994, Simon Bikindi s'est rendu à la prison de Gisenyi. Il était en compagnie de Hassan Ngeze, du major Kabera, de Gasirabo, directeur de la prison, et de gardes du corps. Consultant une liste de 12 prisonniers, Simon Bikindi a appelé Matabaro et Kayibanda. Ceux-ci ont été frappés à l'arrière de la tête, l'un après l'autre, par le garde du corps de Bikindi. Les 10 Tutsis dont les noms figuraient sur la liste ont été tués.

26. À la fin de juin 1994, Simon Bikindi a fait établir un barrage au «camp scout», près de l'église pentecôtiste, sur la route menant à la «commune rouge», dans la commune de Gisenyi. Plusieurs Tutsis ont été massacrés à ce barrage.

27. Au début de juillet 1994, Simon Bikindi et ses *lnterahamwe* ont transporté trois Tutsies à la «commune rouge», où elles ont été tuées.

28. Au début de juillet 1994, NOEL et PASCAL, deux des *Interahamwe* de Simon Bikindi, ont découvert que ANCILLA, une femme tutsie, se cachait dans le plafond de sa maison, sous la protection apparente de son mari hutu. Simon Bikindi a déclaré qu'elle faisait partie des personnes qui combattaient les Hutus et qu'elle devait être emmenée (tuée); il était présent quand NOEL et PASCAL ont emmené ANCILLA. NOEL et PASCAL ont tué la femme et sa fille de quatre ans et les ont enterrées dans une tombe peu profonde.

29. Les actes de violence sexuelle systématiquement dirigés contre les femmes tutsies faisaient partie des attaques généralisées dont les Tutsis étaient la cible. En dirigeant, en ordonnant et en encourageant la campagne d'extermination lancée dans la préfecture de Gisenyi, Simon Bikindi savait, ou avait des raisons de savoir, que les actes de violence sexuelle dirigés contre les civils tutsis étaient généralisés ou systématiques, ou qu'ils prendraient un tel caractère, et que leurs auteurs étaient soit ses subordonnés soit les personnes qui s'en étaient rendu coupables suite aux ordres et aux instructions par lui donnés d'exterminer tous les Tutsis.

30. En vertu de l'autorité renforcée qu'il avait sur les *Interahamwe*, notamment du fait des relations étroites qu'il entretenait avec des responsables de la direction nationale du MRND et de l'*Interahamwe*, et eu égard à son statut particulier d'artiste

reconnu à l'échelle nationale et de directeur du Ballet *Irindiro*, Simon Bikindi a ordonné ou donné instruction aux milices civiles, notamment les membres *Interahamwe* de son propre Ballet *Irindiro*, ou leur a, de toute autre manière, donné l'autorisation de persécuter et de tuer des civils tutsis ou les a encouragés à les mettre à mort. En vertu de cette même autorité, Simon Bikindi était investi du pouvoir et de la responsabilité d'arrêter, d'empêcher de commettre ou de dissuader, ou de punir les personnes ayant commis, ou étant sur le point de commettre, de tels actes, et a failli à cette obligation.

Chef 4 : Incitation directe et publique à commettre le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Simon Bikindi d'INCITATION DIRECTE ET PUBLIQUE A COMMETTRE LE GÉNOCIDE, sous l'empire de l'article 2 (3) (c) du Statut, en ce que entre le 1er janvier 1994 et le 14 juillet 1994 ou à ces dates, Simon Bikindi a été responsable d'inciter directement et publiquement des personnes, y compris, mais sans s'y limiter, des militaires, des fonctionnaires de l'administration locale, des policiers communaux, des miliciens civils et la population locale à tuer ou infliger des atteintes graves à l'intégrité physique ou mentale des membres de la population tutsie, en vue de les détruire, en tout ou en partie, en tant que groupe ethnique ou racial, comme suit :

En vertu de l'article 6 (1) du Statut : par ses actes positifs, en ce que l'accusé a planifié, incité à commettre, ordonné de commettre, commis ou de toute autre manière aidé et encouragé à planifier, à préparer et à exécuter l'infraction retenue contre lui en ce que :

31. Entre 1990 et 1994, Simon Bikindi a composé, interprété, enregistré ou diffusé des compositions musicales prônant la solidarité entre Hutus et faisant passer les Tutsis pour les asservisseurs des Hutus. Ces compositions ont par la suite été utilisées dans une campagne de propagande visant à faire passer les Tutsis pour l'ennemi, ou les complices de l'ennemi, et à inciter et à encourager la population hutue à se démarquer des Tutsis et à les tuer.

32. Simon Bikindi interprétait régulièrement ses compositions musicales lors de sessions d'animation organisées pendant les réunions des *lnterahamwe* ou les meetings des partis politiques MNRD ou CDR. Simon Bikindi circulait souvent dans la ville de Gisenyi et dans la commune de Rwerere, préfecture de Gisenyi, à bord d'un véhicule équipé d'un système de haut-parleurs et interprétait ses compositions ou diffusait leur enregistrement.

33. Les sessions d'animation de Simon Bikindi organisées lors des réunions et des meetings du MRND étaient souvent le prélude à la commission d'actes de violence anti-tutsie dirigés contre des personnes ou des biens situés à proximité des lieux servant de cadre à ces regroupements de personnes, avant ou immédiatement après leur tenue, ou incitaient à la commission de tels actes.

34. Simon Bikindi s'est publiquement adressé à des membres du MRND et de la CDR au cours de réunions de ces partis en les exhortant spécifiquement à travailler, langage codé prônant l'extermination des Tutsis.

35. Tout particulièrement, en février 1994, peu après l'assassinat de Martin BUCYANA et de Félicien GATABAZI, Simon Bikindi a pris la parole lors d'une réunion du MRND au stade Umuganda de Gisenyi, et a dit à la population de prendre leurs gourdins, leurs machettes et d'autres armes et de chercher les *Inyenzi* pour les tuer. *Inyenzi* était un terme péjoratif utilisé pour désigner les Tutsis.

36. De même, en mars 1994, Simon Bikindi a pris la parole lors d'une réunion de la CDR et encouragé les participants à travailler et à tuer ceux qui s'opposaient à la CDR et au MRND. Au cours de la période visée dans le présent acte d'accusation, il était de notoriété publique partout au Rwanda que la CDR était opposée aux Tutsis.

37. Simon Bikindi est également intervenu dans des émissions de la RTLM pour prôner l'extermination des Tutsis sur les ondes de la radio publique. À titre d'exemple, quelque temps après la mort de Martin BUCYANA et d'un autre *Interahamwe* affilié à la CDR, Simon Bikindi a déclaré ce qui suit : « Voyez comme les Tutsis vous exterminent, vous les Hutus. Si vous ne réagissez pas tout de suite, ce sera votre faute... ».

38. Simon Bikindi a particulièrement essayé, au cours de la dernière semaine de février 1994, d'inciter à la violence contre un groupe de Tutsis qui s'étaient réfugiés au foyer pour jeunes de Gatenga, à Kigali. Quand les gendarmes se sont interposés entre Simon Bikindi et son groupe d'*Interahamwe* pour les empêcher d'attaquer le foyer pour jeunes, celui-ci a appelé la station de radio de la RTLM pour signaler que des Hutus empêchaient d'autres Hutus d'attaquer les Tutsis à Gatenga.

39. De même, à la fin de juin 1994, dans la préfecture de Gisenyi, Simon Bikindi a utilisé un véhicule équipé d'un système de haut-parleurs et pris la tête d'une caravane d'*Interahamwe* sur la route principale reliant les communes de Kivumu et de Kayove en tenant les propos suivants : « La majorité de la population, c'est vous, les Hutus à qui je m'adresse. Vous savez que les Tutsis sont minoritaires. Exterminez rapidement ceux qui restent ». Simon Bikindi a également utilisé le même véhicule équipé de haut-parleurs pour diffuser ses compositions musicales.

40. À travers les paroles de ses chansons, Simon Bikindi a déformé la politique et l'histoire du Rwanda à l'effet de prôner la solidarité entre les Hutus. Parmi ses créations les plus prisées figure *Twasezereye*, chanson composée en 1987 qui signifie : « Nous avons dit au revoir au régime féodal ». Diffusée sans arrêt sur les ondes de Radio Rwanda et de la RTLM en 1992 et 1993, *Twasezereye* était un appel public à la solidarité entre Hutus contre les Accords d'Arusha.

41. La RTLM a diffusé à maintes reprises d'autres compositions de Simon Bikindi, notamment Bene sebahinzi, qui signifie : « Les fils du père des cultivateurs » et Nanga bahutu, qui signifie : « Je hais ces Hutus ». Les appels à l'attaque de l'ennemi lancés dans les émissions de la RTLM étaient souvent précédés ou suivis de ces chansons composées et interprétées par Simon Bikindi. Aux termes de la loi rwandaise régissant les droits d'auteur, Simon Bikindi avait le droit d'interdire ou de demander la diffusion publique de ses compositions.

Chef 5 : Crime contre l'humanité (assassinat)

Le Procureur du Tribunal pénal international pour le Rwanda accuse Simon Bikindi de CRIME CONTRE L'HUMANITÉ (ASSASSINAT), sous l'empire de l'article 3 (a)

du Statut, en ce que entre le 7 avril 1994 et le 14 juillet 1994 ou à ces dates, Simon Bikindi a tué ou fait tuer des personnes dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou faciale, comme suit :

En vertu de l'article 6 (1) du Statut : par ses actes positifs, en ce que l'accusé a planifié, incité à commettre, ordonné de commettre, commis ou de toute autre manière aidé et encouragé à planifier, à préparer ou à exécuter le crime retenu contre lui ; et

En vertu de l'article 6 (3) du Statut : en ce que l'accusé avait effectivement eu connaissance ou avait des raisons d'être instruit des actes ou omissions de ses subordonnés, dont des *Interahamwe* et des miliciens civils, notamment les membres *Interahamwe* de son Ballet *Irindiro*, et n'a pas pris les mesures nécessaires ou raisonnables pour les faire cesser ou les en empêcher, ou les punir à raison de leur participation à la planification, à la préparation ou à l'exécution du crime qui lui est reproché, en ce que :

42. Au cours des événements visés dans le présent acte d'accusation, notamment entre le 6 avril 1994 et le 17 juillet 1994, partout au Rwanda, des attaques généralisées ou systématiques ont été perpétrées contre une population civile en raison de son appartenance politique, ethnique ou raciale. Une campagne de violence avait notamment était lancée par les milices *Interahamwe* contre la population civile tutsie et contre les Hutus considérés comme des opposants politiques au MRND. Des centaines de milliers de civils tutsis, hommes, femmes et enfants ainsi que des « Hutus modérés » ont été tués.

43. Simon Bikindi a, de concert avec d'autres personnes, planifié, encouragé et préparé ces massacres en recrutant de nouveaux adhérents pour les milices *Interahamwe*, en organisant des entraînements militaires à leur intention, en leur inculquant une idéologie anti-tutsie, en participant à une campagne de propagande visant à faire passer les citoyens tutsis pour les complices d'un ennemi envahisseur, et en encourageant spécifiquement les milices civiles à faire des Tutsis la cible de leurs attaques.

44. À une date indéterminée du mois de juin de 1994, Simon Bikindi a particulièrement participé dans la commune de Nyamyumba, préfecture de Gisenyi, à la mise à mort d'un riche homme d'affaires tutsi en conduisant une bande d'*Interahamwe* au domicile de la victime et en ordonnant à plusieurs d'entre eux, dont Paulin (de patronyme inconnu) et NOKORI, et à des membres de son ballet, dont SERUMVERI Bosco et DUSENGIMANA Kizito, de tuer l'homme d'affaires et de voler ses biens. Les éléments de ce groupe ont tué l'homme d'affaires et chargé ses biens à bord du véhicule de Simon Bikindi.

45. À une date indéterminée du mois de juin de 1994, à la frontière entre Gisenyi et le Zaïre, suite aux instructions du colonel Anatole NSENGIYUMVA, Simon Bikindi a ordonné à ses *Interahamwe* de tuer un groupe de femmes tutsies qui essayaient de franchir la frontière pour se réfugier au Zaïre. Ces femmes sont ensuite tombées sous des balles tirées par des armes à feu de marque UZI.

46. Au début de juillet 1994, Simon Bikindi a encouragé la mise à mort d'une femme tutsie prénommée ANCILLA, en disant à NOEL et PASCAL, deux de ses *Interahamwe*, qu'elle faisait partie de ceux qui combattaient les Hutus et qu'elle devait être emmenée (tuée). NOEL et PASCAL ont tué la femme et sa fille de 4 ans et les ont enterrées dans une tombe peu profonde.

47. Au vu du caractère généralisé des attaques perpétrées contre les Tutsis d'avril à juillet 1994, Simon Bikindi est responsable du massacre de nombreux Tutsis qui a fait suite aux exhortations, par lui adressées aux *Interahamwe* et aux milices civiles en particulier à travers ses actes, ses chansons et ses propos.

Chef 6 : Crime contre l'humanité (persécution)

Le Procureur du Tribunal pénal international pour le Rwanda accuse Simon Bikindi de CRIME CONTRE L'HUMANITÉ (PERSÉCUTION), sous l'empire de l'article 3 (h) du Statut en ce que entre le 1er janvier 1994 et le 31 décembre 1994, Simon Bikindi a collectivement ciblé des personnes appartenant à l'ethnie tutsie et incité publiquement des personnes, y compris, mais sans s'y limiter, des soldats, des fonctionnaires de l'administration locale, des policiers communaux, des miliciens civils et des civils hutus à s'employer à persécuter des membres du groupe ethnique tutsi. Ce comportement s'inscrivait dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile.

48. Entre 1990 et 1994, Simon Bikindi a pris la parole lors de rassemblements publics, composé, interprété, enregistré ou diffusé des créations musicales prônant la solidarité entre Hutus et faisant passer les Tutsis pour les asservisseurs des Hutus. Ces compositions ont par la suite été diffusées dans le cadre d'une campagne de propagande visant à faire passer les Tutsis pour l'ennemi, ou pour les complices de l'ennemi, et à inciter et encourager la population hutue à s'en démarquer dans le but de les soumettre à des actes de violence et à les tuer.

Les actes et omissions de Simon Bikindi articulés dans le présent acte d'accusation sont punissables en vertu des articles 22 et 23 du Statut du Tribunal.

Fait à Arusha, le 31 Août 2004

[Signé] : Bongani Majola, Procureur adjoint

The Prosecutor v. Paul BISENGIMANA

Case N° ICTR-2000-60

Case History

- Name : BISENGIMANA
- First Name : Paul
- Date of Birth : unknown
- Sex : male
- Nationality : Rwandan
- Former Official Function : Mayor of Gikoro
- Date of Indictment : 1st July 2000 [1]
- Counts : 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 : 4 December 2001, in Mali
- Date of Transfer : 11 March 2002
- Date of Initial Appearance : 18 March 2002
- Date Trial Began : 17 November 2005
- Date and content of the Sentence : 13 April 2006, 15 years imprisonment (pleading guilty)

[1] The text of the indictment is reproduced in the *2000 Report*, p. 540.

Le Procureur c. Paul BISENGIMANA

Affaire N° ICTR-2000-60

Fiche technique

- Nom : BISENGIMANA
- Prénom : Paul
- Date de naissance : inconnue
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : bourgmestre de Gikoro
- Date de l'acte d'accusation : 1er juillet 2000 [1]
- Chefs d'accusation : génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II auxdites Conventions de 1977
- Date et lieu de l'arrestation : 4 décembre 2001, au Mali
- Date du transfert : 11 mars 2002
- Date de la comparution initiale : 18 mars 2002
- Date du début du procès : 17 novembre 2005
- Date et contenu du prononcé de la peine : 13 avril 2006, 15 ans d'emprisonnement (a plaidé coupable)

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 541.

Decision on Defence Urgent Motion to Acknowledge Violation of the Accused's Rights 20 August 2004 (ICTR-2001-60-I)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding; Arlette Ramaroson; Solomy B. Bossa

Bisengimana, Semanza – mentions of the accused in the Semanza case – Prosecution witnesses heard in the Semanza case, credibility already assessed – right to be presumed innocent, presumption of guilt – fair trial – impartiality of the judges – symbolic reparation – amicus curiae – no jurisdiction of the Chamber over another case – judges not bound by the findings of former decisions – challenge of the Prosecution case, cross-examination – motion denied

International instruments cited : Statute, Article 20 (2), (3) and (4) (e)

International cases cited : Appeals Chamber, The Prosecutor v. Georges Rutaganda*, Judgement, 26 May 2003 (ICTR-96-3-A,* Reports 2003*, p. 3181)*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of "Bisengimana's Urgent Motion to Acknowledge Violation of the Accused's Rights" ("the Motion"), filed on 20 February 2004[1];

CONSIDERING the "Prosecutor's Response to Bisengimana's Urgent Motion to Acknowledge Violation of the Accused's Rights" ("the Response"), filed on 4 Match 2004;

CONSIDERING "Bisengimana's Reply to the Prosecutor's Response to 'Bisengimana's Urgent Motion to Acknowledge Violation of the Accused's Rights'" ("the Reply"), filed l0 March 2004[2];

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

[1] The Motion was filed in French and originally entitled : "Requête urgente de Paul Bisengimana en constatation de violation des droits de l'accusé".

[2] The Reply was fited in French and originally entitled "Réplique à la Réponse du Procureur à la requête urgente de Paul Bisengimana en constatation de violation des droits de l'accusé".

Defence Motion

1. The Defence submits that the case against Bisengimana is closely related to the case against Semanza, who was convicted by the Tribunal on 15 May 2003 and sentenced to 24 years and six months' imprisonment : the indictment against Bisengimana contains several references to Semanza and several references to Bisengimana were made in the indictment against Semanza. The *Semanza* Judgement mentions the name of Bisengimana 41 times and concludes that Bisengimana is directly implicated in the massacres at Musha Church and that Bisengimana is directly implicated in the torture and assassination of Rusanganwa.

2. The Defence submits that the current Motion was filed together with a Motion to appear as an *amicus curiae* in the *Semanza* case before the Appeals Chamber and a Motion to censor all references to Semanza in the Indictment against Bisengimana.

3. The Defence submits that the numerous mentions of Bisengimana in the *Semanza* Judgement violate his right to be presumed innocent until proven guilty, pursuant to Article 20 (3) of the Statute. Moreover, the Defence quotes several abstracts of the *Semanza* Judgement, in which the Trial Chamber found that "Laurent Semanza, together with Paul Bisengimana" committed crimes, that is to say paragraphs 425, 429, 486, 549 of the Judgement and paragraph 55 and 67 of the separate opinion of Judge Ostrovsky.

4. According to the Defence, the violation of the Accused's right to be presumed innocent violates his right to a fair trial, pursuant to Article 20 (2) of the Statute.

5. The Defence submits that, even if the Accused is judged by a different bench than the one sitting in the Semanza trial, the new judges have knowledge of the *Semanza* Judgement which creates a presumption of guilt and may jeopardize their impartiality.

6. The Defence also submits that the problem is similar with the Prosecution witnesses who were heard and whose credibility was assessed in the *Semanza* case : the judges may be tempted to consider them as credible without a chance for the Defence to dispute their credibility.

7. Finally, the Defence submits that such a perception may be formed in the mind of the Accused.

8. The Defence knows that the Trial Chamber has no jurisdiction to remedy such situation, nor to intervene before the Appeals Chamber. However, the Defence submits that an acknowledgement by the Trial Chamber that the rights of the Accused were violated in the *Semanza* Judgement would be a symbolic reparation of his prejudice and would encourage the granting of the Defence Motion to appear as *amicus curiae* before the Appeals Chamber.

9. According to the Defence, the seriousness of the alleged violations of the rights of the Accused requires reinforced guarantees of impartiality from the bench.

10. Therefore, the Defence prays the Chamber to acknowledge that the rights of the Accused to be presumed innocent and to a fair trial were violated and to affirm that all guarantees of impartiality and fair trial will be granted.

Prosecutor's Response

11. The Prosecutor submits that the Trial Chamber has jurisdiction to answer the Defence requests.

AFTER HAVING DELIBERATED

12. In the Chamber's view, there are two distinct issues that are raised by the Defence in its Motion : the first issue is the allegation of violation of Bisengimana's rights in the *Semanza* Case ; the second issue is the alleged threat of violation of the Accused's rights, in particular his right to be presumed innocent, in the current Case as a result of the *Semanza* Judgement.

13. With regard to the first issue, as acknowledged by the Defence in its submission, the Trial Chamber has no jurisdiction over the *Semanza* Judgement, issued by a different Chamber, currently before the Appeals Chamber, and in which the Accused was not represented. Therefore, the Trial Chamber dismisses the Defence request to acknowledge that the rights of the Accused to be presumed innocent and to a fair trial were violated in the *Semanza* Judgement.

14. With regard to the second issue raised by the Defence, the Trial Chamber recalls that, as highlighted by the Appeals Chamber in the *Rutaganda* case, the judges composing the bench are not bound by the findings of former decisions[3] : Trial Chambers, which are courts with coordinate jurisdiction, are not mutually bound by their decisions, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.

15. Judges composing the bench are professional judges, whose impartiality cannot be prejudiced by former decisions that were issued without the Accused being represented. The case against the Accused will be determined upon the evidence that will be adduced in the course of his trial and the Accused will be given full opportunity to defend himself and to challenge the Prosecution case, in particular by cross-examining Prosecution witnesses and by calling and examining witnesses on his behalf, pursuant to Article 20, para. 4 (e) of the Statute.

16. Therefore, the Trial Chamber affirms that the Accused is presumed innocent, whatever the findings in the *Semanza* Judgement, and will be given full opportunity to defend himself and challenge the Prosecution case during his own trial.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DISMISSES the Motion.

Arusha, 20th August 2004

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy B. Bossa

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[3] *Prosecutor v. Rutaganda*, Case N° ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 188.

Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses 25 August 2004 (ICTR-2000-60-I)

(Original : English)

Trial Chamber II

Judges : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

Protective measures for victims and witnesses – disclosure of witness statements, non-disclosure of the identity – ICTY – real fear, objective justification – exceptional circumstances – rights of the accused – defence response, delay – interest of justice

International instruments cited : Statute, art. 20 (4) (e) and 21 – Rules of procedure and evidence, Rules 53, 66, 67, 69, 73 and 75

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Georges Rutaganda*, 13 July 1998 (ICTR-96-3) – Trial Chamber II,* The Prosecutor v. Alphonse Nteziryayo*, Decision on the defence motion for protective measures for witnesses (articles 14, 19, 20 and 21 of the Statute and Rules 69, 75 and 79 of the Rules), 18 September 2001 (ICTR-98-42-T, Reports 2001, p. 1988) – Trial Chamber,* The Prosecutor v. Hormisdas Nsengimana*, 2 September 2002 (ICTR-2001-69,* Reports 2002*, p. X) – Trial Chamber I,* The Prosecutor v. Athanase Seromba*, Decision on the Prosecutor's motion for protective measures for victims and witnesses, 30 June 2003 (ICTR-2001-66-I,* Reports 2003*, p. 3990) – Trial Chamber,* The Prosecutor v. Gatete*, Decision on Protection Request for Protection of Witnesses, 11 February 2004 (ICTR-2000-61,* Reports 2004*, p. X)*

T.P.I.Y. : Trial Chamber, The Prosecutor v. Tadic*, Decision on Prosecutor's Motion Requesting Protection Measures for Victims and Witnesses, 10 August 1995 (IT-94-1) – Trial Chamber,* The Prosecutor v. Blaskic*, Decision on Prosecutor's Motion Requesting Protection Measures for Victims and Witnesses, 17 October 1996 (IT-95-14)*

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins 25 août 2004 (ICTR-2000-60-I)

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de Chambre ; Arlette Ramaroson ; Solomy Balungi Bossa

Protection des victimes et témoins – communication de déclarations de témoins, non divulgation d'identité – TPIY – crainte réelle, raisons objectives – droits de l'accusé – réponse de la défense, retard – intérêt de la justice – circonstances exceptionnelles

Instruments internationaux cités : Statut, art. 20 (4) (e), 21 – Règlement de procédure et de preuve, art. 53, 66, 67, 69, 73 et 75

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Georges Rutaganda*, 13 juillet 1998 (ICTR-96-3) – Chambre de première instance II,* Le Procureur c. Alphonse Nteziryayo*, Décision relative à la requête de la défense aux fins d'obtenir des mesures de protection des témoins (articles 14, 19, 20 et 21 du Statut et articles 69, 75 et 79 du Règlement) 18 septembre 2001 (ICTR-98-42-T,* Recueil 2001*, p. 1989) – Chambre de première instance,* Le Procureur c. Hormisdas Nsengimana*, 2 septembre 2002 (ICTR-2001-69,* Recueil 2002*, p. X) – Chambre de première instance I,* Le Procureur c. Athanase Seromba*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003 (ICTR-2001-66-I,* Recueil 2003*, p. 3991) – Chambre de première instance,* Le Procureur c. Gatete*, Decision on Protection Request for Protection of Witnesses, 11 février 2004 (ICTR-2000-61,* Recueil 2004*, p. X)*

T.P.I.Y. : Chambre de première instance, Le Procureur c. Tadic*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 10 août 1995 (IT-94-1) – Chambre de première instance,* Le Procureur c. Blaskic*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 17 octobre 1996 (IT-95-14)*

TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II, composée des juges William H. Sekule, Président de Chambre, Arlette Ramaroson et Solomy Balunga Bossa (la «Chambre»),

BEING SEIZED of the Prosecutor's "Motion for Protective Measures for Victims and Witnesses", including 14 Annexes[1] filed on 23 July 2002 (the "Motion");

CONSIDERING "Conclusions en réponse à la requête du Procureur aux fins de protection des victimes et des témoins", filed by the Defence on 20 February 2004 (the "Defence Response")

RECALLING the Chamber's "Decision on Bisengimana's Motion for Complete and Accurate Translation into Working Languages of the Tribunal and Respect for the Rights of the Accused", filed on 7 March 2003 in which the Chamber directed the Defence to file a Response to the Prosecutor's Motion within five (5) days from the date of notification of its Decision (the "Chamber's Decision of 7 March 2003");

NOTING that the Defence did not comply with the Chamber's Decision of 7 March 2003 in that it filed its Response on 24 February 2004, almost eleven (11) months out of time, the Chamber will not tolerate such conduct in the future but it nonetheless admits the Defence Response in the determination of the Motion in the interests of justice;

CONSIDERING that the Chamber will decide the Motion solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73 of the Rules;

1. WHEREAS the present Motion is brought under Article 21 of the Statute of the Tribunal (the "Statute") and Rules 69 and 75 (A) of the Rules requesting for orders for protection of victims and witnesses as set out in the Motion.

2. WHEREAS the Defence objects to the Motion and submits that it should be denied for the following major reasons;

> (i) Since the Prosecution requests for general protective measures for all 33 witnesses all of whom reside in Gikoro and its environs, which is an area outside of the areas suggested as dangerous by which the Prosecution Investigation Commander Alfred Kwende (see Annex A) and other articles relied upon by the Prosecution;

[1] Annex A - affidavit of Commander A. Kwende dated 11 July 2002; Annex B - *Hirondelle* Press article dated 25 March 2002; Annex C - Afro News article "*Interahamwe* Killers Launch New Attacks on Rwanda", dated 7 June 2002 : Annex D - New York Times article "Hutu Attack from Congo" dated 23 May 2002; Annex E -CNN article "Rwandan Presidential Advisor Murdered", dated 6 March 2001; Annex F- Daily Mail and Guardian article dated 29 December 1999; Annex G - BBC News Online article "*Interahamwe* : A Serious Military Threat", dated 2 March 1999; Annex H - nine newspaper articles dated November, December 1997 and August 2001 : Annex I - US Institute of Peace article "Post Genocidal Reconstruction" dated 15 September 1999. Annex J - Amnesty International reports dated 2001. 2000. 1999 and 1998 : Annex K - UN General Assembly report "Human Rights Field Operations in Rwanda", dated 11 September 1998; Annex L -Abdulrahman Security report dated 14 August 2001; Annex M - HFOR Status report dated 27 February 1997; and Annex N - Journal of Humanitarian Assistance excerpts dated May, June 1998.

SAISI de la requête du Procureur en prescription de mesures de protection des victimes et des témoins, accompagnée de 14 annexes[1], déposée le 23 juillet 2002 (la «Requête»),

CONSIDÉRANT les «Conclusions en réponse à la requête du Procureur en prescription de mesures de protection des victimes et des témoins» déposées par la défense le 20 février 2004 (la «Réponse de la défense»),

RAPPELANT la décision de la Chambre relative à la requête de Bisengimana aux fins d'une traduction exacte et complète dans les langues de travail du Tribunal et du respect des droits de l'accusé, déposée le 7 mars 2003, dans laquelle la Chambre invite la défense à déposer une réponse à la requête du Procureur dans un délai de cinq jours à compter de la notification de sa décision (la «Décision de la Chambre du 7 mars 2003»),

CONSTATANT que la défense ne s'est pas conformée à la décision de la Chambre du 7 mars 2003, puisqu'elle a déposé sa réponse le 24 février 2004, avec près de 11 mois de retard, chose que la Chambre est bien décidée à ne plus tolérer à l'avenir, même si, dans l'intérêt de la justice, elle a accepté d'examiner cette réponse avant de statuer sur la requête,

CONSIDÉRANT que la décision relativement à sa requête sera rendue sur la seule base des mémoires déposés par les parties, en vertu de l'article 73 du Règlement,

1. ATTENDU que ladite requête est présentée sur la base de l'article 21 du Statut du Tribunal (le «Statut») et des articles 69 et 75 (A) du Règlement et vise à obtenir de la Chambre qu'elle prescrive les mesures de protection des victimes et des témoins précisées dans la requête.

2. ATTENDU que la défense s'oppose à la requête et demande qu'elle soit rejetée pour les motifs suivants :

> (i) Le Procureur sollicite des mesures de protection de portée générale pour les 33 témoins qui résident tous à Gikongoro ou dans ses environs, c'est-à-dire dans une zone sise à l'écart des zones présentées comme dangereuses par Alfred Kwende, le commandant des enquêtes du Bureau du Procureur (voir l'annexe A), et dans les articles sur lesquels se fonde le Procureur.

[1] Annexe A - Affidavit du commandant A. Kwende, 11 juillet 2002; Annexe B - Article de l'agence de presse Hirondelle du 25 mars 2002. Annexe C - Article d'Afro News «Les *Interahamwe* lancent une nouvelle attaque contre le Rwanda», daté du 7 juin 2002; Annexe D - Article du New York Times «Hutus attack from Congo» daté du 23 mai 2002; Annexe E - Article de CNN – «Rwandan Presidential Adviser Murdered», daté du 6 mars 2001; Annexe F - Article du Daily Mail et du Guardian daté du 29 décembre 1999; Annexe G - Article de BBC News Online - «*Interahamwe* : A serious Militaty Threat» daté du 2 mars 1999; Annexe H – Neuf articles de journaux datés de novembre et décembre 1997 et août 2001; Annexe 1 - Article de US Peace Institute «Post genocide Reconstruction», daté du 15 septembre 1999; Annexe J- Rapports d'Amnesty International, datés de 2001, 2000 1999 et 1998; Annexe K- Rapport de l'Assemblée générale des Nations Unies «Les opérations des droits de l'homme sur le terrain au Rwanda», daté du 11 septembre 1998; Annexe L - Abdulrahman Security Report, daté du 14 août 2001; Annexe M - HFOR Status Report, daté du 27 février 1997; et Annexe N - Extraits du Journal de l'assistance humanitaire, de mai et juin 1998.

(i)* Since the Prosecution does not specify, for each of the witnesses the exceptional circumstances warranting the protective measures sought contrary to the provisions of Rules 66 and 67;

(ii) Since the totality of the five circumstances[2] considered exceptional by the case law of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") have not been outlined for any of the witnesses for whom the Prosecution requests measures of protection;

(iii) A 'rolling disclosure' of 21 days before testimony of the identifying information and unredacted witness statements of the 33 witnesses, will not allow the Defence an adequate opportunity to prepare itself;

3. WHEREAS the Defence submits that if the Prosecution can substantiate that any of its witnesses do warrant the protective measures sought, it does not object to said witnesses being put under protective measures (a) to (d) and (f), (g) and (h) so long as they prejudice the rights of the Accused.

4. WHEREAS the Defence nonetheless opposes measures (e), (i), (k), (1) and (m) because such measures would make it impossible for it to conduct investigations; measure(h) because said measure providing for a 'rolling disclosure' is contrary to the provisions of Rule 66;

5. WHEREAS the Defence prays that the Chamber order the Prosecution to disclose to the Defence the identifying information and non-redacted witness statements of the 33 witnesses immediately; or in the alternative that said disclosure be made at least 90 days before commencement of the trial; or in the further alternative the identifying information and non-redacted statements of the witnesses for whom protective measure have been granted be disclosed to the Defence on a 'rolling disclosure' of at least 90 days before testimony of the witness.

DELIBERATIONS

6. Rule 66 (A) (ii) *inter alia* provides that, subject to the provisions of Rules 53 and 69, the Prosecutor shall disclose to the Defence, 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.

7. Rule 69 (A) of the Rules provides that in exceptional circumstances, either of the Parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

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* Numbering mistake by the Tribunal.

[2] See pg 4 of the Defence Response. that "there exists a real fear for personal security of the witness or the security of the family of the witness; the testimony of the witness must be important for the case of the Prosecution : the Chamber must be convinced that there exists no *prima facie* evidence that the witness is untrustworthy; and that there is an ineffective non existence of a witness protection program; and that the measures are absolutely necessary"; see also paras. 62, 63.64. 65 and 66 of *Tadic*. "Decision on Prosecutor's Motion Requesting Protection Measures for Victims and Witnesses" of 10 August 1995; *Blaskic*. "Decision .... " of 17 October 1996 including

(ii) (*sic*) Contrairement aux dispositions des articles 66 et 67 du Règlement, le Procureur ne précise pas, en ce qui concerne chaque témoin, les circonstances exceptionnelles qui justifient les mesures de protection sollicitées.

(ii) Le Procureur n'a pas établi, pour aucun des témoins pour lesquels il demande des mesures de protection, que la totalité des cinq circonstances[2] considérées comme exceptionnelles par la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») étaient réunies.

(iii) Une «communication échelonnée», faite 21 jours avant la déposition de chacun des 33 témoins, des données permettant de l'identifier et des déclarations non caviardées ne donne pas à la défense suffisamment de temps pour se préparer.

3. ATTENDU que la défense dit ne pas s'opposer, à condition que le Procureur justifie, pour chacun de ses témoins, la nécessité des mesures de protection sollicitées, à ce que le témoin bénéficie des mesures de protection (a) à (d) et (f), (g) et (h), pour autant qu'elles ne portent pas préjudice aux droits de l'accusé.

4. ATTENDU que la défense s'oppose cependant aux mesures (e), (i), (k), (l) et (m) au motif qu'elles l'empêcheraient de mener des enquêtes, et à la mesure (h) au motif que cette mesure, qui autorise «une communication échelonnée», est contraire aux dispositions de l'article 66 du Règlement.

5. ATTENDU que la défense prie la Chambre d'enjoindre au Procureur de communiquer sans délai à la défense, pour chacun des 33 témoins, les données permettant de l'identifier et les déclarations non caviardées ou, à titre subsidiaire, de procéder à cette communication au moins 90 jours avant l'ouverture du procès ou, à titre plus subsidiaire encore de communiquer au fur et à mesure à la défense, au moins 90 jours avant la déposition de chacun des témoins pour lesquels des mesures de protection ont été accordées, les données permettant de l'identifier et les déclarations non caviardées.

DÉLIBÉRATIONS

6. L'article 66 (A) (ii) du Règlement dispose, entre autres, que sous réserve des dispositions des articles 53 et 69, le Procureur communique à la défense, au plus tard 60 jours avant la date fixée pour l'ouverture du procès, copies des déclarations de tous les témoins qu'il entend appeler à la barre.

7. L'article 69 (A) du Règlement dispose que, dans des cas exceptionnels, chacune des 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 décide autrement.

[2] Voir p. 4 de la réponse de la défense : il existe une peur réelle pour la sécurité du témoin et sa famille; le témoignage du témoin doit être important pour l'argument du Procureur; la Chambre de première instance doit être convaincue qu'il n'existe pas d'indice sérieux du manque de crédibilité du témoin; inefficacité ou inexistence d'un programme de protection des témoins; la mesure adoptée est strictement nécessaire. Voir aussi par. 62 à 66 de la décision rendue dans l'affaire *Tadic* intitulée «Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins», 10 août 1995; et la décision rendue dans l'affaire Blaskic (La Décision . . . du 17 octobre 1996).

8. The established jurisprudence of the Tribunal and that of the ICTY requires that the witnesses for whom protective measures are sought must have a real fear for their personal safety or the safety of their family, and there must be an objective justification for this fear[3]. The Chamber notes that the Prosecution has submitted documents, which tend to demonstrate that there is real and substantial danger that victims and potential prosecution witnesses could be threatened, assaulted or killed if their identities were made known and that these occurrences threaten not only victims and potential witnesses living in Rwanda and specifically in Gikoro and its surroundings, but also those living in other countries on the continent of Africa and those residing outside of the continent of Africa who would request that they be protected[4]. Accordingly, the Chamber finds that the demonstrated fear for personal security that the witnesses and potential witnesses may face in the event they testify in this case do amount to exceptional circumstances warranting non-disclosure to the public and delayed disclosure of their identities to the Defence.

9. The Chamber recalls that, in accordance with Article 20 (4) (e) of the Statute, the Accused has the right to examine, or have examined Prosecutor's witnesses. Mindful at all times of guaranteeing the full respect of the rights of the accused, the Chamber shall therefore order, pursuant to Rule 75 of the Rules, any appropriate measures for the protection of victims and witnesses so as to ensure a fair determination of the matter before it. However, this is subject to the proviso that, in accordance with Rule 69 (C), "[...] the identity of the victim or witnesses shall be disclosed *within such a time as determined by the Trial Chamber* to allow adequate time for preparation of the prosecution and the defence." (emphasis added)

10. The Chamber recalls that the Trial Chamber in the case of *Prosecutor v. Gatete* considered that, "[t]he vulnerability of the witness or witnesses and the nature of the threat in the particular case must be weighed against the impact of the particular period of nondisclosure on the ability of the Defence to prepare [and that because the case] involves a single Accused, the Chamber expects the Prosecution case to be short in comparison with some of the larger cases before the Tribunal in which rolling disclosure has been ordered." The aforementioned Chamber accordingly ordered "full disclosure twenty-one days prior to the commencement of the trial."[5]

11. In the instant case, the Chamber notes that Bisengimana is also indicted alone therefore the Prosecution case will not be so long as to jeopardize the security of the witnesses should full disclosure be ordered to be effected before the commencement of trial. Furthermore the Chamber is mindful of the Defence need to prepare itself and it accordingly orders that full disclosure of the identifying information of Prosecution witnesses to the Defence should be made no later than twenty-one (21) days prior to the commencement of the trial.

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[3] See Tribunal Decisions on Witness Protection, for example, *Rutaganda* Decision of 13 July 1998; *Nteziryayo* Decision of 18 September 2001 and *Nsengimana* Decision of 2 September 2002.

[4] See the Annexes to the Motion.

[5] See *Prosecutor v. Gatete*, Decision on Prosecution Request for Protection of Witnesses. of 11 February 2004 paras. 6 and 7; See also *Prosecutor v. Seromba*, Decision on the Prosecutor's Motion for Protective measures for Victims and Witnesses, of 30 June 2003

8. Selon la jurisprudence bien établie du Tribunal de céans et du TPIY, le témoin pour lequel les mesures de protection sont demandées doit éprouver une crainte réelle pour sa sécurité personnelle ou celle de sa famille, et cette crainte doit reposer sur des raisons objectives[3]. La Chambre relève que le Procureur a présenté des documents qui tendent à démontrer qu'il existe un danger réel et grave pour les victimes et les témoins potentiels à charge d'être menacés, agressés, voire tués si leur identité était révélée, et que ce danger existe non seulement pour les victimes et les témoins potentiels résidant au Rwanda et, plus particulièrement à Gikongoro ou dans ses environs, mais également pour ceux résidant ailleurs en Afrique ou sur un autre continent et qui demanderaient à être protégés[4]. En conséquence, la Chambre estime que la crainte réelle pour leur sécurité personnelle que les victimes et les témoins potentiels peuvent éprouver à l'idée de déposer dans la présente affaire constitue une circonstance exceptionnelle justifiant que leur identité ne soit pas divulguée au public et qu'elle le soit avec retard à la défense.

9. La Chambre rappelle qu'en vertu de l'article 20 (4) (e) du Statut, l'accusé a le droit d'interroger ou de faire interroger les témoins à charge. Soucieuse à tout moment de garantir le plein respect des droits de l'accusé, la Chambre ordonnera donc, en vertu de l'article 75 du Règlement, toutes mesures appropriées de protection des victimes et des témoins afin d'être en mesure de statuer équitablement en l'espèce, en veillant cependant à préciser que, conformément à l'article 69 (C),

> «[...] l'identité des victimes ou des témoins doit être divulguée dans des délais prescrits par la Chambre de première instance pour accorder au Procureur et à la défense le temps nécessaire à leur préparation». (non souligné dans l'original)

10. La Chambre rappelle que dans l'affaire *Le Procureur c. Gatete*, la Chambre de première instance avait estimé que la vulnérabilité du témoin ou des témoins et la nature de la menace en l'espèce devraient être mis en balance avec l'impact que la période prescrite de non-divulgation était susceptible d'avoir sur la capacité de la défense de se préparer. L'affaire ne comportant qu'un seul accusé, la Chambre avait précisé qu'elle attendait une présentation des moyens de preuves à charge relativement brève par rapport à d'autres affaires comportant de nombreux accusés dans lesquelles une communication échelonnée avait été décidée. La Chambre en question avait, en conséquence, ordonné une communication complète 21 jours avant l'ouverture du procès[5].

11. En l'espèce, la Chambre relève que Bisengimana étant, lui aussi, le seul accusé, la présentation des moyens de preuve du Procureur ne devrait pas prendre un temps à ce point si long qu'il mette en danger la sécurité des témoins, au cas où la communication complète serait ordonnée et devrait se faire avant l'ouverture du procès. En outre, la Chambre, consciente de la nécessité pour la défense de se préparer, enjoint au Procureur de dévoiler à la défense toutes les données permettant d'identifier les témoins à charge, et ce, au plus tard 21 jours avant l'ouverture du procès.

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[3] Décisions du Tribunal relatives à la protection des témoins, par exemple, la décision *Rutaganda* du 13 juillet 1998 ou la décision *Nteziryayo* du 18 septembre 2001 et la décision *Nsengimana* du 2 septembre 2002.

[4] Annexes de la requête.

[5] *Le Procureur c. Gatete*, *Decision on Protection Request for Protection of Witnesses* du 11 février 2004, paras. 6 et 7. Voir aussi, *Le Procureur c. Seromba*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003.

12. As regards many of the other measures sought, the Chamber notes that they are substantially identical to those ordered in previous cases. Accordingly, the Chamber grants them in the language customarily granted in those previous orders.

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that :

1. The names, addresses, whereabouts, and other identifying information concerning all Prosecution witnesses described hereinafter, be sealed by the Registry and not included in any non-confidential records of the Tribunal; that the said witnesses bear the pseudonyms : VA, VB, VD, VI, V J, VP, VS, VT, VC, VAI, VAZ, VAZ1, VAZ2, VAZ3, VAZS, VAZ6, VAZ7, VAZ8, VAZ9, VH, VM, VAE, VAL, VAQ, VFI, VV, VX, VW, ZB, ZC, CE, AX and ED and any other additional witnesses will also be assigned pseudonyms which will be used during the course of the trial. A pseudonym for each Prosecution witness will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between parties to the trial, and the public;

2. The names, addresses, whereabouts, and other identifying information concerning all Prosecution witnesses described in Order (1) above be communicated only to the Registry in accordance with the established procedure only in order to implement protection measures for these individuals;

3. Disclosure to the public or the media of the names, addresses, whereabouts, and any other identifying data in the supporting material or any other information on file with the Registry, or any other information which would reveal the identity of such prosecution witnesses is prohibited, and this order shall remain in effect after the termination of this trial and any appeal;

4. The Defence and the Accused are prohibited from sharing, discussing or revealing any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any witness to any person or entity other than the Accused, assigned Counsel or other persons working on the Defence team;

5. The Defence shall provide the Registry with a designation of all persons working for the Defence who have access to identifying information concerning the witnesses and to notify the Registry in writing of any changes in the composition of the Defence team and that the Defence to ensure that any member departing the Defence team remits all documents and information that could lead to the identification of the protected witnesses;

6. It is prohibited to photograph, audio and/or video record, or sketch any prosecution witness at any time or place without leave of the Trial Chamber, except where such is done as part of the *bona fide* processes of creating and maintaining records of the proceeding by the Registry of the Tribunal;

7. The Prosecution is authorized to temporarily withhold disclosure of witness identifying information to the Defence and to temporarily redact their names; addresses, locations and other identifying information as may appear in witness statements or other material disclosed to the Defence;

12. En ce qui concerne les autres mesures sollicitées, la Chambre observe qu'elles sont en gros identiques à celles ordonnées dans des affaires précédentes. Partant, elle y fait droit en reprenant la formulation employée habituellement dans les précédentes ordonnances.

PAR CES MOTIFS, LA CHAMBRE

ORDONNE les mesures ci-après :

1. Les nom, adresses, lieux où ils se trouvent et toutes autres informations permettant d'identifier tous les témoins à charge ci-après visés seront placés sous scellé par le greffe et ne devrons figurer dans aucun dossier non confidentiel du Tribunal ; lesdits témoins portent les pseudonymes suivants : VA, VB, VD, VI, VJ, VP, VS, VT, VC, VAI, VAZ, VAZ1, VAZ2, VAZ3, VAZ5, VAZ6, VAZ7, VAZS, VAZ9, VH, VM, VAE, VAL, VAQ, VFI, VV, VX, VW, ZB, ZC, CE, AX et ED, et des pseudonymes devant également être attribués à tous les autres témoins supplémentaires pour les désigner au procès. Chaque témoin à charge sera désigné par un pseudonyme dans le cadre de la procédure devant le Tribunal et dans les communications et discussions ayant lieu entre les parties et vis-à-vis du public.

2. Les nom, adresses, lieux où ils se trouvent et toutes autres informations permettant d'identifier tous les témoins à charge visés au paragraphe ci-dessus ne seront communiqués qu'au Greffe, conformément à la procédure en vigueur à la seule fin de mettre en oeuvre les mesures de protection concernant ces personnes.

3. Il est interdit de révéler au public ou aux médias les nom, adresse, lieux où se trouvent les témoins à charge visés et toutes autres informations permettant de les identifier qui figureraient dans les pièces justificatives ou tous autres renseignements susceptibles de révéler leur identité, la présente mesure continuant à s'appliquer après la fin du présent procès en première instance, et éventuellement en appel.

4. Il est interdit à la défense et à l'accusé de partager, discuter ou communiquer tout document ou renseignement susceptible de révéler l'identité ou de permettre l'identification d'un témoin à aucune personne physique ou morale autre que l'accusé, le conseil commis d'office ou les autres membres de l'équipe de la défense.

5. La défense devra fournir au Greffe une liste de toutes les personnes travaillant pour le compte de la défense qui ont accès aux renseignements permettant d'identifier les témoins, signaler par écrit au Greffe toute modification apportée à la composition de l'équipe de la défense, et veiller à ce que tout membre de l'équipe de la défense qui quitte celle-ci restitue tous les documents et renseignements permettant d'identifier les témoins protégés.

6. Il est interdit de photographier tout témoin à charge, d'enregistrer ses propos sur un support audio et/ou de le filmer et de le dessiner en tout lieu et en tout temps, sans l'autorisation de la Chambre de première instance, sauf dans le cadre de procédés utilisés de bonne foi pour permettre au Greffe de créer des dossiers et de les archiver.

7. Le Procureur est autorisé à retarder la communication à la défense des renseignements permettant d'identifier les témoins et de caviarder temporairement leur nom, adresse et lieux où ils se trouvent, ainsi que tous autres renseignements permettant de les identifier qui apparaîtraient dans des déclarations de témoin et autres pièces communiquées à la défense.

8. The identifying information withheld by the Prosecution in accordance with this Order shall be disclosed by the Prosecution to the Defence no later than twenty-one (21) days prior to the commencement of trial.

9. The Accused or his Defence Counsel shall notify the Prosecution, prior to any contact with Prosecution witness. With the consent of such protected person or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact;

10. It is prohibited for the Defence to attempt to make an independent determination of the identity of any protected witness or encouraging any person in so doing;

Arusha, 25 August 2004.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

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Decision on Motion by Paul Bisengimana to be served with the French Translation of all Procedural Documents within reasonable time 5 November 2004 (ICTR-2000-60-I)

(Original : French)

Trial Chamber II

Judge : Arlette Ramaroson

Translations of procedural documents – proper administration of justice – equality of treatment of the parties – disclosure of the French versions of documents relating to another case – motion granted in part

International instruments cited : Statute, art. 20 (4) – Rules of procedure and evidence, Rules 3 (e) and 73 (A)

International case cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu*, Order (Motion for translation of Appellant's Briefs), 29 March 2001 (lCTR-96-4-A, Reports 2001, p. 6)*

THE INTERNATIONAL CRIMINAL TRIUBNAL FOR RWANDA (hereinafter "the Tribunal");

SITTING as Trial Chamber II, composed of Judge Arlette Ramaroson, Presiding Judge, designated under Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules");

8. Les renseignements ainsi retenus par le Procureur conformément à la disposition 7 ci-dessus devraient être communiqués par le Procureur à la défense au plus tard 21 jours avant l'ouverture du procès.

9. Avant d'entrer en contact avec un témoin à charge, l'accusé ou le conseil de la défense en informe le Procureur. Si une personne ainsi protégée, ou les parents ou les tuteurs du mineur de moins de 18 ans, consent à un entretien avec la défense, le Procureur prend les mesures nécessaires pour faciliter un tel contact.

10. Il est interdit à la défense de chercher à percer, de son propre chef, l'identité d'un témoin protégé ou d'encourager autrui à le faire.

Arusha, le 25 août 2004

[Signé] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

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Décision sur la requête de Paul Bisengimana aux fins d'obtenir dans un délai raisonnable la version française de tous les actes de Procédure 5 novembre 2004 (ICTR-2000-6-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente

Traduction des actes de procédure – bonne administration de la justice – égalité de traitement des parties – communication en langue française de documents afférents à une autre affaire – requête accordée en partie

Instruments internationaux cités : Statut, art. 20 (4) – Règlement de procédure et de preuve, art. 3 (e) et 73 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Jean Paul Akayesu*, Ordonnance (Requête aux fins de traduction des mémoires de l'appelant), 29 mars 2001 (ICTR-96-4-A,* Recueil 2001*, p. 7)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée de la Juge Arlette Ramaroson, Présidente, désignée conformément à l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement»)

CONSIDERING the "Motion by Paul Bisengimana to be Served with the French Translations of all Procedural Documents Within Reasonable Time", filed on 29 September 2003 [sic] (the "Motion");

CONSIDERING that the Prosecutor has not responded to the said Motion;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules;

HEREBY DECIDES the Motion solely on the basis of the Motion filed by the Defence.

AFTER HAVING DELIBERATIED

1. The Chamber notes the Defence arguments that although it does not speak English, all the procedural documents served on it are in English, and the further argument that it receives the translations very belatedly, at the best of times, and sometimes does not receive them at all.

2. The Chamber recalls that Article 20 (4) (a) of the Statute provides that :

> "In the determination of charges 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 (…)".

3. The Chamber further recalls that "it is imperative, for the proper administration of justice and for equality of treatment of the parties, that their written submissions and particularly their briefs are translated into the Tribunal's two working languages."[6] The Chamber subscribes to this principle and adds that, in the instant case also, the administration of justice and equal treatment of the parties require that the evidence produced at trial as well as the procedural documents be made available within reasonable time in the two working languages of the Tribunal, pursuant to Article 3 (e) of the Rules.

4. With regard to the Defence's request for disclosure of the French versions of all documents relating to the Semanza case on the grounds that the two proceedings are closely linked, the Chamber notes that the documents requested by the Defence are not among the documents that the parties are under obligation to disclose and, therefore, that part of the request must be denied.

FOR THE FOREGOING REASONS, THE TRIBUNAL,

DIRECTS the Registrar to have the documents in the instant proceedings translated into French within reasonable time and to serve them on the Defence.

DISMISSES the additional request made in the motion.

Arusha, 5 November 2004

[Signed] : Arlette Ramaroson

[6] *The Prosecutor v. Jean-Paul Akayesu*, Case N° lCTR-96-4-A, "Order (Motion for translation of Appellant's Briefs)" (AC), 29 March 2001, p. 3.

CONSIDÉRANT la «Requête de Paul Bisengimana aux fins d'obtenir dans un délai raisonnable la version française de tous les actes de procédure», déposée le 29 septembre 2003 (la «Requête»);

CONSIDÉRANT que le Procureur n'a pas répondu à ladite requête;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement

STATUANT sur la seule base du mémoire déposé par la défense.

APRÈS EN AVOIR DÉLIBÉRÉ

1. La Chambre note les arguments de la défense qui soutient qu'elle ne parle pas anglais, alors qu'elle reçoit tous les documents relatifs à sa procédure en langue anglaise; la défense ajoute que dans le meilleur des cas, les traductions ne lui sont parvenues que très tardivement et parfois ne lui pas sont transmises du tout.

2. La Chambre rappelle que d'après l'article 20 (4) (a) du Statut

> «toute personne contre laquelle une accusation est portée an vertu du présent Statut a droit, en pleine égalité, au moins aux garanties suivantes :
>
> (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».

3. La Chambre rappelle également «qu'il est impératif, pour une bonne administration de la justice et une égalité de traitement des parties, que les écritures de celles-ci, et notamment leurs mémoires, soient traduites dans les deux langues de travail du Tribunal.»[6] La Chambre de céans souscrit à ce principe et ajoute que l'administration de la justice comme l'égalité de traitement des parties imposent aussi, en l'espèce, que les éléments de preuve présentés au procès ainsi que les documents relatifs à la procédure soient disponibles dans un délai raisonnable dans les deux langues de travail du Tribunal, conformément à l'article 3 (e) du Règlement.

4. En ce qui concerne la demande de la défense aux fins de communication en langue française de tous les documents afférents à la procédure de Semanza au motif que les deux procédures seraient étroitement liées, la Chambre note que les documents sollicités par la défense ne figurent pas parmi les pièces faisant l'objet d'une obligation de communication entre les parties et qu'il y a lieu de rejeter la demande sur ce point.

PAR CES MOTIFS, LE TRIBUNAL

INVITE le Greffier à faire traduire en langue française les pièces de la présente procédure dans un délai raisonnable et à les communiquer par la suite à la défense,

REJETTE le surplus de la requête.

Arusha, le 5 novembre 2004

[Signé] : Arlette Ramaroson.

[6] *Le Procureur c. Jean Paul Akayesu*, Affaire N° TPIR-96-4-A «Ordonnance (Requête aux fins de traduction des mémoires de l'appelant)» (CA) 29 mars 2001, p. 3.

The Prosecutor v. Augustin BIZIMUNGU, Protais MPIRANYA, Augustin NDINDILIYIMANA, François-Xavier NZUWONEMEYE and Innocent SAGAHUTU

Case N° ICTR-2000-56

Case History : Augustin Bizimungu

- Name : BIZIMUNGU
- First Name : Augustin
- Date of Birth : 28 August 1952
- Sex : male
- Nationality : Rwandan
- Former Official Function : Chief of Staff of the Rwandan Army

- Date of Indictment's Confirmation : 23 January 2000 [1]
- Counts : genocide, complicity in the genocide, conspiracy 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 and Place of Arrest : 2 August 2002, in Angola
- Date of Transfer : 14 August 2002
- Date of Initial Appearance : 21 August 2002
- Date Trial Began : 20 September 2004

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Case History : Augustin Ndindiliymana

- Name : NDINDILIYMANA
- First Name : Augustin
- Date of Birth : 1943
- Sex : male
- Nationality : Rwandan
- Former Official Function : Chief of Staff of the gendarmerie nationale

- Date of Indictment's Confirmation : 28 January 2000 [2]

[1] The text of the indictment is reproduced in the *2000 Report*, p. 820.

[2] The text of the indictment is reproduced in the *2000 Report*, p. 820. The text of the Decision to confirm the indictment is reproduced in the *2000 Report*, p. 880.

Le Procureur c. Augustin BIZIMUNGU, Protais MPIRANYA, Augustin NDINDILIYIMANA, François-Xavier NZUWONEMEYE et Innocent SAGAHUTU

Affaire N° ICTR-2000-56

Fiche technique : Augustin Bizimungu

- Nom : BIZIMUNGU
- Prénom : Augustin
- Date de naissance : 28 août 1952
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : chef d'état-major de l'armée rwandaise
- Date de la confirmation de l'acte d'accusation : 23 janvier 2000 [1]
- Chefs d'accusation : 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 : 2 août 2002, en Angola
- Date du transfert : 14 août 2002
- Date de la comparution initiale : 21 août 2002
- Date du début du procès : 20 septembre 2004

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Fiche technique : Augustin Ndindiliyimana

- Nom : NDINDILIYIMANA
- Prénom : Augustin
- Date de naissance : 1943
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : chef du personnel de la gendarmerie nationale
- Date de la confirmation de l'acte d'accusation : 28 janvier 2000 [2]

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 821.

[2] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000,* p. 821. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 881.

- Counts : genocide, complicity in the genocide, conspiracy 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 and Place of Arrest : 29 January 2000, in Belgium
- Date of Transfer : 22 April 2000
- Date of Initial Appearance : 27 April 2000
- Pleading : not guilty
- Date Trial Began : 20 September 2004

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Case History : François-Xavier Nzuwonemeye

- Name : NZUWONEMEYE
- First Name : François-Xavier
- Date of Birth : 30 August 1955
- Sex : male
- Nationality : Rwandan
- Former Official Function : Commander of 42nd Battalion of *Reconnaissance* of the Rwandan Army
- Date of Indictment's Confirmation : 28 January 2000 [3]
- Counts : genocide, complicity in the genocide, conspiracy 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 and Place of Arrest : 15 February 2000, in France
- Date of Transfer : 23 May 2000
- Date of Initial Appearance : 25 May 2000
- Pleading : not guilty
- Date Trial Began : 20 September 2004

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Case History : Innocent Sagahutu

- Name : SAGAHUTU
- First Name : Innocent
- Date of Birth : unknown
- Sex : male
- Nationality : Rwandan

[3] The text of the indictment is reproduced in the *2000 Report*, p. 820. The text of the Decision to confirm the indictment is reproduced in the *2000 Report*, p. 886.

- 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 et lieu de l'arrestation : 29 janvier 2000, en Belgique
- Date du transfert : 22 avril 2000
- Date de la comparution initiale : 27 avril 2000
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 20 septembre 2004

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Fiche technique : François-Xavier Nzuwonemeye

- Nom : NZUWONEMEYE
- Prénom : François-Xavier
- Date de naissance : 30 août 1955
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : commandant du 42e bataillon de reconnaissance de l'armée rwandaise
- Date de la confirmation de l'acte d'accusation : 28 janvier 2000 [3]
- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commette 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 : 15 février 2000, en France
- Date du transfert : 23 mai 2000
- Date de la comparution initiale : 25 mai 2000
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 20 septembre 2004

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Fiche technique : Innocent Sagahutu

- Nom : SAGAHUTU
- Prénom : Innocent
- Date de naissance : inconnue
- Sexe : masculin
- Nationalité : rwandaise

[3] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000,* p. 821. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 887.

- Former Official Function : Second-in-command of the Reconnaissance Battalion within the Rwandan Army
- Date of Indictment's Confirmation : 28 January 2000 [4]
- Counts : genocide, complicity in the genocide, conspiracy 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 and Place of Arrest : 15 February 2000, in Denmark
- Date of Transfer : 24 November 2000
- Date of Initial Appearance : 28 November 2000
- Pleading : not guilty
- Date Trial Began : 20 September 2004

[4] The text of the indictment is reproduced in the *2000 Report*, p. 820. The text of the Decision to confirm the indictment is reproduced in the *2000 Report*, p. 882.

- Fonction occupée au moment des faits incriminés : commandant en second du bataillon de reconnaissance de l'armée rwandaise
- Date de la confirmation de l'acte d'accusation : 28 janvier 2000 [4]
- Chefs d'accusation : génocide, complicité de génocide, entente en vue de commette 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 : 15 février 2000, au Danemark
- Date du transfert : 24 novembre 2000
- Date de la comparution initiale : 28 novembre 2000
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 20 septembre 2004

[4] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 821. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2000*, p. 883.

Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses 19 March 2004 (ICTR-2000-56-I)

(Original : French)

Trial Chamber II

Judge : Arlette Ramaroson, presiding, judge designated pursuant to Rule 73(A) of the Rules

Nzuwonemeye Sagahutu Ndindiliyimana Protective measures for victims and witnesses – Prosecutor – disclosure of the identity of witnesses, time limits – redacted documents – danger for the witnesses – relevant testimony, strong reasons to fear for the security of the witnesses, necessary measures – exceptional circumstances, new facts – volume of the annexes, diligence, relevance – Victims and Witness Support Unit – balance between defence right and protective measures for witnesses – closed session, case-by-case basis, reasons – pseudonym – motion granted in part

International instruments cited : Statute, art. 19, 20 and 21 – Rules of procedure and evidence, Rule 54, 69, 73, 75, 107 and 120 – Practice Direction on the length of briefs and motions on appeal

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. André Ntagerura*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 27 June 1997 (ICTR-96-10A-1,* Reports 1995-1997*, p. 632) – Trial Chamber II,* The Prosecutor v. Alphonse Nteziryayo*, Decision on the extremely urgent motion for protective measures for Mr. Bernard Ntuyahaga, 13 September 1999 (ICTR-97-29) – Trial Chamber II,* The Prosecutor v. Alphonse Nteziyayo*, Decision on the Defence motion for projective measures for witnesses, 18 September 2001 (ICTR-97-29-I,* Reports 2001*, p. 1988) – Trial Chamber,* The Prosecutor v. Samuel Musabyimana*, Decision on the Prosecutor's Motion for protective measures for victims and witnesses, 19 February 2002 (ICTR-01-62,* Reports 2002*, p. X)*

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

SITTING as Trial Chamber II, with Judge Arlette Ramaroson, designated pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules"), presiding;

Décision sur la requête du Procureur aux fins de modification et d'extension des mesures de protection des victimes et des témoins 19 mars 2004 (ICTR-2000-56-I)

(Original : Français)

Chambre de première instance II

Juge : Arlette Ramaroson, présidente

Nzuwonemeye Sagahutu Ndindiliyimana Mesures de protection des victimes et témoins, modification, extension – Procureur – communication de l'identité des témoins, délai – documents caviardés – dangers encourus par les témoins – témoignage pertinent, craintes pour la sécurité du témoin, mesures nécessaires – circonstances exceptionnelles, éléments nouveaux – volume des annexes, diligence, pertinence – Section d'aide aux victimes et aux témoins – juste milieu entre droits de la défense et mesures de protection des témoins – huis clos, cas par cas, motivation – pseudonyme – requête accordée en partie

Instruments internationaux cités : Statut, art. 19, 20 et 21 – Règlement de procédure et de preuve, art. 54, 69, 73, 75, 107 et 120 – Directive pratique relative à la longueur des mémoires et des requêtes en appel

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance II, Le Procureur c. André Ntagerura*, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 27 juin 1997 (ICTR-96-10A-I,* Recueil 1995-1997*, p. 632) – Chambre de première instance II,* Le Procureur c. Alphonse Nteziryayo*, Décision relative à la requête en extrême urgence introduite par la défense aux fins de mesures de protection en faveur de Bernard Ntuyahaga, 13 septembre 1999 (ICTR-97-29) – Chambre de première instance II,* Le Procureur c. Alphonse Nteziryayo*, Décision relative à la requête de la défense en prescription de mesures de protection de témoins, 18 septembre 2001 (ICTR-97-29-I,* Recueil 2001*, p. 1989) – Chambre de première instance,* Le Procureur c. Samuel Musabyimana*, Décision relative à la requête du Procureur en prescription de mesures de protection de victimes et de témoins, 19 février 2002 (ICTR-01-62,* Recueil 2002*, p. X)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le "Tribunal"),

SIÉGEANT en la Chambre de première instance II composée de la juge Arlette Ramaroson, présidente, désignée conformément à l'article 73 (A) du Règlement de procédure et de preuves (le «Règlement»);

BEING SEIZED OF :

i. The Prosecutor's Motion for review, variation and extension of protective measures for victims and witnesses, filed 22 November 2002 ("Motion"),

ii. The Response to the Prosecutor's motion for review, variation and extension of protective measures for victims and witnesses, filed by Nzuwonemeye's Counsel on 10 February 2003;

iii. Accused Innocent Sagahutu's response to the Prosecutor's motion for review, variation and extension of protective measures for victims and witnesses, filed on 11 February 2003;

iv. The Reply by Applicant Augustin Ndindiliyimana to Prosecutor's Motion for review, Variation and Extension of Protective Meaures [sic] for Victims and Witnesses, filed on 8 April2003;

v. The "Rectificatif de la réponse à la requête du Procureur aux fins d'examen, de modification et d'extension de mesures de protection de victimes et de témoins", filed on 15 May 2003.

NOTING the "Order for Protective Measures for Witnesses" of 12 July 2001 (hereafter "Order of 12 July 2001"), issued by Trial Chamber III in the *The Prosecutor v. Augustin Ndindiliyimana, Innocent Sagahutu and François-Xavier Nzuwonemeye*;

NOTING the "Ordonnance portant calendrier" [Scheduling Order] of 24 March 2003 issued in the instant case, directing the "[Prosecution to file a redacted version of Annex V (page 2045 only) with the Registry for disclosure exclusively to the Defendants within five days following notification of this order]";

RECALLING that the parties were informed by Memorandurn ICTWJUD-11-6-2-03/010 of the Court Management Section that they had ten days to reply instead of the earlier time limit of five days initially granted to them and NOTING the Prosecution's failure to reply to the Defence's responses;

RULING solely on the basis of the parties' written briefs, pursuant to Rule 73 of the Rules :

SUBMISSIONS OF THE PARTIES

Reinforced protective measures for victims and potential witnesses

1. The Prosecution submits that since the Order of 12 July 2001, victims and potential Prosecution witnesses have been facing new dangers and risks, regardless of their areas of residence.

2. Relying on Article 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules, the Prosecution seeks variation and extension of protective measures for witnesses, particularly by dropping the distinction based on the witness's place of residence, and

ÉTANT SAISI :

(i) de la «requête aux fins d'examen, de modification et d'extension de mesures de protection de victimes et de témoins» déposée par le Procureur le 22 novembre 2002 («requête»),

(ii) de la «réponse à la requête du Procureur aux fins d'examen, de modification et d'extension de mesures de protection de victimes et de témoins» déposée par le conseil de Nzuwonemeye le 10 février 2003;

(iii) de la «réponse de l'accusé Innocent Sagahutu à la requête du Procureur aux fins d'examen, de modification et d'extension de mesures de protection de victimes et de témoins» déposée le 11 février 2003;

(iv) de la «Reply by Applicant Augustin Ndindiliyimana to Prosecutor's Motion for review, Variation and Extension of Protective Meaures [sic] for Victims and Witnesses» déposée le 8 avril 2003;

(v) du «rectificatif de la réponse à la requête du Procureur aux fins d'examen, de modification et d'extension de mesures de protection de victimes et de témoins» déposée le 15 mai 2003.

NOTANT l'«Order for Protective Measures for Witnesses» en date du 12 juillet 2001 rendu en l'affaire *le Procureur contre Augustin Ndindiliyimana, Innocent Sagahutu et François-Xavier Nzuwonemeye* par la Chambre de première instance III, (ci-après «ordonnance du 12 juillet 2001»);

NOTANT «l'ordonnance portant calendrier» rendue en cette affaire le 24 mars 2003 ordonnant au «Procureur de déposer une version caviardée de l'annexe V (page 2045 uniquement) auprès du greffe pour communication exclusive aux parties défenderesses dans les cinq jours de la notification de cette ordonnance»;

RAPPELANT que les parties ont été informées par mémorandum ICTR/JUD-11-6-2-03/010 de la Section de l'administration des chambres qu'elles disposaient d'un délai de 10 jours pour répliquer en lieu et place du délai initial de cinq jours qui leur avaient été initialement accordé et NOTANT que le Procureur n'a pas répondu aux réponses de la défense;

STATUANT uniquement sur la base des mémoires écrits déposés par les parties conformément à l'article 73 du Règlement;

ARGUMENTS DES PARTIES

Sur le renforcement des mesures de sécurité entourant les victimes et les témoins potentiels

1. Le Procureur fait valoir que, depuis l'ordonnance du 12 juillet 2001, les victimes et les témoins à charge potentiels courent de nouveaux dangers, et ce, quel que soit leur lieu de résidence.

2. S'appuyant sur l'article 21 du Statut et les articles 54, 69, 73 et 75 du Règlement, le Procureur demande la modification et l'extension des mesures de protection des témoins en abandonnant notamment le critère distinctif du lieu de résidence du témoin et en réduisant les délais de communication de l'identité des témoins à la

reducing the time limits for disclosure of the identity of witnesses to the Defence to 21 days prior to the date each witness is due to testify.

3. The Prosecution relies on two written statements given under oath – one on 16 October 2002 by Rémi Abdulrahman, Chief of the ICTR security section in Kigali, and the other by an unnamed potential Prosecution witness, initially filed with the Chamber only, and marked "Filed confidentially, under seal, *ex parte*". The Prosecution also relies on "new and additional evidence" contained in Annexes D to U attached to the motion.

4. In light of these various documents, the Prosecution highlighted the following three sources of danger to which the potential Prosecution witnesses in this case, who reside in Rwanda, are exposed :

(a) The cross-border areas, where incursions by armed rebels occurred in 2000 and 2001, warranting the creation of two security zones in Rwanda (Phase II and Phase III);

(b) Because of the very nature of the trial and the former functions of the accused within the Rwanda Armed Forces (FAR) in 1994, the accused have many supporters, especially among ex-FAR members, who, according to Mr. Abdulrahman, are a possible source of threat which "must not be underestimated" (para. 11 of his "*affidavit*");

(c) For some time now, incidents of isolated attacks and killings of individuals in various regions of the country, including in Kigali-*ville* have been on the increase. According to Mr. Abdulrahman, the incidents have something to do with the role played by these people as witnesses in the various cases. These allegations were allegedly confirmed by an article in the *Hirondelle* press agency dated 25 March 2002.

5. Mr. Abdulrahman is of the view that the situation calls for reinforced witness protection measures and that the security of the "Tribunal's witnesses, could be very much compromised if adequate security measures are not put into place."

6. Moreover, the Prosecution stresses that witnesses residing outside Rwanda, either within or outside Africa, are also at risk because of the high concentration of Rwandan asylum seekers in some countries (Annex U). The Prosecution alleges that the reality of these threats is demonstrated in the witness's statement filed confidentially under seal, *ex parte* and appended to the motion (Annex V).

7. Lastly, the Prosecution cites ICTR case law and relies on a decision of 14 August 2002 rendered in the *Niyitegeka* case. This decision refers to a letter of 26 July 2002 from the Rwandan Representative to the United Nations to the President of the Security Council highlighting the Rwandan Government's concern about the risks faced by ICTR potential witnesses.

8. Counsel for Sagahutu and Nzuwonemeye submit that that Prosecution has not shown the existence of new exceptional circumstances warranting reinforced measures for the security of the witnesses.

9. The Defence criticizes the Prosecution for not attaching any new document to its initial motion for the protection of witnesses, filed on 16 May 2001. Counsel for

défense à un maximum de 21 jours avant la date fixée pour la comparution de chaque témoin.

3. Le Procureur se fonde sur deux déclarations écrites sous serment, l'une faite le 16 octobre 2002 par M. Rémi Abdulrahman, Chef du service de la sécurité du TPIR à Kigali, et l'autre faite par un témoin à charge potentiel sous anonymat et initialement déposée uniquement auprès de la Chambre, avec les mentions «Confidentiel, sous scellés et unilatéral» ainsi que sur des éléments de preuve «nouveaux et supplémentaires» figurant dans les annexes D à U jointes à la requête.

4. Au vu de ces différents documents, le Procureur fait état de trois sources de dangers encourus par les témoins à charge potentiels dans cette affaire et résidant au Rwanda :

(i) les régions transfrontalières ont été dans les années 2000 et 2001 le théâtre d'incursions de rebelles armés, ce qui a justifié la création de deux zones de sécurité au Rwanda (Phase II et Phase III);

(ii) la nature même du procès et les anciennes fonctions des accusés au sein des Forces armées rwandaises (FAR) en 1994 font que les partisans des accusés, notamment parmi les membres des ex-FAR, sont nombreux et constituent pour M. Abdulrahman «une source potentielle de menaces qui ne devrait pas être sous-estimée» (paragraphe 11 de son «affidavit»);

(iii) depuis quelque temps, a été constatée une recrudescence d'attaques et de meurtres d'individus isolés dans différentes régions du pays, y compris à Kigali-ville, qui, selon M. Abdulrahman, est liée à la qualité de témoin de ces personnes dans différentes affaires. Ces allégations seraient confirmées par un article de l'agence de presse Hirondelle daté du 25 mars 2002.

5. La situation semble, selon M. Abdulrahman, justifier le renforcement des mesures de protection des témoins en indiquant que la sécurité «des témoins cités devant le Tribunal pourra être bien compromise si des mesures de sécurité suffisantes ne sont pas mises en place».

6. En outre, le Procureur insiste sur le fait que des risques sont aussi encourus par les témoins résidant hors du Rwanda, soit en Afrique, soit hors d'Afrique, en raison de la forte concentration de demandeurs d'asile rwandais dans certains pays (annexe U). Le Procureur allègue que la réalité de ces menaces est démontrée dans la déclaration confidentielle de témoin déposée unilatéralement et mise sous scellé en annexe à la requête (annexe V).

7. Enfin le Procureur invoque la jurisprudence du TPIR et s'appuie sur une décision du 14 août 2002 rendue dans l'affaire *Niyitegeka*. Dans cette décision, il est fait référence à une lettre du 26 juillet 2002 du représentant du Rwanda auprès des Nations-Unies adressée au président du Conseil de sécurité faisant état de l'inquiétude du gouvernement rwandais face aux menaces dont sont l'objet les témoins potentiels du TPIR.

8. Les conseils de la défense des accusés Sagahutu et Nzuwonemeye soutiennent que le Procureur n'a pas établi l'existence de nouvelles circonstances exceptionnelles qui justifieraient les mesures de renforcement de la sécurité des témoins.

9. La défense reproche au Procureur de ne joindre aucun nouveau document par rapport à sa requête initiale en mesure de protection des témoins en date du 16 mai

Sagahutu argues that even Mr. Abdulrahman's *affidavit* contains passages similar to the one filed in support of the initial motion – which makes it debatable whether the evidence is really new and whether the document is relevant.

10. Moreover, Counsel for Sagahutu stresses that a detailed comparison of the statements made by Mr. Abdulrahman in his *affidavits* of 11 May 2001 and 16 October 2002 respectively tends to show that the security situation has improved. Indeed, in May 2001, Mr. Abdulrahman stated that the situation was "highly precarious and unpredictable" and that in October 2002, it was only "unpredictable".

11. Thus, Counsel for Sagahutu submits that the Prosecution has failed to show the existence of exceptional circumstances and challenges the application of Rule 69 cited by the Prosecution to the circumstances of the instant case.

12. Counsel for Ndindiliyimana challenges the practice of assigning a code name to all the Prosecution witnesses as a matter of course, whereas no evidence of a specific and individual threat has been. He submits that such a practice violates the right of the accused to a public and fair hearing.

13. In the present case, Counsel for Ndindiliyimana alleges that the Prosecution has not adduced any specific evidence of threat to potential witnesses in this matter. A case in point is the witness statement in Annex V, which does not indicate any instance relating to this matter in which threats were allegedly issued.

Amendment relating
to the Prosecution's disclosure obligation

14. The Prosecution seeks variation of the disclosure deadlines set by the initial Order of 12 July 2001. In light of three new developments, namely :

1. Whereas Trial Chamber III in its Order gave a strict interpretation to Rule 69 (C) and adhered to a disclosure deadline of 21 days before the commencement of trial, the Prosecution argues that the amendment of Rule 69 (C) of the Rules made in July 2002 transformed the obligation to disclose materials "prior to the trial" into an obligation to disclose "within such time as determined by [the] Trial Chamber."

2. The case law of both the International Criminal Tribunal for former Yugoslavia and Trial Chamber II of the International Criminal Tribunal for Rwanda in 2001 seems to agree on the obligation to disclose materials 21 days before the witness testifies.

3. A memorandum dated 4 September 2002 from the Witness and Victims Support Section recommends reinforced victim security measures, which may take the form of redaction of names and extension of disclosure deadlines to 21 days prior to the date of testimony.

2001. Le conseil de Sagahutu fait valoir que même l'*affidavit* de M. Abdulrahman contient des passages identiques à celui déposé à l'appui de la requête initiale rendant la nouveauté de ces éléments et la pertinence dudit document discutables.

10. En outre, le conseil de Sagahutu souligne qu'une comparaison minutieuse des conclusions de M. Abdulrahman dans ses *affidavits* datés respectivement des 11 mai 2001 et 16 octobre 2002 tendent à montrer une amélioration des conditions de sécurité. En effet, en mai 2001 M. Abdulrahman concluait que la situation était «hautement précaire et imprévisible» et en octobre 2002 qu'elle est seulement «imprévisible».

11. Le conseil de la défense de Sagahutu fait ainsi valoir l'incapacité du Procureur à démontrer l'existence de circonstances exceptionnelles, et conteste l'application de l'article 69 invoqué par le Procureur aux circonstances de l'espèce.

12. Le conseil de Ndindiliyimana conteste la pratique de l'attribution systématique de nom de code à tous les témoins du procureur alors qu'aucune preuve de menace spécifique et individuelle n'a pas été rapportée et soutient qu'une telle pratique viole le droit de l'accusé à un procès public et équitable.

13. En la présente affaire, le conseil de Ndindiliyimana allègue que le Procureur n'a fourni aucune preuve particulière de menace à l'encontre de témoins qui pourraient être appelés dans cette affaire, et ceci inclut la déclaration du témoin à l'annexe V qui ne contient aucune indication quant à l'affaire dans laquelle les menaces auraient été proférées.

Sur la modification de l'obligation de communication des pièces par le Procureur

14. Le Procureur demande une modification des délais de communication des pièces prescrits par l'ordonnance initiale datée du 12 juillet 2001. Cette modification se justifie, selon lui, par trois nouveaux éléments :

(1) alors que dans son ordonnance, la Chambre de première instance III s'en était tenue à une interprétation stricte de l'article 69 (C) et avait maintenu un délai de communication de 21 jours avant le début du procès, le Procureur fait valoir que l'amendement de l'article 69 (C) du Règlement intervenu en juillet 2002 transforme l'obligation de communication «avant le commencement du procès» en une obligation «dans les délais prescrits par la Chambre de première instance».

(2) la jurisprudence du Tribunal Pénal International pour l'ex-Yougoslavie, ainsi que celle de la Chambre II du Tribunal Pénal International pour le Rwanda en 2001, semblent s'accorder sur une obligation de communication des pièces de 21 jours avant la déposition du témoin.

(3) un mémorandum daté du 4 septembre 2002 émanant de la Section d'aide aux victimes et aux témoins recommande le renforcement des mesures de sécurité entourant les témoins, ce qui peut prendre la forme du caviardage des noms ainsi que de l'extension des délais de communication des pièces à 21 jours avant le début de la déposition du témoin.

15. Thus, the Prosecution requests that "unredacted disclosure [...] take place upon the implementation of witness protection measures but in any event not earlier than 21 days prior to testimony."

16. Counsel for Nzuwonemeye fails to see how an amended Rule 69 is a source of constraint for the Trial Chamber, which should now abide by what has become a "practice" of the Tribunal.

17. The Defence interprets amended Rule 69 differently and stresses that the amendment gives a wider discretion to the Trial Chamber, enables it to proceed on a case-by-case-basis, and also that there is no "final and general rule of application".

18. The Defence further submits that the Witness and Victims Support Section is only entitled to give a simple opinion, which is not binding on the judges and that, in the instant case, such opinion is not "supported by any fact."

19. Lastly, the Defence denounces the fact that, by seeking disclosure of materials "not earlier than 21 days prior to the date of testimony," the Prosecution arrogates to itself the right to disclose evidence "up to the date of the trial and lawfully son, thus preventing the Defence from organizing itself to examine the witness testimony. The Defence contends that this would substantially undermine the adversarial principle.

Request for coercive measures against the Defence team

20. Points (e) to (h) of the Prosecutor's motion set out the protective measures that the Prosecution would like the Chamber to issue in order to prevent members of the Defence team from disclosing information.

21. The Prosecution acknowledges that the orders sought in Points (f) to (h) were rejected by the Chamber in its Witness protection Order, yet it makes a fresh request of them.

22. The Prosecution submits that the Trial Chamber, which at the time relied on a decision of the Appeals Chamber in denying the request, should adopt one of the other measures ordered by the Appeals Chamber, and proposes to include it in its initial request. Since the Trial Chamber had declined to issue a requested order requiring the Defence to draw up and disclose a list of persons working on the Defence team, the Prosecution requests that the said list be drawn up by the Registry, which would inform the members of the Defence team of the non-disclosure obligations imposed on them.

23. The Prosecution further submits that while the Trial Chamber had deemed it "prudent to require that Defence Counsel notify the Chamber in writing of any person leaving the Defence team", it would now be appropriate to specifically issue an order to that effect.

24. Reacting to the Prosecution requests, Counsel for Nzuwonemeye first argues that the orders sought in paragraphs (d) to (g) had already been issued, almost verbatim, in the First Order, and condemns this "unacceptable suspicion" vis-à-vis the Defence, insofar as the Prosecution does not apparently-take into account the fact that

15. Ainsi, le Procureur souhaite que «la communication des versions non-caviardées des pièces ait lieu après la mise en place des mesures de protection des témoins, mais, en tout état de cause, au plus tôt 21 jours avant la date prévue pour la déposition».

16. Le conseil de la défense de Nzuwonemeye refuse de voir dans l'adoption de l'amendement à l'article 69 une source de contrainte pour la Chambre qui devrait se plier à ce qui serait devenu une «pratique» du Tribunal.

17. La défense apporte une interprétation différente de l'article 69 amendé et souligne une plus grande liberté ainsi laissée à la Chambre, une analyse au cas par cas par la Chambre et l'absence de «décision définitive et générale d'application» que l'adoption de cet amendement révèle.

18. En outre, la défense considère que la Section d'aide aux victimes et aux témoins n'est habilitée qu'à donner un avis qui ne saurait lier les juges et que, en l'espèce, cet avis n'est «appuyé par aucun élément».

19. Enfin, la défense dénonce le fait que le Procureur, en exigeant que les pièces soient dévoilées «au plus tôt 21 jours avant la date prévue pour la déposition», s'arroge le droit de communiquer les témoignages «jusqu'au jour du procès, et ce, en toute légitimité», empêchant ainsi la défense de préparer efficacement la déposition du témoin. La défense signale que cette dérive contreviendrait gravement au principe du contradictoire.

Demande de mesures coercitives à l'égard de l'équipe de la Défense

20. Dans sa requête, le Procureur énumère dans les points (e) à (h) les mesures qu'il souhaite voir adoptées afin que des précautions soient prises pour éviter la divulgation d'informations par les membres de l'équipe de défense.

21. Le Procureur admet que les ordonnances (f) et (h) sollicitées ont été rejetées par la Chambre dans son ordonnance de protection des témoins mais les formule à nouveau.

22. Le Procureur fait valoir que la Chambre, s'étant à l'époque référée à une décision de la Chambre d'appel pour justifier son rejet, devrait adopter une des autres mesures ordonnées par la Chambre d'appel et propose de l'incorporer à sa première demande. Dans la mesure où l'établissement et la communication d'une liste de ses membres par l'équipe de la défense avait été rejetée par la Chambre, le Procureur demande que cette liste soit établie par le Greffe qui leur ferait part des exigences de confidentialité auxquelles ils sont tenus.

23. D'autre part, le Procureur fait valoir que si la Chambre avait estimé «prudent de demander que le conseil de la défense informe la Chambre de première instance par écrit du départ de tout membre de l'équipe de la défense», il serait désormais opportun de l'ordonner expressément.

24. Le conseil de la défense de Nzuwonemeye réagit à ces demandes en arguant dans un premier temps que les paragraphes (d) à (g) avaient été déjà accordés, pratiquement mot pour mot, dans l'ordonnance initiale et dénonce une «suspicion inacceptable» à l'égard de la défense dans la mesure où le Procureur ne semble pas

Defence Counsel take the oath and that concern for confidentiality is inherent in their profession.

25. The Defence further states that the Prosecution seems to request that Defence Counsel take "responsibility […] for any bad behaviour on the part of members of the team", which, in the opinion of the Defence is :

(i) Practically unmanageable given the fact that members of the team live far from each other;

(ii) Legally untenable, since members of the Defence team "are individually contracted by the United Nations under the direction of the Registry and, therefore, the Lead Counsel has no legal means of exercising coercion in the matter."

Arguments of the Defence

26. Counsel for Sagahutu comments on the annexes to the Prosecutor's motion, describing them as "oversized." He cites the Practice Direction on the length of briefs and motions on appeal which limits the length of annexes to three times that of the body of the motion. He further argues that, pursuant to Rule 107 of the Rules, the rules that govern proceedings before the Trial Chamber are applicable to proceedings before the Appeals Chamber. He concludes that it would therefore be "logical" that the rules governing proceedings on appeal, in this case the said Practice Direction, should be applicable before the Trial Chamber, hence he requests that the Prosecution's filings be dismissed on account of their excessive length.

27. Counsel for Nzuwonemeye, like Counsel for Ndindiliyimana, denounces the confidential manner in which the Prosecutor filed Annex V, and requests the Chamber not to admit it into evidence, in accordance with the principle of a fair trial.

28. Both Counsel for Nzuwonemeye and Counsel for Sagahutu agree that the Prosecution is seeking measures which the Chamber had aiready granted in the First Order, almost exactly as they were requested.

29. Counsel for Sagahutu also asserts that the Prosecution, realizing that it cannot appeal the initial decision on the basis of Rule 73 (B), requests the Chamber to review it by means of an order. Counsel however, points out that Rule 120 of the Rules which governs requests for review of a "decision" is only applicable in cases where a "new fact" has been discovered. The Defence considers that the Prosecution has failed to demonstrate the existence of a new fact and consequently requests that the Order of 12 July 2001 be upheld.

30. Counsel for Nzuwonemeye accepts, on the one hand and unconditionally, the orders requested in Points (a), (b), (d), (g), (i), (k), and, on the other hand, the order sought in Point (j), subject to the Prosecution providing specific and objective reasons. However, he objects to the orders sought in Points (c), (e), (f) and (h).

prendre en considération le fait que les avocats prêtent serment et que le souci de confidentialité est inhérent à leur profession.

25. D'autre part la défense fait remarquer que le Procureur semble rendre les avocats «responsables des errements éventuels des membres de leur équipe» ce qui est selon elle :

(i) pratiquement ingérable étant donné la dispersion géographique de l'équipe;

(ii) légalement injustifié puisque les membres de l'équipe de la défense contractent «personnellement avec l'ONU sous le contrôle du Greffe et que dès lors le conseil principal n'a pas de moyen juridique de coercition en la matière».

Conclusions de la défense

26. Le conseil de la défense de Sagahutu se penche sur les annexes du Procureur qu'il trouve «anormalement longues». Il cite la directive pratique relative à la longueur des mémoires et requêtes en appel qui limite la taille des annexes à trois fois celle du corps de la requête. Il avance d'autre part que l'article 107 du Règlement rend les procédures devant le Tribunal de première instance applicables devant la Chambre d'appel. Il en conclut qu'il serait «logique» que les procédures d'appel – en l'occurrence l'application de cette directive – soient applicables devant la Chambre de première instance et souhaite ainsi voir les écritures du Procureur rejetées pour longueur excessive.

27. En outre, le conseil de Nzuwonemeye s'est associé au conseil de Ndindiliyimana pour dénoncer la production de façon confidentielle par le Procureur de l'annexe V et a demandé qu'elle ne soit pas admise comme preuve par la Chambre, conformément au principe du procès équitable.

28. Les conseils de Nzuwonemeye et de Sagahutu s'accordent pour souligner le fait que le Procureur sollicite des mesures déjà obtenues, à quelques mots près, dans l'ordonnance initiale.

29. En outre, le conseil de Sagahutu affirme que le Procureur, conscient que l'article 73 (B) l'empêche de faire appel de la première décision, demande sa révision en vertu d'une ordonnance. Or le conseil fait valoir que l'article 120 du Règlement qui justifie la demande de révision d'un «jugement» ne s'applique qu'en présence d'un «fait nouveau». La défense estime que le Procureur a échoué à établir un élément nouveau et souhaite que l'ordonnance du 12 juillet 2001 soit maintenue.

30. Le conseil de Nzuwonemeye accepte d'une part les projets d'ordonnances (a), (b), (d), (g), (i), (k) sans condition, et d'autre part le projet d'ordonnance (j) sous réserve que le Procureur fournisse des motifs précis et objectifs mais s'oppose aux projets d'ordonnances sollicitées aux points (c), (e), (f) et (h).

AFTER HAVING DELIBERATED

Legal basis of the motion

31. The Chamber notes that the Prosecutor's request is basically founded on Articles 19 and 21 of the Statute. Article 21 of the Statute provides for protection measures for victims and witnesses taken within the framework of the Rules. Such measures "shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

32. The application of Article 21 of the Statute is clarified by Rules 69 and 75 of the Rules. Rule 69 (A) of the Rules provides that "[I]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." Rule 75 (A) of the Rules moreover states that "A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused", pursuant to Article 20 of the Statute.

33. In accordance with Article 20 of the Statute and in order to safeguard the rights of the accused to "have adequate time and facilities for the preparation of his or her defence" and his or her right to "to examine […] the witnesses against him or her", the Chamber may, on a case-by-case basis and pursuant to Rules 69 and 75 of the Rules, take any appropriate measure to protect the witnesses. The Chamber recalls, in this connection, the new provisions of paragraph (C), Rule 69 of the Rules as amended in July 2002.

34. In determining the appropriateness of such protective measures, the Chamber takes into account several criteria as set forth in previous decisions[1] : first, the testimony must be relevant and of consequence to the accused's case; secondly, there must be strong reasons to fear for the security of the witnesses and thirdly, protective measures must be absolutely necessary.

35. In this regard, and in order to determine the existence of exceptional circumstances pursuant to Rule 69 (A), the Tribunal requests the parties to provide recent information when they seek protection measures[2]. Now, the Chamber notes that some of the evidence presented in the annex to the Motion to show Rwanda's very volatile security situation dates back over two years, and was obtained prior to the date of

[1] See *The Prosecutor v. Nteziyayo*, Case n° ICTR-97-29-1; "Decision on the Defence motion for projective measures for witnesses"; 18 September 2001 and "Decision on the extremely urgent motion for protective measures for Mr. Bernard Ntuyahaga" : 13 September 1999.

[2] See *The Prosecutor v. C. Ntagerura*, Case n° ICTR-96-10A-1, "Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses", 27 June 1997.

APRÈS EN AVOIR DÉLIBÉRÉ

Fondement juridique de la requête

31. La Chambre note que la requête du Procureur se fonde essentiellement sur les articles 19 et 21 du Statut. L'article 21 du Statut envisage les mesures de protection des victimes et des témoins prises dans le cadre du Règlement, ces mesures «comprennent sans y être limitées, la tenue d'audiences à huis-clos et la protection de l'identité des victimes.»

32. L'application de l'article 21 du statut est explicitée par les articles 69 et 75 du Règlement. L'article 69 (A) du Règlement dispose que «[d]ans 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 encourent un danger ou des risques, et ce, jusqu'au moment où la Chambre en décidera autrement». L'article 75 (A) du Règlement précise en outre qu'«[u]n juge ou une Chambre peut, de sa propre initiative ou à la demande d'une des parties, ou de la victime ou 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 que lesdites mesures ne portent pas atteinte aux droits de l'accusé» conformément à l'article 20 du Statut.

33. Conformément à l'article 20 du Statut et pour qu'on ne puisse pas porter atteinte au droit de l'accusé de «[d]isposer du temps et des facilités nécessaires à la préparation de sa défense» et à son droit «[d]'interroger les témoins à charge», la Chambre peut ordonner au cas par cas, conformément aux articles 69 et 75 du Règlement, toutes mesures appropriées pour protéger les témoins. Elle rappelle à cet effet les nouvelles dispositions du paragraphe C de l'article 69 du Règlement tel que modifié en juillet 2002.

34. Pour décider de l'opportunité de telles mesures de protection, la Chambre prend en considération plusieurs critères tels qu'énoncés dans la jurisprudence[1] : premièrement le témoignage doit être pertinent et porter à conséquence dans la cause de l'accusé, deuxièmement il doit y avoir de solides raisons de craindre pour la sécurité du témoin et troisièmement les mesures de protection doivent être absolument nécessaires.

35. A cet égard, et afin d'établir l'existence de circonstances exceptionnelles conformément à l'article 69 (A), le Tribunal demande aux parties de lui fournir des informations récentes lorsque ces dernières sollicitent des mesures de protection[2]. Or, la Chambre constate que certains des éléments de preuve joints en annexe à la requête pour établir la forte instabilité que connaît le Rwanda dans le domaine de la sécurité datent de plus de deux ans, et sont notamment antérieurs à la date de dépôt de la

1 Voir le Procureur c. Nteziryayo, affaire n° ICTR-97-29-I; «Décision relative à la requête de la défense en prescription de mesures de protection de témoins», 18 septembre 2001 et «Décision relative à la requête en extrême urgence introduite par la défense aux fins de mesures de protection en faveur de Bernard Ntuyahaga» du 13 septembre 1999.

2 Voir *le Procureur c. Ntagerura* , affaire n° ICTR-96-10A-I, "Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses", 27 juin 1997.

filing of the Prosecutor's first motion of 16 May 2001, in the light of which initial Order of 12 July 2001 was issued. The Chamber is therefore of the view that the information contained in those annexes cannot constitute new facts as alleged by the Prosecution.

36. Furthermore, in the eyes of the Chamber, the volume of the annexes is not justified, considering the information provided. In this connection, the Chamber invites the Prosecution to show more diligence and orders that in future, it should to take into account the volume of annexes filed and to select them on the basis of their relevance, so as to facilitate the conduct of proceedings by limiting the filing of voluminous documents, and hence avoiding their being translated.

37. However, the Chamber does not accept the reasoning of the Defence founded on Rule 107 of the Rules. The Practice Direction on the length of briefs and motions on appeal cannot, under any circumstances, be applicable before a Trial Chamber.

38. The Chamber notes that the annexes contain two new documents, namely :

(i) the *affidavit* by Mr. Rémi Abulrahman, dated 16 October 2002, the security situation in Rwanda that the activities of the rebels no longer seem to be the only cause of insecurity, what with the attacks and incidents of armed robbery that have marked the beginning of 2002 : According to Mr. Abulrahman, the death of the representative of IBUKA "was not unconnected with his role as a potential witness for the GACACA court". He aserts that in addition to these threats, "supporters of the Defendants" were also under threat. Lastly he specifically recommends that the security of "the witnesses could be very much compromised if adequate security measures are not put into place."

(ii) The statement of a potential Prosecution witness (Annex V), indicating that he was threatened on account of his testimony in this matter despite his being outside the Rwandan territory. The witness specifically requested that his statement should not be disclosed to the public or the Defence. By Order of the Chamber, the statement was subsequently disclosed to the Defence in its redacted form.

39. It is the opinion of the Chamber that the Prosecution has presented new facts which are different from those presented before Trial Chamber III which issued the Order that limited protective measures to witnesses residing in Rwanda, which order has been challenged by the Prosecution. Consequently, the Chamber finds that the change in the security situation of victims and potential witnesses residing in and outside Rwanda demonstrates the existence of exceptional circumstances warranting the extension of protective measures to all the Prosecution witnesses, including those residing outside Rwanda. The Chamber thus grants order (a) sought by the Prosecution.

Time limits for disclosure of the identity of Prosecution witnesses

40. The Chamber will now consider the amendment made to Rule 69 (C) of the Rules since the initial Order of 12 July 2001 and Article 20 (b) of the Statute relating

première requête du Procureur en date du 16 mai 2001 qui a donné lieu à l'ordonnance initiale du 12 juillet 2001. La Chambre estime ainsi que les éléments d'information fournis à travers ce type d'annexes ne peuvent constituer des faits nouveaux tels qu'allégués par le Procureur.

36. D'autre part, le volume des annexes n'est pas apparu à la Chambre comme justifié au regard des informations apportées. À cet égard, la Chambre invite le Procureur à davantage de diligence et lui enjoint de prendre, à l'avenir, en considération le volume des annexes déposées et de les sélectionner selon leur pertinence afin de faciliter le déroulement de la procédure en limitant la distribution de documents volumineux et d'éviter par conséquent leur traduction.

37. Néanmoins, la Chambre ne peut adhérer au raisonnement de la défense fondé sur l'article 107 du Règlement. La directive pratique relative à la longueur des mémoires et des requêtes en appel ne saurait en aucun cas s'appliquer devant une Chambre de première instance.

38. La Chambre note que les annexes contiennent deux nouveaux documents :

(i) l'*affidavit* de M. Rémi Abdulrahman daté du 16 octobre 2002 faisant état d'une évolution de la sécurité au Rwanda et précisant que les activités des rebelles ne semblent plus être la seule cause d'insécurité avec un début d'année 2002 marqué par des attentats et des vols à main armée. Selon lui, la mort du représentant d'IBUKA «n'était pas sans rapport avec sa qualité de témoin potentiel appelé à déposer devant la juridiction *Gacaca*.». Il affirme qu'à ces menaces, s'ajoute en outre celle des «partisans des suspects». Enfin il recommande expressément que «la sécurité […] des témoins cités devant le Tribunal pourra être bien compromise si des mesures de sécurité suffisantes ne sont pas mises en place.»

(ii) La déclaration d'un témoin à charge potentiel (annexe V) indiquant qu'il a été victime de menaces en relation avec son témoignage dans cette affaire, et ce, hors du territoire rwandais, demandant expressément l'interdiction de la communication de sa déclaration au public ou à la défense. Cette déclaration a été subséquemment communiquée en version caviardée à la défense sur ordonnance de la Chambre.

39. La Chambre estime que le Procureur a fait état d'éléments nouveaux par rapport aux éléments soumis à la Chambre de première instance III qui a rendu l'ordonnance contestée par le Procureur qui limitait les mesures de protection des témoins à ceux qui résident au Rwanda. Par conséquent, la Chambre estime que le changement de la situation sécuritaire des victimes et des témoins à charge potentiels résidant tant au Rwanda qu'en dehors du Rwanda établit l'existence de circonstances exceptionnelles qui justifie l'élargissement des mesures de protection à tous les témoins à charge y compris à ceux résidant hors du Rwanda. La Chambre accorde ainsi l'ordonnance (a) demandée par le Procureur.

Sur les délais de communication de l'identité des témoins à charge

40. La Chambre considère l'amendement apporté à l'article 69 (C) du Règlement depuis l'ordonnance initiale du 12 juillet 2001 et l'article 20 (b) du Statut concernant

to the rights of the accused 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."

41. Pursuant to Rule 69 (B) which provides that "in the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit", the Chamber noted the Unit's opinion presented in a memorandum dated 4 September 2002, prepared at the request of the Prosecution in another case. In terms of organization of its work, the Section points out that the best protection consists in the non-disclosure of the identity of witnesses up to 21 days before they testify, as well as the disclosure to the Defence of redacted documents which contain information likely to reveal the identity of the witnesses.

42. The Chamber also considers that in the decision rendered on this point in Musabyirnana[3],Trial Chamber II, composed differently, pointed to the need to strike a "balance between the right of the Defence and the demonstrated need for protective measures for witnesses."

43. The Chamber considers that, by requesting that the identity of witnesses be disclosed not earlier than 21 davs before their testimony at trial (measure (c)), the Prosecution departed from the case law that it cited itself. The Chamber therefore reminds the Office of the Prosecutor of its continuous obligation to Co-operate in matters of disclosure.

44. In accordance with the relevant precedents on the subject, the Chamber grants measure (c), subject to rewording the phrase "no earlier than twenty-one (21) days before each witness is due to testify at trial" to read "not later than twenty-one days (21) before each witness is due to testify at trial."

45. Regarding order (i) which seeks *in camera* proceedings, the Chamber is of the view that this is contrary to Rule 79 pursuant to which the Chamber may order a closed session on a case-by-case basis and to paragraph (B) thereof which requires the Chamber to make public the reasons for its order.

Measures (b), (d), (e), (g) and (i)

46. The Chamber notes that order (b) sought by the Prosecution for the protection of information that may lead to the identification of protected persons has, in fact, already been granted by the First Order (para. (b)). The Chamber dismisses the measure proposed and upholds measure (b) of the First Order.

47. The Chamber notes that, apart from some changes made by the Prosecution affecting only the form and not the substance of the measures, measures (d), (e), (g) and (i) have already been granted by the First Order in paragraphs (d), (e), (f) and (g). The Chamber hereby denies the request and upholds the measures prescribed in the First Order.

[3] Decision on the Prosecutor's Motion for protective measures for victims and witnesses, 19 February 2002.

les droits de l'accusé de «disposer du temps et des facilités nécessaires à la préparation de la défense et à communiquer avec le conseil de son choix».

41. Conformément à l'article 69 (B) qui dispose que «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», la Chambre a noté l'avis de cette section développé dans un mémorandum du 4 septembre 2002 préparé à la demande du Procureur dans une autre affaire. Dans le cadre de l'organisation de son travail, la Section indique que le maintien de l'anonymat des témoins jusqu'à 21 jours avant la déposition de celui-ci et le caviardage des documents à destination de la défense portant mention d'informations susceptibles de révéler l'identité des témoins représente la meilleure protection.

42. La Chambre considère également que dans la décision rendue en la matière dans l'affaire *Musabyimana*[3], la Chambre de première instance II, autrement composée, a mis en évidence la nécessité de trouver un «juste milieu entre les droits de la défense et le besoin de mesures de protection des témoins dont le caractère impérieux a été établi».

43. La Chambre estime ainsi qu'en demandant que l'identité des témoins soit révélée au plus tôt 21 jours avant leur témoignage au procès (mesure (c)), le Procureur s'écarte de la jurisprudence qu'il a lui-même citée et rappelle au Bureau du Procureur son obligation continue de collaboration en matière de communication.

44. Conformément à sa jurisprudence en la matière, la Chambre accorde la mesure (c) sous réserve de la modification de la formulation «au plus tôt 21 jours avant la date fixée pour la comparution de chaque témoin» par «au plus tard 21 jours avant la date fixée pour la comparution de chaque témoin».

45. Concernant l'ordonnance (j) requise pour prescrire le huis clos, la Chambre estime qu'elle est contraire à l'article 79 suivant lequel la Chambre décide de la tenue d'une audience à huis clos au cas par cas et à son paragraphe (B) qui exige que toute décision de tenir une audience à huis clos est publiquement motivée par la Chambre.

Mesures (b), (d), (e), (g) et (i)

46. La Chambre note que l'ordonnance (b) demandée par le Procureur en protection des données d'identification des personnes protégées a déjà été accordée en fait par l'ordonnance initiale au paragraphe (b). La Chambre rejette la mesure préconisée et maintient la mesure (b) de l'ordonnance initiale.

47. La Chambre note que, mis à part quelques modifications de forme apportées par le Procureur qui n'affectent pas leur portée, les mesures (d), (e), (g) et (i) ont en fait déjà été accordées par l'ordonnance initiale aux paragraphes (d), (e), (f) et (g). La Chambre rejette la demande et décide de maintenir les mesures préconisées par la première ordonnance.

[3] Décision relative à la requête du Procureur en prescription de mesures de protection de victimes et de témoins, 19 février 2002

Preventive measures to monitor the activities of the Defence (f), (h) and (k)

48. The Chamber is of the view that measure (f) sought by the Prosecution concerning the provision (either by the Defence itself or through the Registry) of a list of the members of the Defence team, does not in any way constitute a protective measure for witnesses and victims, as was held in the First Order of 12 July 2001. The Chamber dismisses the measure sought and upholds the terms of the said Order.

49. With respect to order (h) relating to the disclosure of all identifying information, the Chamber notes that it is not feasible to manage such a situation, as emphasized by the Defence in its submissions. The Chamber consequently rejects the request for the order.

50. Measure (k) requiring "[A]ny other order or orders the Trial Chamber may deem appropriate in the interests of justice" is rejected on the ground that it is superfluous.

For these reasons, the Trial Chamber,

GRANTS measure (a) sought by the Prosecution and amends the first heading of the Order of 12 July as follows :

ORDERS that the following protective measures be put in place for al1 Prosecution witnesses :

EXPUNGES the second heading of the Order of 12 July 2001 which reads :

ORDERS that the following protective measures be taken for all potential prosecution witnesses residing in Gisenyi, Ruhengen, Kibuye, Cyangugu and Gikongoro Prefectures :

GRANTS measure (c) sought by the Prosecution and reworded by the Chamber and, consequently, orders that measure (j) of the First Order be reworded as follows :

> (j) that the Prosecution must disclose to the Defence any identifying information relating to protected witnesses no later than 21 days prior to the date when each witness is due to testify.

UPHOLDS measures (a) to (i) as ordered on 12 July 2001.

Wherefore, the TRIBUNAL,

ORDERS that the following protective measures be put in place for all Prosecution witnesses :

> (a) That the Prosecution should designate a pseudonym for each witness, to be used whenever referring to such witnesses in Tribunal proceedings, communication and discussions between the parties and the public;
>
> (b) That the names, addresses and whereabouts and other identifying information of these witnesses (hereinafter referred to as "identifying information") be sealed by the Registry and not included in any records of the Tribunal and that such identifying information be communicated to the Victims and Witness Sup-

Mesures préventives encadrant les activités de la défense (f), (h) et (k)

48. La Chambre est de l'opinion que la production d'une liste des membres de la défense sollicitée par le Procureur par la mesure (f) que ce soit par la défense elle–même ou par le biais du Greffe ne constitue aucunement une mesure de protection des victimes et des témoins comme il a été déjà statué dans l'ordonnance initiale du 12 Juillet 2001. La Chambre rejette la mesure demandée et maintient les termes de ladite ordonnance.

49. Concernant l'ordonnance (h) sur la communication de toutes données d'identification, la Chambre note qu'il est pratiquement impossible de gérer une telle situation ainsi que l'a souligné la défense dans sa conclusion et par conséquent la rejette.

50. La mesure (k) demandant «toute autre ordonnance que la Chambre de première instance jugerait appropriée dans l'intérêt de la justice» est rejetée comme étant superflue.

Par ces motifs, la Chambre,

ACCORDE la mesure (a) demandée par le Procureur et modifie le premier chapeau de l'ordonnance du 12 juillet comme suit :

ORDONNE que les mesures de protection suivantes soient mises en place en faveur de tous les témoins à charge :

SUPPRIME le deuxième chapeau de l'ordonnance du 12 juillet 2001 qui se lit comme suit :

Ordonne que les mesures de protection suivantes mises en œuvre en faveur de tous les témoins à charge potentiels résidant dans les préfectures de Gisenyi, Ruhengeri, Kibuye, Cyangugu et Gikongoro :

ACCORDE la mesure (c) demandée par le Procureur et reformulée par la Chambre et ordonne par conséquent une reformulation de la mesure (j) de l'ordonnance initiale comme suit :

> (j) Le Procureur communique à la défense toute donnée d'identification des témoins protégés au plus tard 21 jours avant la date fixée pour la comparution de chaque témoin.

MAINTIENT en l'état les mesures (a) à (i) telles qu'ordonnées le 12 juillet 2001.

Par conséquent, le TRIBUNAL,

ORDONNE que les mesures de protection suivantes soient mises en place en faveur de tous les témoins à charge :

> (a) Le Procureur doit attribuer à chaque témoin à charge un pseudonyme par lequel il sera désigné dans le cadre de la procédure devant le Tribunal, dans les communications et les discussions ayant lieu entre les parties et vis-à-vis du public ;
>
> (b) Les noms de ces témoins, leurs adresses, les lieux où ils se trouvent et les autres informations permettant de les identifier (ci-après dénommés les «données d'identification») doivent être placés sous scellés par le Greffe et ne figurer dans aucun dossier du Tribunal et ces données d'identification doivent être communi-

port Section ("VWSS") in order to implement protection measures for these witnesses;

(c) That any identifying information relating to these witnesses that is contained in existing records of the Tribunal be redacted;

(d) That no identifying information relating to these witnesses shall be disclosed to the public or the media prior to, during and after the trial;

(e) That the Accused and all members of the Defence team shall not attempt to make any independent determination of the identity of any of witnesses nor encourage or otherwise aid any person to attempt to identify any such protected witnesses;

(f) That the Accused or Defence Counsel shall make a written request to the Trial Chamber, on reasonable notice to the Prosecution, to contact any of the witnesses whose identity is known to the Defence or any relative of such person, and that, on the instructions of the Trial Chamber, the Prosecution shall facilitate such contact provided that the person (or his or her parents or guardian where he or she is under the age of eighteen years) consents to an interview with the Defence;

(g) That there shall be no photographing and audio and/or video recording or sketching of any of these witnesses at any time or place without leave of the Trial Chamber and of the parties.

(h) That the Registry shall not disclose to the Defence any identifying information filed with the Registry in relation to the protected witnesses;

(i) That the Prosecution may initially disclose materials to the Defence in a redacted form in order to protect the names, addresses and other identifying information relating to these protected witnesses;

(j) That the identities and all previously redacted information pertaining to these protected witnesses be disclosed to the Defence no later than 21 days prior to the date each witness is due to testify.

DENIES the motion in all other respects.

Arusha. 19 March 2004

[Signed] : Arlette Ramaroson

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quées à la Section d'aide aux victimes et aux témoins aux fins de la mise en œuvre des mesures de protection ordonnées en faveur de ces personnes;

(c) Toute donnée d'identification de ces témoins figurant dans les dossiers actuels du Tribunal doit être caviardée;

(d) Il est interdit de divulguer toute donnée d'identification de ces témoins au public ou aux médias avant, pendant et après le procès;

(e) Il est interdit à l'accusé et à tous les membres de l'équipe de la défense de tenter de découvrir par leurs propres moyens l'identité de l'un de ces témoins et d'encourager ou aider de toute autre manière quiconque à tenter d'identifier une telle personne;

(f) L'accusé ou le conseil de la défense est tenu de demander par écrit l'autorisation à la Chambre de première instance et d'aviser le Procureur en temps utile lorsqu'il souhaite entrer en contact avec l'un de ces témoins dont la Défense connaît l'identité ou tout membre de la famille d'une telle personne. Sur instructions de la Chambre de première instance, le Procureur prend les dispositions nécessaires pour faciliter ce contact lorsque le consentement de la personne protégée ou, si celle-ci est âgée de moins de 18 ans, celui de ses parents ou de son tuteur a été obtenu;

(g) Il est interdit de photographier l'un de ces témoins, d'enregistrer ses propos sur un support audio et/ou de le filmer, ainsi que de le dessiner, en tout temps ou en tout lieu, sans l'autorisation de la Chambre de première instance et des parties;

(h) Le Greffe est tenu de ne communiquer à la défense aucune donnée d'identification de ces témoins protégés qui figurerait dans les pièces déposées au Greffe;

(i) Le Procureur peut, dans un premier temps, communiquer les pièces à la défense en version caviardée pour dissimuler les noms de ces témoins protégés, leurs adresses et les autres informations permettant de les identifier;

(j) Le Procureur communique à la défense toute donnée d'identification des témoins protégés au plus tard 21 jours avant la date fixée pour la comparution de chaque témoin.

REJETTE la requête en tous ses autres chefs de demande.

Arusha, le 19 mars 2004

[Signed] : Arlette Ramaroson

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Decision on Prosecutor's Motion Under Rule 50 for Leave to Amend the Indictment issued on 20 January 2000 and Confirmed on 28 January 2000 26 March 2004 (ICTR-2000-56-I)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding; William H. Sekule; Solomy Balungi Bossa

Ndindiliyimana, Nzuwonemeye, Sagahutu, Bizimungu – indictment, modification – Chamber's leave – undue delay in the filing of the motion – ad litem judge – new facts – interest of justice – vagueness – Tribunals' jurisprudence – rights of the Accused, fair trial – no prejudice suffered by the Accused – granting appropriate time to prepare the defence, time remaining until the scheduled start of the trial – narrowed scope of the Indictment, new charges – Crimes Against Humanity based on persecution, other inhumane acts, withdrawal – Genocide, Complicity in Genocide – errors in the proposed amended Indictment – ICTY – proposed amended Indictment clearer and more factually precise – lack of full disclosure in the Prosecution's Motion – motion granted

International instruments cited : Statute, art. 2 (3), 12 quarter *(d) 15, 17, 18, 19, 20 (4) (c) – Rules of procedure and evidence, Rules 46 (A), 47, 50, 51, 53* bis*, 62, 72, 73, 73* bis

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Théoneste Bagosora*, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 12 August 1999 (ICTR-96-7-T,* Reports 1999*, p. 106) – Trial Chamber III,* The Prosecutor v. Simon Bikindi*, Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment, 22 September 2003 (ICTR-2001-72-I,* Reports 2003*, p. 1254) – Trial Chamber II,* The Prosecutor v. Casimir Bizimungu et al*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003 (ICTR-99-50-I,* Reports 2003*, p. 1168) – Appeals Chamber,* The Prosecutor v. Edouard Karemera*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II's Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 (ICTR-98-44-AR73,* Reports 2003*, p. 1504)– Appeals Chamber,* The Prosecutor v. Casimir Bizimungu et al.*, Appeals Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003*

Décision relative à la requête formée par le Procureur en vertu de l'article 50 du Règlement de procédure et de preuve aux fins d'être autorisé à modifier l'acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000 26 mars 2004 (ICTR-2000-56-1)

(Original : Anglais)

Chambre de première instance II

Juges : Arlette Ramaroson, Président de Chambre ; William H. Sekule ; Solomy Balungi Bossa

Ndindiliyimana, Nzuwonemeye, Sagahutu, Bizimungu – acte d'accusation, modification – autorisation de la Chambre – circonstances pertinentes – retard excessif de la requête – juge ad litem – faits nouveaux – intérêt de la justice – imprécisions – jurisprudence du Tribunal – droits de l'accusé, procès équitable – octroi d'un délai supplémentaire pour préparer la défense, laps de temps restant à courir jusqu'à l'ouverture du procès – pas de préjudice pour l'accusé – réduction du champ de l'acte d'accusation, nouvelles accusations – persécution constitutive de crime contre l'humanité, autres actes inhumains constitutifs de crimes contre l'humanité, retrait – génocide, complicité dans le génocide – erreurs dans le projet d'acte d'accusation modifié – TPIY – projet d'acte d'accusation modifié plus clair et plus précis – renseignement nécessaires doivent être fournis par le Procureur – requête accordée

Instruments internationaux cités : Statut, art. 2 (3), 12 quarter *(d), 15, 17, 18, 19, 20 (4) (c) – Règlement de procédure et de preuve, art. 46 (A), 47, 50, 51, 53* bis*, 62, 72, 73, 73* bis

Jurisprudence internationale citée :

T.P.I.R : Chambre de première instance II, Le Procureur c. Théoneste Bagosora*, Décision sur la requête du Procureur en modification de l'acte d'accusation, 12 août 1999 (ICTR-96-7-T,* Recueil 1999*, p. 107) – Chambre de première instance III,* Le Procureur c. Simon Bikindi*, Décision relative à la requête de la défense intitulée « Motion by the Accused Simon Bikindi Challenging the Temporal Jurisdiction of the Tribunal and Objecting ta the Form of the Indictment » et à la requête du Procureur intitulée « Prosecutor's Motion for Leave ta File an Amended Indictment », 22 septembre 2003 (ICTR-2001-72-I,* Recueil 2003*, p. 1255) – Chambre de première instance II,* Le Procureur c. Casimir Bizimungu et consorts*, Décision sur la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 6 octobre 2003 (ICTR-99-50-I,* Recueil 2003*, p. 1169) – Chambre d'appel,* Le Procureur c. Edouard Karemera*, Décision relative à l'appel interlocutoire interjeté par le Procureur de la décision rendue le 8 octobre 2003 par la Chambre de première instance III refusant d'autoriser le dépôt d'un acte d'accusation modifié, 19 décembre 2003 (ICTR-98-44-AR73,* Recueil 2003*, p. 1505) – Chambre d'appel,* Le Procureur c. Casimir Bizimungu et consorts*, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II*

Denying Leave to File Amended Indictment, 12 February 2004 (ICTR-99-50-AR50, Reports 2004*, p. X)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Kovadevic*, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998 (IT-97-24-AR73) – Trial Chamber,* The Prosecutor v Limaj et al.*, Decision on Prosecutor's Motion to Amend the Amended Indictment, 12 February 2004 (IT-03-66-PT)*

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

SITTING as Trial Chamber II composed of Judges Arlette Ramaroson, presiding, William H. Sekule, and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion Under Rule 50 of the Rules of the Procedure and Evidence for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000 (*cf.* Amended Indictment on 17 October 2002)", to which is attached copies of the proposed amended Indictment, in English and French, and supporting materials introducing the new facts, filed on 28 October 2003 (the "Motion");

HAVING RECEIVED AND CONSIDERED THE "c*onclusions en réponse n° 2 à l'encontre de la requête du Procureur en date du 28.10.2003 aux fins de modification de son acte d'accusation du 20.01.2000, modifié le 17.10.2002* ", filed on 15 December 2003 ("Bizimungu's Second Response"); "*Réponse du Procureur aux « conclusions en réponse n°2 » de la défense d'Augustin Bizimungu*", filed on 17 December 2003 ("Prosecutor's Reply to Bizimungu's Response""); AND "Reply of Respondent Augustin Ndindiliyimana to Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment", filed on 23 January 2004 ("Ndindiliyimana's Response"); AND "Réplique du Procureur à la réponse de Maitre Christopher Black datée du 23 janvier 2004, faisant suite à la requête en modification de l'acte d'accusation du 30 octobre 2003 ", filed on 27 January 2004 ("Prosecutor's Response to Ndindiliyimana's Response"); AND "*Réponse à la requête du Procureur sur le fondement de l'article 50 du Règlement de Procédure et de preuve, aux fins d'être autorisé à modifier son acte d'accusation du 20 janvier 2000, confirmé le 28 janvier 2000* ", filed on 17 November 2003 ("Nzuwonemeye's Response"); AND "*Réponse à la requête du Procureur en date du 28 octobre 2003 aux fins d'être autorisé à modifier l'acte d'accusation*", filed on 15 December 2003 ("Nzuwonemeye's Response to Prosecutor's Reply"); AND "*Réponse du Procureur à la réponse du conseil de Francois-Xavier Nzuwonemeye sur la requête en modification de l'acte d'accusation datée du 28 octobre 2003*", filed on 17 December 2003 (the "Prosecutor's Reply to Nzuwonemeye's Response"); AND "*Réplique à la requête du Procureur aux fins de demande d'autorisation de modifier son acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000*", filed on 17 November 2003 ("Sagahutu's Response"); AND "*Réplique du Procureur à la requête du Procureur aux fins d'être autorisé à modifier son acte d'accusation du 20janvier 2000, confirmé le 28 janvier 2000*", filed on 24 November 2003 ("Prosecutor's Reply to the Defence Responses");

Decision of 6 October 2003 Denying Leave ta File Amended Indicment, 12 février 2004 (ICTR-99-50-AR50, Recueil 2004*, p. X)*

T.P.I.Y. : Chambre de première instance, Le Procureur c. Kovacevic*, Decison Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 juillet 1998 (IT-97-24-AR73) – Chambre de première instance,* Le Procureur c. Limaj et consorts*, Decision on Prosecutor's Motion to Amend the Amended Indicment, 12 février 2004 (IT-03-66-PT)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée des juges Arlette Ramaroson, Président de Chambre, William H. Sekule et Solomy Balungi Bossa (la «Chambre»),

SAISI de la requête intitulée «Requête du Procureur sur le fondement de l'article 50 du Règlement de procédure et de preuve, aux fins d'être autorisé à modifier son acte d'accusation du 20 janvier 2000, confirmé le 28 janvier 2000 (cf. acte d'accusation modifié du 17 octobre 2002)», laquelle est accompagnée des versions française et anglaise du projet d'acte d'accusation modifié, ainsi que de pièces justificatives présentant les faits nouveaux reprochés aux accusés, et a été déposée le 28 octobre 2003 (la «requête»),

AYANT REÇU ET EXAMINÉ les écritures suivantes : Conclusions en réponse n° 2 à l'encontre de la requête du Procureur en date du 28.10.2003 aux fins de modification de son acte d'accusation du 20.01.2000, modifié le 17.10.2002, déposées le 15 décembre 2003 («seconde réponse de Bizimungu»); et la Réplique du Procureur aux «conclusions en réponse n° 2» de la défense d'Augustin Bizimungu, déposée le 17 décembre 2003 («réplique du Procureur à la réponse de Bizimungu»); *Reply of Respondent Augustin Ndindiliyimana to Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment*, déposée le 23 janvier 2004 («réponse de Ndindiliyimana»); Réplique du Procureur à la réponse de Maître Christopher Black datée du 23 janvier 2004, faisant suite à la requête en modification de l'acte d'accusation du 30 octobre 2003, déposée le 27 janvier 2004 («réplique du Procureur à la réponse de Ndindiliyimana»); Réponse à la requête du Procureur sur le fondement de l'article 50 du Règlement de procédure et de preuve, aux fins d'être autorisé à modifier son acte d'accusation du 20 janvier 2000, confirmé le 28 janvier 2000, déposée le 17 novembre 2003, («réponse de Nzuwonemeye»); Réponse à la requête du Procureur en date du 28 octobre 2003 aux fins d'être autorisé à modifier l'acte d'accusation, déposée le 15 décembre 2003 («duplique de Nzuwonemeye à la réplique du Procureur»); Réplique du Procureur à la réponse du conseil de François-Xavier Nzuwonemeye sur la requête en modification de l'acte d'accusation datée du 28 octobre 2003, déposée le 17 décembre 2003, («réponse du Procureur à la duplique de Nzuwonemeye»); Réplique à la requête du Procureur aux fins de demande d'autorisation de modifier son acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000, déposée le 17 novembre 2003 («réponse de Sagahutu»); Réplique du Procureur à l'ensemble des réponses de la défense à la requête du Procureur aux fins d'être autorisé à modifier son acte d'accusation du 20janvier 2000, confirmé le 28 janvier 2000, déposée le 24 novembre 2003, («réplique du Procureur aux réponses de la défense»),

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 50 and 73;

NOW DECIDES the Motion on the basis of the written briefs as filed by the Parties pursuant to Rule 73 (A) of the Rules.

PRELIMINARY MATTER

1. Judge Asoka de Zoysa Gunawardana is temporarily absent from the seat of the Tribunal. The President of the Tribunal, on 22 March 2004, has assigned *ad litem* Judges to Trial Chamber II to adjudicate over pre-trial proceedings pursuant to Article 12 *quarter* (d) of the Statute. Therefore, for purposes of deciding this Motion, the Trial Chamber is composed of Judges Arlette Ramaroson, presiding, William H. Sekule, and Solomy Balungi Bossa.

SUBMISSIONS OF THE PARTIES

Prosecution

2. Based on Articles 15, 17, and 18 of the Statute and pursuant to Rules 50 and 73, the Prosecution requests that the Chamber grant it leave to amend the current Indictment, confirmed on 28 January 2000 and amended on 17 October 2002, after the initial appearance of four of the five Accused, so as to include new facts brought to the Prosecution's notice since the confirmation of the Indictment (in the last quarter of 2002 or during 2003), fulfil the interests of justice, and ensure consistency with the Tribunal's jurisprudence on vagueness of charges. The Prosecution submits that the proposed amended Indictment does not prejudice the rights of the Accused, disrupt any pre-established schedules, or lead to a delay in the speedy conduct of the trial.

3. The Prosecution submits that certain charges in the original Indictment, for example those contained in Paragraphs 5.19, 5.43 to 5.45, were overly vague, and did not meet the requirements stipulated in the Tribunal's jurisprudence and criminal law. The Prosecution alleges, in particular, that new facts, a well-established ground for leave to amend indictments in international jurisprudence, are provided by the following witnesses :

(a) Witnesses GFA, GFB, GFC, GFD, GFE, GFF, GFU, GFV and GAP for Accused Augustin Bizimungu;

(b) Witnesses FAM, FAN, CDV, K J, GLJ, FAV, KSB, GFH, GFR, GFS, GFT, GFW and XS for Accused Augustin Ndindiliyimana;

(c) Witnesses GFQ and ZG for Accused Protais Mpiranya;

(d) Witnesses DCK, DN, DAK, HP, DA and ALN for Accused François-Xavier Nzuwonemeye and Innocent Sagahutu.

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), notamment les articles 50 et 73 du Règlement,

STATUE À PRÉSENT sur la requête sur la base des conclusions écrites des parties, en application de l'article 73 (A) du Règlement.

AVANT-PROPOS

1. Le juge Asoka de Zoysa Gunawardana étant temporairement absent du siège du Tribunal, le Président du Tribunal a, le 22 mars 2004, affecté à la Chambre de première instance II des juges *ad litem* qui se prononceront sur les questions dont elle est saisie pendant la phase préalable au procès, en application de l'article 12 *quarter* (d) du Statut. Il s'ensuit que pour statuer sur la requête, la Chambre de première instance est composée des juges Arlette Ramaroson, Président de Chambre, William H. Sekule et Solomy Balungi Bossa.

ARGUMENTS DES PARTIES

Arguments du Procureur

2. En vertu des articles 15, 17 et 18 du Statut et en application des articles 50 et 73 du Règlement, le Procureur demande à la Chambre de l'autoriser à modifier l'acte d'accusation actuel confirmé le 28 janvier 2000 et modifié dans un premier temps le 17 octobre 2002 après la comparution initiale de quatre des cinq accusés, afin d'y inclure des faits nouveaux portés à sa connaissance depuis la confirmation de l'acte d'accusation (au dernier trimestre de l'année de 2002 ou courant 2003), de servir l'intérêt de la justice et de s'aligner sur la jurisprudence du Tribunal relative à l'imprécision des accusations. Il fait valoir que son projet d'acte d'accusation modifié ne porte pas atteinte aux droits des accusés, ne perturbe aucun calendrier préétabli, ni ne ralentira le déroulement du procès.

3. Au dire du Procureur, certaines des accusations figurant dans l'acte initial, par exemple celles retenues aux paragraphes 5.19 et 5.43 à 5.45, étaient trop vagues et ne satisfaisaient pas aux normes définies par la jurisprudence du Tribunal et le droit pénal. Le Procureur allègue notamment que des faits nouveaux – lesquels constituent de longue date une raison valable pour autoriser la modification d'actes d'accusation dans la jurisprudence internationale – ont été fournis par les témoins suivants :

a) Témoins GFA, GFB, GFC, GFD, GFE, GFF, GFU, GFV et GAP pour l'accusé Augustin Bizimungu;

b) Témoins FAM, FAN, CDV, KJ, GLJ, FAV, KSB, GFH, GFR, GFS, GFT, GFW et XS pour l'accusé Augustin Ndindiliyimana;

c) Témoins GFQ et ZG pour l'accusé Protais Mpiranya;

d) Témoins DCK, DN, DAK, HP, DA et ALN pour les accusés François-Xavier Nzuwonemeye et Innocent Sagahutu.

4. The Prosecution specifically refers to the following amendments :

(a) Count 2, Genocide, and Count 3, Complicity in Genocide, are withdrawn against the Accused Frangois-Xavier Nzuwonemeye and Innocent Sagahutu;

(b) Count 8, Crimes Against Humanity (persecution), and Count 9, Crimes Against Humanity (inhumane acts), are withdrawn against all Accused;

(c) Count 4 and Count 5 are combined to charge all Accused with Count 4, Crime Against Humanity (Murder);

(d) Count 10 and Count 11 of the Indictment are combined to charge all Accused with Count 7, Violation of Article 3 Common to the Geneva Convention and Additional Protocol II (Murder);

(e) Accused Augustin Bizimungu, Augustin Ndindiliyimana, and Protais Mpiranya, are charged with the Count of Genocide, with the alternative Count of Complicity to Commit Genocide; and

(f) The proposed amended Indictment reduces the counts charged against each Accused :

a. for Augustin Bizimungu, from nine to seven counts;

b. for Augustin Ndindiliyimana, from nine, to five;

c. for Protais Mpiranya, from eleven to seven;

d. for François-Xavier Nzuwonemeye and Innocent Sagahutu, from eleven to five.

5. The Prosecution alleges that the new Indictment contains only new charges and no new counts. The Prosecution argues that, although Rule 50 (b)'s "new charges" corresponding French text should read "charges nouvelles" instead of "nouveaux chefs d'accusation", the Accused should be given the opportunity to have a new initial appearance in order to plead guilty or not guilty to the proposed amended Indictment, and an additional period of 30 days from the date of the new appearance to submit to the Chamber any preliminary motions that they may wish to bring.

Preliminary Issues

6. Nzuwonemeye's and Bizimungu's motion, filed on 17 November 2003 and 21 November 2003 respectively, asked for additional time to file a response to the Motion. The Prosecution objected on 24 November 2003. The Chamber directed on 24 November 2003 that an additional twenty days be granted to the Accused to file their responses to the Prosecution Motion.

4. Concrètement, le Procureur fait état des modifications suivantes :

a) Abandon du deuxième chef d'accusation [génocide] et du troisième [complicité dans le génocide] en ce qui concerne les accusés François-Xavier Nzuwonemeye et Innocent Sagahutu;

b) Abandon du huitième chef [crime contre l'humanité (persécution)] et du neuvième [crimes contre l'humanité (actes inhumains)], en ce qui concerne accusés;

c) Jonction du quatrième et du cinquième chefs pour retenir contre tous les accusés le quatrième chef nouveau suivant : de crime contre l'humanité (assassinat);

d) Jonction du dixième et du onzième chefs pour retenir contre tous les accusés le septième chef nouveau suivant : violation de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (meurtre);

e) Mise en accusation d'Augustin Bizimungu, d'Augustin Ndindiliyimana et de Protais Mpiranya pour de génocide et, subsidiairement, complicité dans le génocide;

f) Réduction du nombre de chefs retenus contre chaque accusé, lequel passe :

a. de neuf à sept chefs pour Augustin Bizimungu;

b. de neuf à cinq pour Augustin Ndindiliyimana;

c. de onze à sepi pour Protais Mpiranya;

d. de onze à cinq pour François-Xavier Nzuwonemeye et Innocent Sagahutu.

5. Le Procureur allègue que le nouvel acte d'accusation contient des charges nouvelles et non pas des chefs nouveaux. Il estime que même si l'expression «new charges» employé au paragraphe B de l'article 50 en anglais aurait dû être traduite en français par «charges nouvelles» au lieu de «nouveaux chefs d'accusation», le Tribunal devrait accorer aux accusés la possibilité de faire une nouvelle comparution initiale pour plaider coupable ou non coupable des faits qui leur sont reprochés dans le projet d'acte d'accusation modifié, ainsi qu'un délai supplémentaire de 30 jours, à compter de la date de la novelle comparution, pour soulever devant la Chambre leurs éventuelles exceptions préjudicielles.

Questions préliminaires relatives à l'argumentation de la défense

6. Dans leurs requêtes déposées le 17 et le 21 novembre 2003 respectivement, Nzuwonemeye et Bizimungu ont demandé qu'un délai supplémentaire leur soit imparti pour déposer leurs réponses à la requête du Procureur. Le Procureur a formulé des objections à cet égard le 24 novembre 2003. Le même jour, la Chambre a ordonné qu'un délai supplémentaire de 20 jours soit accordé aux accusés pour déposer leurs réponses a ladite requête.

Defence Submissions

7. As a preliminary remark, the Defence for Bizimungu notes that the Motion reopens a debate on numerous aspects settled by the Judge's confirmation of the current Indictment, pursuant to Rule 47, which deemed that the Indictment satisfied the threshold to proceed with a fair trial. Defence for Bizimungu also contends that only the confirming judge is competent to decide the Motion.

8. The Defence for Sagahutu argues that the Prosecution's Motion is filed with undue delay because, following the Chamber's Decision on 25 September 2002, the indictment was amended on 17 October 2002. Defence for Bizimungu also submits that the Prosecution's Motion is filed late, two years after the *Kupreskic* judgement on which it is allegedly based.

9. The Defence for Bizimungu submits that the general criteria in deciding on leave to amend an indictment are new facts, absence of prejudice to the accused, and with respect to the organisation of the defence, judicial economy.

10. The Defence for Ndindiliyimana submits that the Motion is not consistent with the changes in the Indictment. Both the Defence for Ndindiliyimana and Bizimungu allege the proposed amended Indictment to be new. Defence for Ndindiliyimana alleges that it shifts the thrust of the prosecution case against the Accused, and will delay the trial proceedings as it requires a new defence strategy as well as new investigations. Defence for Bizimungu argues that the legal qualifications, the nature and the number of charges are modified, rather than just reduced as indicated in the Motion.

11. Defence for Bizimungu alleges that the summary of facts in support of the Count of Conspiracy is vague and imprecise. In addition, Defence for Ndindiliyimana alleges that the new charges with respect to counts relating to murders, specifically Paragraphs 71, 72, 73, 76, 77, 94, 95, 96, 97, 98, 99, 100, 101,102, 103, and 104 do not specify dates.

12. The Defence for Sagahutu submits that, on receiving the Prosecution's pre-trial belief, filed pursuant to Rule 73 *bis*, it understood that the Prosecution had completed its investigation. Defence for Bizimungu also requests that the Prosecution should stop its investigations to prevent constant changes. The Defence for Bizimungu also notes that, although the Prosecution has been working on this case since 1995, it only now submits that the Indictment is often vague, in contrast to the specificity required in criminal law, and that the lack of substance in some paragraphs of the Indictment has led to the withdrawal and addition of charges in the proposed amended Indictment. The Defence also points out that the newly communicated charges could have been previously disclosed in the Prosecution's witness statements.

13. The Defence submits that the proposed amended Indictment causes undue delay to the trial proceedings. Defence for Sagahutu and Bizimungu argue further that the Prosecution's undue delay in filing its Motion will inevitably result in a delay in the

Arguments de la défense

7. Avant d'entrer dans le vif du sujet, le conseil de Bizimungu fait observer que la requête rouvre le débat sur de nombreux points réglés par la confirmation de l'acte d'accusation actuel que le juge a effectuée en application de l'article 47 du Règlement, ce qui laissait supposer que l'acte d'accusation remplissait les conditions minimales requises pour que le procès soit équitable. En outre, il considère que seul le juge confirmateur est habilité à statuer sur la requête.

8. Selon les conseils de Sagahutu, la requête du Procureur a été déposée trop tard, car l'acte d'accusation a été modifié le 17 octobre 2002 à la suite de la décision rendue par la Chambre le 25 septembre 2002. Celui de Bizimungu fait valoir également que la requête du Procureur a été déposée en retard, deux ans après l'arrêt Kupreskic sur lequel elle serait fondée.

9. Le conseil de Bizimungu soutient que les critères généraux à prendre en considération pour décider d'autoriser la modification d'un acte d'accusation sont l'existence de faits nouveaux, l'absence de préjudice pour l'accusé et, concernant l'organisation de la défense, l'économie des ressources du Tribunal.

10. Selon le conseil de Ndindiliyimana, la requête ne cadre pas avec les modifications apportées à l'acte d'accusation. Le conseil de Ndindiliyimana et celui de Bizimungu allèguent que le projet d'acte d'accusation modifié constitue un acte nouveau. Au dire de celui de Ndindiliyimana ce projet modifie les grands axes des accusations portées par le Procureur contre son client et retardera le procès, puisqu'il impose l'obligation d'adopter une nouvelle stratégie de défense et de mener de nouvelles enquêtes. Le conseil de Bizimungu estime que loin d'avoir seulement réduit le nombre de chefs d'accusation, comme le donne à croire la requête, le Procureur a modifié la qualification juridique, la nature et le nombre des accusations retenues.

11. Le conseil de Bizimungu allègue que le résumé des faits étayant le chef d'entente en vue de commettre le génocide est vague et imprécis. Celui de Ndindiliyimana ajoute que les accusations nouvelles portées dans le cadre des chefs relatifs aux meurtres simples et aux assassinats, notamment aux paragraphes 71, 72, 73, 76, 77, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103 et 104, ne sont pas assorties des dates des faits incriminés.

12. Les conseils de Sagahutu déclarent avoir compris que le Procureur avait terminé ses enquêtes lorsqu'ils ont reçu son mémoire préalable au procès déposé en application de l'article 73 *bis* du Règlement. Dans le même ordre d'idées, celui de Bizimungu demande également que le Procureur mette fin à ses enquêtes pour éviter de modifier sans cesse l'acte d'accusation. En outre, il relève qu'en dépit du fait que le Procureur travaille sur cette affaire depuis 1995, c'est à présent seulement qu'il dit que l'acte d'accusation est souvent vague et donc loin de répondre à la précision requise en droit pénal, et que l'inconsistance de certains des paragraphes dudit acte l'a poussé à abandonner des accusations et a en ajouter d'autres dans le projet d'acte d'accusation modifié. La défense souligne au demeurant que les accusations nouvellement communiquées auraient pu être révélées auparavant dans les déclarations des témoins à charge.

13. La défense fait valoir que le projet d'acte d'accusation modifié retardera excessivement le procès. Plus précisément, les conseils de Sagahutu et celui de Bizimungu ajoutent que le retard excessif pris par le Procurer dans le dépôt de sa requête empê-

scheduling of the trial proceedings. Defence for Sagahutu contend that the thirty days afforded to the Accused, pursuant to Rule 72, to file any preliminary motions with respect to the new counts will delay the pre-trial conference. Defence for Nzuwonemeye also requests that a further initial appearance for the Accused should be allowed, with leave to the Defence to file additional preliminary motions. Defence for Bizimungu points out that any delays in the proceedings of the trial will prolong the Accused's provisional detention. Further, Defence for Bizimungu cites the Trial Chamber's decisions in Bizimungu, dated 6 October 2003, and Karemera, dated 8 October 2003, in support of their argument that the timing of the amendments, just before the start of the trial, would cause serious prejudice to the Accused's right to be tried without undue delay. Defence for Ndindiliyimana also argues that paragraphs 48, 49 and 52 of the proposed amended Indictment, in linking the Accused Ndindiliyimana with Bagasora, adds new charges, and other charges bring in the Butare trial, Muvunyi and Nzabirinda, lengthening the trial proceedings to beyond the completion strategy date of 2008.

14. Defence for Nzuwonemeye also submits that the statement of Witness ALN, against the Accused Nzuwonemeye, has not been disclosed, and requests the Chamber to order its disclosure. Further, Defence for Bizimungu alleges that the thirty witness statements in support of the proposed amended Indictments are too redacted to be meaningful. Defence for Ndindiliyimana also questions the value of redacted witness statements and requests that the unredacted witness statements be disclosed. Further, according to the Defence for Ndindiliyimana, the Prosecution's contention of new factual evidence to support the proposed amended Indictment is incorrect as the statements in support of the Motion are dated between 1995 and 2000, before the confirmation of the current indictment on 28 January 2000.

15. Defence for Sagahutu contends that the proposed amended Indictment's structure does not clearly demonstrate the actual changes from the current Indictment. Sagahutu is also unclear on the new numbering system as some paragraphs are not numbered in Counts one, two, three, four, five, six, seven and eight, which may cause reference problems in the future. Defence for Nzuwonemeye further submits that the Prosecution's modification of the Indictment, without distinguishing between new counts and new charges, prejudice the Accused.

16. The Defence for Bizimungu cites *Kupregkic* in arguing that the Prosecution's Indictment should have given the Accused sufficient notice of the charges against him, with a concise and optimally precise statement of the criminal allegations and factual allegations against him. The Defence also argues that it should have sufficient time to prepare, the Accused has a right to be tried within a reasonable timeframe and that the principle of judicial economy is a necessity. The Defence further alleges that the principle of *nemo auditor propriam turpidinem allegans* prevents the Prosecution from using its own incompetence in support of a Motion.

chera inévitablement de fixer à temps la date d'ouverture du procès. D'après les conseils de Sagahutu, le délai de 30 jours accordé à l'accusé en vertu de l'article 72 du Règlement pour soulever d'éventuelles exceptions préjudicielles portant sur les nouvelles accusations retardera la conférence préalable au procès. Les conseils de Nzuwonemeye demandent également que la Chambre permette aux accusés de faire une nouvelle comparution initiale et autorise la défense à soulever des exceptions préjudicielles supplémentaires. Le conseil de Bizimungu rappelle que tout retard dans le déroulement du procès prolongera la détention provisoire de l'accusé. Par ailleurs, il invoque les décisions rendues par la Chambre de première instance le 6 et le 8 octobre 2003 dans l'affaire *Bizimungu* et l'affaire *Karemera* respectivement pour soutenir que le moment choisi pour effectuer les modifications, à savoir la période précédant immédiatement l'ouverture du procès, porterait gravement atteinte au droit de l'accusé d'être jugé sans retard excessif. Quant au conseil de Ndindiliyimana, il déclare que les paragraphes 48, 49 et 52 du projet d'acte d'accusation modifié renferment des accusations nouvelles lorsqu'ils créent un lien entre l'accusé Ndindiliyimana et Bagosora, et d'autres accusations font appel au procès dit de Butare, à Muvunyi et à Nzabirinda, ce qui prolongerait le procès jusqu'au-delà du terme de la stratégie d'achèvement des travaux du Tribunal prévu pour l'année 2008.

14. Par ailleurs, les conseils de Nzuwonemeye signalent que la déclaration faite par le témoin ALN contre l'accusé Nzuwonemeye ne leur a pas été communiquée et demandent à la Chambre d'en ordonner la communication. De plus, le conseil de Bizimungu allègue que les 30 déclarations de témoin produites à l'appui du projet d'acte d'accusation modifié sont trop caviardées pour être exploitables. Le conseil de Ndindiliyimana remet aussi en question l'intérêt des déclarations de témoin caviardées et demande que les versions non caviardées soient communiquées. Selon lui, le Procureur n'a pas raison lorsqu'il affirme présenter des faits nouveaux à l'appui du projet d'acte d'accusation modifié, puisque les déclarations jointes à la requête ont été recueillies entre 1995 et 2000, c'est-à-dire avant la confirmation de l'acte d'accusation actuel qui a eu lieu le 28 janvier 2000.

15. Les conseils de Sagahutu considèrent que la structure du projet d'acte d'accusation modifié ne fait pas ressortir clairement les modifications concrètes apportées à l'acte d'accusation en vigueur. De même, Sagahutu ne comprend pas le nouveau système de numérotation, car certains paragraphes ne sont pas numérotés sous les chefs d'accusation 1, 2, 3, 4, 5, 6, 7 et 8, ce qui pourrait créer des difficultés plus tard au cas ou on voudrait en faire état. S'agissant du conseil de Nzuwonemeye, il ajoute que le fait que le Procureur modifie l'acte d'accusation sans distinguer les chefs nouveaux des accusations nouvelles porte préjudice à l'accusé.

16. Le conseil de Bizimungu invoque l'arrêt *Kupreskic* pour soutenir que l'acte d'accusation établi par le Procureur aurait dû informer suffisamment son client des accusations portées contre lui, en lui fournissant un exposé concis et aussi précis que possible du comportement criminel et des faits qui lui sont reprochés. Il soutient également qu'il convient de lui accorder assez de temps pour se préparer, que l'accusé a le droit d'être jugé dans un délai raisonnable et qu'il est nécessaire de respecter le principe de l'économie des ressources du Tribunal. En outre, il fait valoir que la règle «memo auditur propriam turpitudinem allegans» (nul ne peut être entendu lorsqu'il invoque sa propre turpitude) interdit au Procureur d'invoquer sa propre incompétence à l'appui d'une requête.

17. Defence for Ndindiliyimana contends that the Prosecution Motion is premature in light of his motion for a stay of proceedings because of abuse of process.

18. Defence for Ndindiliyimana submits that paragraph 39's new charge accusing Ndindiliyimana of responsibility for the actions of the RTLM radio staff will require review of the entire *Media* case, disclosure of the *Media* trial to the Defence team, and will therefore increase the length of the trial.

19. Defence for Ndindiliyimana accuses the proposed amended Indictment of propaganda for mixing charges with prosecution theory.

20. With respect to the Prosecution's withdrawal of the Count of Genocide against the Accused Sagahutu, Defence for Sagahutu points out that Sagahutu is still charged with the Count of Conspiracy to Commit Genocide in the proposed amended Indictment, and has his name mentioned in paragraph 38, referencing the planning of genocide, and paragraph 43, referencing concomitant acts of genocide. The Defence demands, for purposes of consistency, that all references to genocide be withdrawn against all the Accused.

21. All Defence Counsel requests the Chamber that the Motion be dismissed except for the following :

(i) Defence for Sagahutu requests that, pursuant to Rule 51, the Chamber grant the Prosecution's Motion in respect to the withdrawal of the Counts of Genocide and Extermination against the Accused Sagahutu.

(ii) Defence for Bizimungu requests that the reduction of the Counts against Accused Bizimungu from nine to seven, with the withdrawal of the Counts of Crimes Against Humanity (persecution) and Crimes Against Humanity (inhumane acts) be allowed the Chamber.

Responses by the Prosecution

22. The Prosecution submits that, with respect to Bizimungu's Response, pursuant to Rule 50, the confirming judge is no longer competent to rule on a Prosecution Motion to amend an indictment, with jurisdiction resting with the Trial Chamber.

23. The Prosecution submits that Nzuwonemeye's arguments on the dates of witness statements are premature, as these are issues for the trial. Similarly, allegations of vagueness of the Indictment can be argued at trial. Also, preliminary motions can be filed after the proposed amended Indictment is allowed. Further, redactions in the witness statements are authorized by the Chamber.

24. The Prosecution contends that the Tribunal's jurisprudence on Rule 50 requires only that the Prosecution ascertain that there are sufficient grounds in fact and law to allow the amendments, without demonstrating the existence of exceptional circum-

17. Le conseil de Ndindiliyimana estime que la requête du Procureur est prématurée, puisque la Chambre n'a pas encore statué sur la sienne tendant à la suspension des poursuites pour abus de procédure.

18. Selon lui, l'accusation nouvelle portée au paragraphe 39 qui fait grief à Ndindiliyimana de s'être rendu responsable des agissements des employés de la station de radio de la RTLM imposera l'obligation d'examiner toute l'affaire des *Médias*, ainsi que de communiquer à l'équipe de la défense les débats de cette affaire, et allongera par conséquent le procès.

19. Par ailleurs, il reproche au projet d'acte d'accusation modifié d'être un instrument de propagande, en ce sens que le Procureur y mélange les accusations et ses idées.

20. S'agissant de l'abandon du chef de génocide par le Procureur en ce qui concerne l'accusé Sagahutu, les conseils de celui-ci soulignent que Sagahutu est toujours accusé d'entente en vue de commettre le génocide dans le projet d'acte d'accusation modifié et que son nom est mentionné au paragraphe 38 ayant trait à la planification du génocide et au paragraphe 43 faisant état d'actes concomitants au génocide. Par souci de cohérence, ils demandent instamment que toutes les indications relatives au génocide soient retirées en ce qui concerne l'accusé.

21. Tous les conseils de la défense demandent à la Chambre de rejeter la requête, sous réserve des précisions suivantes :

i) Les conseils de Sagahutu demandent qu'en application de l'article 51 du Règlement, la Chambre fasse droit à la requête du Procureur en ce qui concerne l'abandon des chefs de génocide et d'extermination à l'égard de l'accusé Sagahutu,

ii) Le conseil de Bizimungu demande à la Chambre d'autoriser que le nombre des chefs retenus contre l'accusé soit ramené de neuf a sept avec le retrait des chefs de persécution constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité.

Répliques du Procureur

22. S'agissant de la réponse de Bizimungu, le Procureur déclare qu'en application de l'article 50 du Règlement, le juge ayant confirmé l'acte d'accusation n'est plus compétent, à ce stade de la procédure, pour statuer sur une requête du Procureur en modification d'un acte d'accusation, la Chambre de première instance étant seule habilitée à le faire.

23. S'agissant des observations de Nzuwonemeye relatives aux dates des déclarations de témoin, le Procureur les juge prématurées, au motif qu'il s'agit de questions a traiter lors du procès. De même, les allégations concernant le caractère imprécis de l'acte d'accusation peuvent être débattues au procès. Qui plus est, les exceptions préjudicielles peuvent être soulevées après l'admission du projet d'acte d'accusation modifié, et les caviardages effectués dans les déclarations de témoin ont été autorisés par la Chambre.

24. Selon le Procureur, la jurisprudence du Tribunal relative à l'article 50 du Règlement lui fait uniquement obligation de prouver que sa requête en modification est justifiée en fait et en droit, et il n'est donc pas tenu de démontrer l'existence de cir-

stances. It cites *Bagosora et al*. in arguing that the Motion itself is well founded in law, and the new factual allegations better articulate the Accused's role in the serious crimes alleged against them, as requested by the Defence. According to the Prosecution, it is allowed in law to correct imperfections in the Indictment through amendments. Further, *Karemera et al*. is cited to argue that the Prosecution is not proscribed from offering substantial arguments.

25. With respect to the new structure of the proposed amended Indictment, the Prosecution argues that it is consistent with Rule 47 (C), and alternatively, the Defence is premature in raising issues more appropriately argued with preliminary motions pursuant to Rule 72.

26. The Prosecution submits that the proposed amended Indictment will not cause an undue delay as Trial Chamber II's judicial calendar has no scheduled start date for the trial yet, and the Motion for protective measures is still pending. The Prosecution cites *Prosecutor v. Akayesu*, where the Indictment was amended during trial proceedings. It also points out that if its application for leave to amend the Indictment is granted, it does not intend to ask for additional time to prepare its case.

27. The Prosecution submits that the Accused Sagahutu, Ndindiliyimana, and Nzuwonemeye were arrested only in 2002, while the Accused Bizimungu was arrested in 2000. Citing *Bagosora et al*., it argues that Article 20 (4) (c) guaranteeing the rights of the Accused to a trial without undue delay must be considered taking into the account the nature, complexity and seriousness of the case.

28. The Prosecution submits that the Count of Conspiracy to Commit Genocide and the Count of Genocide are separate counts, pursuant to Article 2 (3) of the Statute. It also submits that the Count of Conspiracy is maintained against the Accused Sagahutu, and the Count of Conspiracy existed in the confirmed Indictment.

29. The Prosecution submits that Defence cannot simultaneously ask for the dismissal of the leave to amend the Indictment and ask for the Chamber to withdraw counts.

30. The Prosecution, responding to the Accused Nzuwonemeye's request for disclosure of the statement of witness ALN, produces the Defence receipt, and points out the standing order of 12 July 2001 in response to the Defence arguments on redaction of statements.

31. The Prosecution submits that the proposed amended Indictment is not new.

32. The Prosecution requests that Defence for Ndindiliyimana's 23 January 2004 submission be held inadmissible for lateness.

constances exceptionnelles. Citant une décision rendue dans l'affaire *Bagosora* et consorts, il soutient que la requête est bien fondée en droit et que les nouvelles allégations factuelles explicitent mieux le rôle des accusés dans la perpétration des crimes graves qui leur sont reprochés, comme l'a demandé la défense. Selon encore le Procureur, le droit permet de modifier l'acte d'accusation pour remédier à ses imperfections. Au demeurant, le Procureur invoque une décision rendue dans l'affaire *Karemera* et consorts pour soutenir qu'il ne lui est pas interdit de présenter des arguments importants.

25. Concernant la structure nouvelle du projet d'acte d'accusation modifié, le Procureur fait valoir qu'elle est conforme aux dispositions de l'article 47 (C) du Règlement et subsidiairement que la défense va vite en besogne en abordant des questions qu'il est plus indiqué de soulever dans le cadre des exceptions préjudicielles prévues par l'article 72 du Règlement.

26. Le Procureur fait valoir que le projet d'acte d'accusation modifié n'occasionnera aucun retard excessif, car le calendrier judiciaire de la Chambre de première instance Il ne prévoit encore aucune date d'ouverture du procès en l'espèce, et la requête en prescription de mesures de protection est toujours pendante. Il invoque l'affaire *Le Procureur c. Akayesu* dans laquelle l'acte d'accusation a été modifié en cours de procès. De plus, il souligne qu'il n'entend pas solliciter un délai supplémentaire pour préparer ses moyens si la Chambre accueille sa requête en modification de l'acte d'accusation.

27. Le Procureur fait observer que les accusés Sagahutu, Ndindiliyimana et Nzuwonemeye n'ont été arrêtés qu'en 2002, alors que l'accusé Bizimungu a été arrêté en l'an 2000*. Invoquant l'affaire *Bagosora* et consorts, il soutient que l'article 20 (4) (c) du Statut qui garantit le droit de l'accusé d'être jugé sans retard excessif doit être examiné en tenant compte de la nature, de la complexité et de la gravité de l'affaire.

28. Relevant que l'article 2 (3) du Statut distingue entre le chef d'entente en vue de commettre le génocide et celui de génocide, le Procureur précise que le chef d'entente en vue de commettre le génocide est toujours retenu contre Sagahutu et que ce chef figurait dans l'acte d'accusation confirmé.

29. Il fait valoir que la défense ne peut pas demander à la fois à la Chambre de rejeter sa requête en modification de l'acte d'accusation et de retirer des chefs d'accusation.

30. Répondant à Nzuwonemeye qui demande de lui communiquer la déclaration du témoin ALN, le Procureur produit l'accusé de réception de cette déclaration par la défense. En ce qui concerne les arguments de la défense relatifs au caviardage des déclarations de témoin, il oppose à celle-ci la décision du 12 juillet 2001 encore en vigueur.

31. Selon le Procureur, le projet d'acte d'accusation modifié ne constitue pas un acte nouveau.

32. Le Procureur demande que les conclusions du conseil de Ndindiliyimana déposées le 23 janvier 2004 soient déclarées irrecevables pour forclusion.

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* Note du Traducteur : Dans sa réplique, le Procureur dit plutôt que l'arrestation de Sagahutu, Ndindiliyimana et Nzuwonemeye s'est faite en l'an 2000 et celle de Bizimungu en 2002.

33. The Prosecution submits that the *Media* trial need not be reopened in the instant case.

HAVING DELIBERATED

34. The Prosecution seeks leave to amend the current Indictment, pursuant to Rule 50, which states, *inter alia* :

> Rule 50 : Amendment of Indictment
>
> (a) The Prosecution 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 President. 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 if granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.
>
> (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 [...].

As the Prosecution acknowledges, the Chamber's leave is required before the Indictment can be amended.

35. Firstly, the Chamber notes the Defence contention regarding undue delay in the filing of the Motion. Although the Defence argues that the witness statements supporting the Indictment date prior to 2000, he makes no specific allegations that the Prosecution did not act in a timely manner. The Chamber maintains that a decision on the tardiness of a motion must take into consideration all circumstances related to the proceedings[1]. Further, Rule 50 does not specify any timeline for filing amendments to the Indictment.

36. With respect to the Defence submissions on applying standards of confirmation of the amendments, pursuant to Rule 47, to the amendment of the Indictment, the Chamber "distinguishes between the stage of confirmation of the Indictment and the stage of amendment of the Indictment"[2]. Accordingly, the Chamber rejects Defence submissions on this issue.

[1] *Prosecutor v Limaj et al*., Case n° IT-03-66-PT, "Decision on Prosecutor's Motion to Amend the Amended Indictment", 12 February 2004, para. 13 (citing *Prosecutor v. Kovadevic*, Case n° IT-97-24-AR73, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998, para 31) (the "Limaj Decision").

[2] *Prosecutor v. Bagosora*, Case n° ICTR-96-7-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 12 August 1999, para. C (i) (the "Bagosora Decision").

33. Il estime qu'il n'est pas nécessaire de rouvrir le «procès des Médias» en l'espèce.

APRÈS EN AVOIR DÉLIBÉRÉ

34. Le Procureur sollicite l'autorisation de modifier l'acte d'accusation actuel, en vertu de l'article 50 du Règlement qui est libellé en partie comme suit :

> Article 50 : Modification de l'acte d'accusation
>
> A) 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 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.
>
> 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.

Comme le reconnaît le Procureur, l'acte d'accusation ne peut être modifié qu'avec l'autorisation de la Chambre.

35. Tout d'abord, la Chambre prend acte de la thèse de la défense relative au retard excessif avec lequel la requête aurait été déposée. La défense fait observer que les déclarations de témoin jointes à l'acte d'accusation sont antérieures à l'an 2000, mais ne reproche pas explicitement au Procureur de n'avoir pas agi en temps voulu. La Chambre rappelle que pour se prononcer sur le caractère tardif d'une requête, il faut tenir compte de l'ensemble des circonstances de la cause[1]. De plus, l'article 50 du Règlement ne précise aucun délai dans lequel des modifications peuvent être apportées à l'acte d'accusation.

36. S'agissant des arguments de la défense relatifs à l'application des normes prévues pour la confirmation de l'acte d'accusation par l'article 47 du Règlement à sa modification, la Chambre distingue «entre le stade de la confirmation de l'acte d'accusation et le stade de modification de l'acte d'accusation»[2]. Par conséquent, elle rejette les arguments de la défense sur ce point.

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[1] *Le Procureur c. Limaj et consorts*, affaire n° 1T-03-66-PT, *Decision on Prosecutor's Motion to Amend the Amended Indicment*, 12 février 2004, para. 13 (citant l'affaire *Le Procureur c. Kovacevic*, affaire n° IT-97-24-AR73, *Decison Stating Reasons for Appeals Chamber's Order of 29 May 1998*, 2 juillet 1998, para. 31 (ci-après dénommée la «Décision *Limaj*»).

[2] *Le Procureur c. Bagosora*, affaire n° ICTR-96-7-T, Décision sur la requête du Procureur en modification de l'acte d'accusation, 12 août 1999, para. C (i) (ci-après dénommée la «Décision *Bagosora*»).

37. The Chamber finds no support for the Defence of Sagahutu's submissions that in conjunction with the withdrawal of the Counts of Genocide and Complicity in Genocide, the other charge related to Genocide should be withdrawn against the Accused.

38. The Chamber also notes that the Motion contends that it is imperative to amend the Indictment to comply with the Tribunals' jurisprudence on specificity and vagueness of Indictments, in order, *inter alia*, to cure potential material defects in the Indictment, and protect the rights of the Accused. The Chamber finds, however, that the Motion does not specify any material defects that are cured by the proposed amended Indictment. The Motion states only that the proposed amended Indictment is less "vague", and more "specific".

39. The Chamber finds no support in the Tribunal's jurisprudence for the Defence submission that the Prosecution should have given notice of the new amended charges in the current Indictment.

40. The Chamber reiterates that pursuant to Rule 50, the Prosecution bears the burden of convincing the Court that the Accused suffers no prejudice[3]. After a careful review of the Tribunal's jurisprudence, the Chamber notes further that the Tribunal has granted leave to amend an indictment "in order to : (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the Indictment"[4].

41. The Chamber recalls the Appeals Chamber's reasoning in the *Bizimungu* decision :

> Essentially, the Trial Chamber balances the rights of the Accused as prescribed under Article 19 and 20 of the Statute, which *inter alia* provide for the Accused right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay. These rights are balanced with the complexity of the case. It is therefore the discretion of the Trial Chamber to consider requests under Rule 50 in the light of the particular circumstances of the case[5].

42. Consistent with the Tribunal's jurisprudence, the Chamber must consider the Prosecution's right to seek an amendment to the Indictment, pursuant to Rule 50, balanced with the likely prejudice to an accused's right to a fair trial, through a case specific analysis of the totality of circumstances. The Chamber must give appropriate weight and consideration to the relevant circumstances, which include, but are not limited to :

[3] *Prosecutor v. Bizimungu et aL*, Case n° ICTR-99-50-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003, para. 28 (the "*Bizimungu* Decision").
[4] *Ibid*., para. 26.
[5] *Ibid*., para. 27.

37. La Chambre ne voit pas les raisons sur lesquelles les conseils de Sagahutu s'appuient pour dire que le retrait des chefs de génocide et d'entente en vue de commettre le génocide devrait s'accompagner de l'abandon de l'autre accusation relative au génocide retenue contre l'accusé.

38. En outre, la Chambre relève que, selon la requête, il est nécessaire de modifier l'acte d'accusation pour s'aligner sur la jurisprudence du Tribunal relative à la précision des actes d'accusation afin, entre autres choses, de supprimer les éventuels vices importants de l'acte d'accusation et de protéger les droits de l'accusé. Elle constate toutefois que le Procureur n'a précisé dans sa requête aucun vice important supprimé par le projet d'acte d'accusation modifié. En effet, il se contente de dire que le projet d'acte d'accusation est moins « vague » et plus « précis ».

39. La Chambre ne trouve dans la jurisprudence du Tribunal aucun précédent sur lequel la défense s'appuie pour soutenir que le Procureur aurait dû l'informer des accusations nouvellement modifiées dans l'acte d'accusation actuel.

40. La Chambre souligne de nouveau que selon l'article 50 du Règlement, il incombe au Procureur de convaincre le Tribunal que l'accusé ne subira aucun préjudice[3]. Après avoir soigneusement examiné la jurisprudence du Tribunal, la Chambre retient en outre que le Tribunal autorise la modification d'un acte d'accusation «a) pour ajouter de nouveaux chefs d'accusation à un acte d'accusation confirmé; b) pour étoffer et développer les allégations factuelles présentées à l'appui des chefs d'accusation initiaux déjà confirmés; c) pour apporter des changements mineurs à l'acte d'accusation»[4].

41. La Chambre rappelle le raisonnement suivi par la Chambre d'appel [sic] dans la décision *Bizimungu* :

> « Essentiellement, la Chambre de première instance tient compte tout ensemble des droits de l'accusé énoncés aux articles 19 et 20 du Statut, à savoir, entre autres, le droit d'être informé, dans le plus court délai et de façon détaillée, de la nature et des motifs de l'accusation portée contre lui, le droit à un procès équitable et rapide, et le droit d'être jugé sans retard excessif, et de la complexité de l'affaire. Elle est donc habilitée à examiner les demandes fondées sur l'article 50 du Règlement en ayant à l'esprit les circonstances particulières de la cause. »[5]

42. Dans le droit fil de la jurisprudence du Tribunal, la Chambre est tenue de concilier le droit du Procureur de demander l'autorisation de modifier l'acte d'accusation en application de l'article 50 du Règlement avec l'atteinte qui pourrait être portée au droit de l'accusé à un procès équitable, en analysant l'ensemble des circonstances de la cause dans leur contexte particulier. Elle doit donner le poids et l'importance nécessaires aux circonstances pertinentes dont voici la liste, pour ne citer que ceux-ci :

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[3] *Le Procureur c. Bizimungu et consorts*, affaire n° ICTR-99-50-1, Décision sur la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 6 octobre 2003, para. 28 (ci-après dénommée la « Décision *Bizimungu* »).

[4] *Ibid*., para. 26.

[5] *Ibid*., para. 27.

(i) The effect of the proposed amended Indictment on the Accused persons' right to an expeditious trial, to prompt notices of the charges against them, and to adequate time and facilities in order to prepare their defence[6];

(ii) Whether any additional time can be granted to the Accused for the preparation of their defence[7];

(iii) Reasonableness of resulting delays in the scheduled start day of trial, and the length of the trial itself[8];

(iv) Effect on the time spent by the Accused in pre-trial detention[9];

(v) "Nature and scope of the proposed amendment"[10];

(vi) "Whether the [A]ccused and Trial Chamber had prior notice of the Prosecutor's intention to seek leave to amend the indictment", the nature of the notice, and any improper tactical advantage gained by the Prosecution as a result of the proposed amended Indictment[11];

(vii) The evidentiary basis of the new charges, if any, and the timing of their discovery[12];

(viii) Judicial economy; and

(ix) Whether the proposed amended Indictment, through more specificity and accuracy, allows the Accused to better respond and prepare for trial, or shortens the length of the trial proceedings, thus protecting rather than prejudicing the Accused persons' rights to a fair trial[13].

43. The Chamber observes that an amendment seeking to expand the scope of the Indictment increases the risk of prejudice to the rights of the Accused, while a narrowing of the Indictment, even though substantially different, may "increase the fairness and efficiency of proceedings, [and] should be encouraged and usually accepted"[14]. In the *Bizimungu* Decision, for instance, despite the Prosecution's contention that no new charges were added, the Chamber held that the "expansions, clarifications and specificity made in support of the remaining counts [...] do amount to substantial changes that would prejudice the [rights of] the accused [...]"[15].

[6] *Limaj* Decision, para. 9.
[7] *Ibid*., para. 10.
[8] *Ibid*.
[9] *Prosecutor v. Bizimungu et al*., Case n° ICTR-99-50-AR50, "Appeals Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004", para. 16 (the "*Bizimungu* Appeals Decision").
[10] *Ibid*.
[11] *Ibid*.
[12] *Prosecutor v. Karemera*, Case n° ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II's Decision of 8 October 2003 Denying Leave to File an Amended Indictment", 19 December 2003, para. 20 (the "*Karemera* Appeals Decision").
[13] *Bizimungu* Appeals Decision, para. 16.
[14] *Ibid*., para. 19.
[15] *Bizimungu* Decision, para. 34.

i) L'effet du projet d'acte d'accusation modifié sur le droit des accusés à un procès rapide, sur leur droit d'être informés rapidement des accusations portées contre eux et sur leur droit de disposer du temps et des facilités nécessaires à la préparation de leur défense[6];

ii) L'opportunité d'accorder un délai supplémentaire aux accusés pour la préparation de leur défense[7];

iii) Le caractère raisonnable des retards qui pourraient se produire dans l'ouverture du procès et son déroulement proprement dits[8];

iv) L'incidence sur la durée de la détention provisoire des accusés[9];

v) La nature et l'ampleur de la modification envisagée[10];

vi) La notification préalable aux accusés et à la Chambre de première instance de l'intention du Procureur de solliciter l'autorisation de modifier l'acte d'accusation, la nature de cette notification et tout avantage illégitime que le projet d'acte d'accusation modifié conférerait au Procureur sur le plan tactique[11];

vii) Les éléments de preuve étayant les accusations nouvelles, s'il y en a, et le moment où ils ont été découverts[12];

viii) L'économie des ressources du Tribunal;

ix) La probabilité que le projet d'acte d'accusation modifié permet aux accusés, grâce à son surcroît de précision et d'exactitude, de mieux répondre aux accusations et se préparer au procès ou réduit la durée de leur procès, protégeant ainsi leur droit à un procès équitable plutôt que d'y porter atteinte[13].

43. La Chambre fait observer que toute modification tendant à étoffer l'acte d'accusation augmente le risque d'une violation des droits de l'accusé, tandis qu'un rétrécissement de son champ, même si l'acte d'accusation devient fondamentalement différent, peut «renforcer l'équité et la rationalité du procès [et] devrait être encouragé et généralement admis»[14]. Dans la décision *Bizimungu*, par exemple, malgré l'affirmation du Procureur selon laquelle aucune accusation nouvelle n'avait été portée, la Chambre a déclaré que «les développements, les clarifications et précisions apportées à l'appui des chefs restants constituent des modifications substantielles susceptibles de porter préjudice à l'accusé»[15].

[6] Décision *Limaj*, para. 9.
[7] *Ibid*., para. 10.
[8] *Ibid.*
[9] *Le Procureur c. Bizimungu et consorts*, affaire n° ICTR-99-50-AR50, Chambre d'appel, *Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave ta File Amended Indicment*, 12 février 2004, para. 16 (ci-après dénommée la «Décision *Bizimungu* de la Chambre d'appel»).
[10] *Ibid.*
[11] *Ibid.*
[12] *Le Procureur c. Karemera*, affaire n° ICTR-98-44-AR73, Décision relative à l'appel interlocutoire interjeté par le Procureur de la décision rendue le 8 octobre 2003 par la Chambre de première instance III refusant d'autoriser le dépôt d'un acte d'accusation modifié, 19 décembre 2003, para. 20 (ci-après dénommée la «Décision *Karemera* de la Chambre d'appel»).
[13] Décision *Bizimungu* de la Chambre d'appel, para. 16.
[14] *Ibid*., para. 19. [traduit pour les besoins de la présente décision].
[15] Décision *Bizimungu*, para. 34.

44. With respect to the type and scope of the amendments, the Chamber recalls the reasoning in the *Bizimungu* Appeals Decision :

> "[...] the Prosecution's Motion and Amended Indictment intertwined the two [types of amendment], such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request. The Trial Chamber was not required to disaggregate the changes that would have caused prejudice from those that would not. *However, this holding does not preclude the Prosecution from coming forward with a new proposed amendment that would provide greater notice of the particulars of the Prosecution's case without causing prejudice in the conduct of the trial*"(emphasis added)[16].

45. In the instant case, the Chamber finds that the proposed amended Indictment and the accompanying Motion, do not separate the amendments that could cause prejudice from those that do not. Amendments narrowing the scope of the Indictment, that may even meet the approval of the Accused, are intertwined with amendments that add substantial new charges. The latter amendments, as mentioned above, may increase the risk of prejudice to the rights of the Accused. For instance, paragraphs 34, 41, 42, 43, 44, 47, 48, 51, 61, 62, 63, 80, 88, 94, 109, 110, 115, and 116 of the proposed amended Indictment combine existing factual allegations with new factual allegations. However, for the sake of judicial economy, the Chamber has undertaken a comparative analysis of the proposed amended and current Indictments to make a determination on the merits of this Motion.

46. The Prosecution's motion combines four of the counts into two counts, and withdraws both the counts of Crimes Against Humanity based on persecution and other inhumane acts as a basis of liability for all Accused. In the proposed amended Indictment, the Accused Innocent Sagahutu and François-Xavier Nzuwonemeye are no longer charged on the basis of the alternate counts of Genocide and Complicity in Genocide. In addition, substantial new charges based on new facts and evidentiary materials are included in the proposed amended Indictment. The Chamber also notes that there greater brevity, specificity, and clarity in the proposed amended Indictment.

47. The Chamber has identified three errors in the proposed amended Indictment :

(i) Count 4 should read Crime Against Humanity (Murder).

(ii) Count 5 should read Crime Against Humanity (Extermination).

(iii) Count 6 should read Crime Against Humanity (Rape).

[16] *Bizimungu* Appeals Decision, para. 20.

44. Concernant la nature et l'ampleur des modifications, la Chambre rappelle l'argumentation suivie dans la décision *Bizimungu* de la Chambre d'appel :

> «[...] la requête du Procureur et l'acte d'accusation modifié ont inextricablement mélangé les deux [types de modifications], à tel point qu'il n'était pas facile de les séparer. Dans ces circonstances, la Chambre de première instance était fondée à rejeter la demande en son entier. Elle n'était pas tenue de séparer les modifications susceptibles de porter préjudice de celles qui ne pouvaient pas le faire. *Toutefois, cette solution jurisprudentielle n'interdit pas au Procureur de présenter un nouveau projet de modification qui fournirait plus de précisions sur sa thèse sans porter préjudice dans le déroulement du procès.*»[16] (non souligné dans l'orignal).

45. En l'espèce, la Chambre estime que le projet d'acte d'accusation modifié et la requête qui l'accompagne ne distinguent pas entre les modifications pouvant porter préjudice et celles qui ne porteraient pas préjudice. Les modifications tendant à réduire le champ de l'acte d'accusation, lesquelles pourraient même recevoir l'approbation des accusés, sont inextricablement liées à celles qui portent de nouvelles accusations substantielles. Comme il a été mentionné plus haut, ces dernières modifications peuvent aggraver le risque d'une violation des droits des accusés. Par exemple, les paragraphes 34, 41, 42, 43, 44, 47, 48, 51, 61, 62, 63, 80, 88, 94, 109, 110, 115 et 116 du projet d'acte d'accusation modifié contiennent à la fois d'anciennes et de nouvelles allégations factuelles. Malgré tout, par souci d'économie des ressources du Tribunal, la Chambre a réalisé une analyse comparative du projet d'acte d'accusation modifié et de l'acte d'accusation en vigueur afin de statuer sur le bien-fondé de la requête.

46. Dans sa requête, le Procureur regroupe quatre des chefs d'accusation antérieurement retenus pour en faire deux et retire tant le chef de persécution constitutive de crime contre l'humanité que celui d'autres actes inhumains constitutifs de crimes contre l'humanité en faveur de tous les accusés. Dans le projet d'acte d'accusation modifié, Innocent Sagahutu et François-Xavier Nzuwonemeye ne sont plus accusés de génocide ou, à défaut, de complicité dans le génocide. Par contre, de nouvelles accusations substantielles fondées sur des faits nouveaux et de nouvelles pièces probantes y sont incorporées. Qui plus est, la Chambre constate que le projet d'acte d'accusation modifié est plus concis, plus précis et plus clair.

47. La Chambre a relevé trois erreurs dans le projet d'acte d'accusation modifié :

i) Le quatrième chef d'accusation devrait être libellé comme suit : Crime contre l'humanité (assassinat).

ii) Le cinquième chef d'accusation devrait être libellé comme suit : Crime contre l'humanité (extermination).

iii) Le sixième chef d'accusation devrait être libellé comme suit : Crime contre l'humanité (viol).

[16] Décision *Bizimungu* de la Chambre d'appel, para. 20 [traduit pour les besoins de la présente décision].

48. The Chamber observes that paragraph 47 of the proposed amended Indictment specifies the Accused Ndindiliyimana's rank as Major, in contrast to his rank of "General" in, *inter alia*, paragraph 55 of the proposed Amended Indictment.

49. The Chamber agrees with the Appeals Chamber in the *Karemera* Appeals Decision that the Prosecutions' contentions on the interests of justice, the rights of victims, the purpose of the Tribunal in adjudicating only the most serious violations of international humanitarian law, the Prosecution's responsibility to seek justice and present all relevant evidence before the Tribunal, without more specific arguments, need be ascribed only a little weight in determining the Motion[17]. In the instant case, the Prosecution has not provided any specificity to its submissions regarding the interests of justice, the rights of victims, and the purpose of the Tribunal. The Chamber, thus, ascribes little weight to these factors.

50. The Chamber notes that delays to the trial's scheduled start date and trial schedule resulting from the proposed amended Indictment, and the cumulative effect on the duration of trial, are important considerations in determining the Motion. These factors need to be considered cumulatively, with "sufficient weight to relevant considerations"[18]. In the *Karemera* Appeals Decision, the Appeals Chamber found that the short span of one month before the scheduled start date of the trial was not dispositive in rejecting the amendment because a more succinct Indictment would shorten the total duration of the trial[19]. In the *Limaj* Decision, however, the ICTY Trial Chamber granted leave to amend an indictment because the "trial of the accused [was] not scheduled to start soon"[20]. In the particular circumstances of this case, the Prosecution and Defence's submissions in relation to delay to trial are not conclusive. The Prosecution claims that the Indictment is more specific, and alternatively, that there is no delay as the trial start day has not been scheduled, a motion for protective witnesses is pending, and all delays must take into account the nature, complexity, and seriousness of the decision. Defence Counsel, for their part, submit correctly, as conceded by the Prosecution, that in accordance with Rule 50 (b), a thirty day delay for preliminary motions is inevitable. The Chamber points out, however, that since the filing of the Prosecution's Motion, the President of the Tribunal has confirmed on 10 March 2004 the commencement of the trial on Monday, 13 September 2004.

[17] *Karemera* Appeals Decision, para. 16.
[18] *Ibid.*
[19] *Ibid.*, para. 5, 13, 15, 19, and 24.
[20] *Limaj* Decision, para. 24.

48. La Chambre fait observer que le paragraphe 47 de la version anglaise du projet d'acte d'accusation modifié précise que l'accusé Ndindiliyimana avait le grade de «major» [en anglais], alors que d'autres paragraphes, notamment le paragraphe 55, lui reconnaissent le grade de «général».

49. La Chambre de première instance pense comme la Chambre d'appel dans sa décision *Karemera* qu'en statuant sur la requête du Procureur, il y a lieu d'accorder uniquement une faible importance à ses affirmations relatives à l'intérêt de la justice, aux droits des victimes, à la mission du Tribunal de ne juger que les plus graves violations du droit international humanitaire et à l'obligation qui est faite au Procureur de demander justice et de produire tous les éléments de preuve pertinents devant le Tribunal lorsqu'il n'étaye pas lesdites affirmations par des arguments plus précis[17]. En l'espèce, le Procureur n'a nullement précisé ses arguments relatifs à l'intérêt de la justice, aux droits des victimes et à la mission du Tribunal. En conséquence, la Chambre n'accorde guère d'importance à ces considérations.

50. La Chambre relève que le report de la date d'ouverture du procès et les retards dans le calendrier des débats que pourrait provoquer le projet d'acte d'accusation modifié, ainsi que leurs effets conjugués sur la durée de la procédure, sont des éléments importants à prendre en considération pour statuer sur la requête. Il faut apprécier ces éléments d'une manière cumulative, en prenant «suffisamment […] en compte les éléments dignes de l'être»[18]. Dans sa décision *Karemera*, la Chambre d'appel a estimé que la courte période d'un mois précédant la date d'ouverture du procès prévue ne justifiait pas le rejet de la modification envisagée, car un acte d'accusation plus succinct réduirait la durée totale du procès[19]. Dans la décision *Limaj*, en revanche, la Chambre de première instance du Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a autorisé la modification d'un acte d'accusation au motif que «l'ouverture du procès des accusés n'était pas prévue pour l'immédiat»[20]. Compte tenu des circonstances particulières de la cause, les arguments présentés par le Procureur et la défense en l'espèce sur la question du retard dans le procès ne sont pas convaincants. Le Procureur fait valoir que l'acte d'accusation est plus précis et, subsidiairement, qu'il n'y aura pas de retard, la date d'ouverture du procès n'ayant pas encore été fixée, qu'une requête en prescription de mesures de protection des témoins est pendante et que l'appréciation de tous les retards doit tenir compte de la nature, de la complexité et de la gravité de la décision*. Les conseils de la défense, quant à eux, estiment à juste titre, comme l'a du reste reconnu le Procureur, qu'un retard de 30 jours permettant de soulever des exceptions préjudicielles est inéluctable, conformément aux dispositions de l'article 50 (B) du Règlement. La Chambre signale toutefois que depuis le dépôt de la requête du Procureur, le Président du Tribunal a confirmé le 10 mars 2004 que le procès s'ouvrirait le lundi 13 septembre 2004.

[17] Décision *Karemera* de la Chambre d'appel, para. 16.

[18] *Ibid.* [Note du traducteur : para. 19]

[19] *Ibid*., paras. 5, 13, 15, 19 et 24.

[20] Décision *Limaj*, para. 24 [traduit pour les besoins de la présente décision].

* Note du traducteur : Dans sa réplique, le Procureur fait plutôt état «de la nature, de la gravité et de la complexité de l'affaire», ce qui est d'ailleurs plus logique et plus intelligible.

51. The Chamber has considered all relevant elements to determine whether the proposed amended Indictment was likely to prejudice to the rights of the Accused from the proposed amended Indictment. Although the Motion does not specify the improvements, the Chamber is of the view that the proposed amended Indictment is clearer and more factually precise. The Chamber finds no proof of the Defence' submission that the Prosecution gained any improper tactical advantage by delaying the amendment to the Indictment, or delaying the disclosure of new factual allegations. Although the Defence contends that it understood the Prosecution to have completed its investigation before the filing of the present Indictment, they specify no dates in their submissions, and make no specific allegations of delayed disclosures. The Chamber notes that certain witness statements, as alleged by the Defence, are dated prior to the confirmation of the current Indictment on 28 January 2000, but the majority of the statements are dated after 28 January 2000. The Accused, as indicated by the Defence, have been in pre-trial detention for substantial periods of time. The Chamber notes that the amendments themselves are expansive in scope, with new charges based on new factual evidence. The Motion, however, offers few specifics of the relationship between the factual evidence and the new charges they support.

52. Moreover, the Chamber, considering all circumstances, the Chamber finds that the addition of the following substantially new charges may increase the risk of prejudice to the Accused's rights to a fair trial :

Paragraphs 28, 30, 31, 32, 33, 38, 39, 45, 46, 53, 54, 56, 57, 58, 60, 66, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 95, 96, 97, 98, 101, 112, 113, and 123.

53. The Chamber, however, acknowledges that granting the Accused appropriate time to prepare their defence may cure any prejudice to the rights of the Accused, in light of the totality of circumstances. In the *Limaj* Decision, the Chamber found that additional time to prepare cured prejudice caused by the amended Indictment[21]. In this case, the Chamber finds that even if there is prejudice to the Accused, it may be cured through the time remaining for the preparation of the Defence until 13 September 2004, the start date of the trial.

54. The Chamber finds that the above reasoning is not applicable with respect to the Accused Protais Mpiranya, who has not yet been arrested. Consequently, the proposed amended Indictment will not prejudice the Accused Mpiranya's rights to a fair trial.

55. The Chamber, on balance, regards any prejudice to the rights of the Accused as insufficient basis to refuse the application of the Prosecution. Indeed, any prejudice to the rights of the Accused to a fair trial arising from the proposed amended Indictment – considering the totality of circumstances, including judicial economy and the interests of justice – is curable considering the time remaining until the scheduled start of the trial on 13 September 2004. This remaining time gives Defence adequate time to investigate the new facts alleged and prepare for the trial based on the pro-

[21] See *Ibid*., para. 24.

51. La Chambre a examiné tous les éléments pertinents figurant dans le projet d'acte d'accusation modifié pour décider s'il était susceptible de porter atteinte aux droits de l'accusé. Même si la requête ne signale pas les améliorations qui y ont été apportées, la Chambre est d'avis que le projet d'acte d'accusation modifié est plus clair et expose les faits d'une manière plus précise. La Chambre ne trouve aucune preuve sur laquelle la défense s'appuie pour dire que le Procureur a obtenu un avantage tactique illégitime en retardant la modification de l'acte d'accusation ou la divulgation de nouvelles allégations factuelles. La défense affirme qu'elle croyait comprendre que le Procureur avait terminé ses enquêtes avant le dépôt de l'acte d'accusation actuel, mais elle ne précise à cet égard aucune date dans ses conclusions respectives et ne fait concrètement état d'aucune pièce dont la communication a été retardée. La Chambre retient que certaines déclarations de témoin, comme l'allègue la défense, sont antérieures à la confirmation de l'acte d'accusation actuel qui s'est faite le 28 janvier 2000, mais la plupart des déclarations sont postérieures au 28 janvier 2000. Les accusés, comme l'a fait savoir la défense, sont en détention provisoire depuis longtemps. La Chambre constate que les modifications apportées tendent en soi à étoffer l'acte d'accusation en y incorporant de nouvelles accusations fondées sur des faits nouveaux. La requête, toutefois, offre peu de détails sur le lien existant entre ces faits et les nouvelles accusations dont ils constituent le fondement.

52. Par ailleurs, la Chambre estime au vu de toutes les circonstances de la cause que l'ajout des accusations fondamentalement nouvelles portées dans les paragraphes énumérés ci-après pourrait aggraver le risque d'une violation du droit des accusés à un procès équitable :

> Paragraphes 28, 30, 31, 32, 33, 38, 39, 45, 46, 53, 54, 56, 57, 58, 60, 66, 67, 71,72,73,74,75,76,77,78,79, 82, 83,95,96,97, 98, 101, 112, 113 et 123.

53. Toutefois, la Chambre reconnaît, compte tenu de l'ensemble des circonstances, que l'octroi aux accusés d'un délai suffisant pour préparer leur défense pourrait réparer toute atteinte portée à leurs droits. Dans la décision *Limaj*, la Chambre a estimé que l'octroi d'un délai supplémentaire aux accusés pour préparer leur défense permettait de réparer le préjudice occasionné par la modification de l'acte d'accusation[21]. En l'espèce, la Chambre retient que même si les accusés subissaient un préjudice, celui-ci pourrait être réparé par le laps de temps dont dispose encore la défense pour se préparer avant le 13 septembre 2004, date d'ouverture du procès.

54. La Chambre relève que le raisonnement ci-dessus ne s'applique pas à l'accusé Protais Mpiranya, puisqu'il n'a pas encore été arrêté. Par conséquent, le projet d'acte d'accusation modifié ne portera pas atteinte à son droit à un procès équitable.

55. En définitive, la Chambre considère qu'aucune atteinte susceptible d'être portée aux droits des accusés ne suffit pour rejeter la demande du Procureur. En effet, compte tenu de l'ensemble des circonstances, notamment du principe de l'économie des ressources du Tribunal et de l'intérêt de la justice, toute atteinte susceptible d'être portée au droit des accusés à un procès équitable du fait du projet d'acte d'accusation modifié pourrait être réparée par le laps de temps restant à courir jusqu'à l'ouverture du procès prévue pour le 13 septembre 2004. Ce laps de temps suffit à la défense

[21] *Ibid.*

posed amended Indictment. The Chamber, thus, allows the proposed amended Indictment as specified below[22].

56. Finally, the Chamber warns the Prosecution on the lack of full disclosure in the Prosecution's Motion, under Rule 46 (A) which stipulates that a party may be sanctioned for "obstruct[ing] proceedings, or [being] otherwise contrary to the interests of justice [...]." As articulated by the Trial Chamber in the *Bikindi* Decision,

> "[...] it is the Prosecutor's duty to the Chamber and the Defence [...] to make explicit any proposed material changes to an indictment. It is to be regretted that the Prosecutor did not explicitly draw the attention of the chamber to these alterations"[23].

In particular, the Chamber points out that the Motion fails to provide adequate notice and intertwines amendments that narrow the scope of the Indictment with those that add new charges based on new factual allegations.

FOR THE FOREGOING REASONS, THE TRIBUNAL :

GRANTS leave to the Prosecution to amend the Indictment, in accordance the proposed amended Indictment, and in particular :

(i) Withdraws Count 2, Genocide, against the Accused Nzuwonemeye and Sagahutu;

(ii) Withdraws Count 3,. Complicity in Genocide, against the Accused Nzuwonemeye and Sagahutu;

(iii) Combines Count 4 and Count 5 as new Count 4, Crime and Humanity (murder) against all Accused;

(iv) Withdraws Count 8, Crime Against Humanity (persecution), against all Accused;

(v) Withdraws Count 9, Crime Against Humanity (inhumane acts), against all Accused;

and

(vi) Combines Count 10 and Count 11 as new Count 7, Violation of Article 3 Common to the Geneva Convention and Additional Protocol II (Murder);

AMENDS the proposed amended Indictment as follows :

(i) Count 4 to read Crime Against Humanity (Murder);

(ii) Count 5 to read Crime Against Humanity (Extermination); and

(iii) Count 6 to read Crime Against Humanity (Rape);

[22] See *Prosecutor v. Bikindi*, Case n° ICTR-2001-72-I, "Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment", 22 September 2003, para. 27 and 29 (the "*Bikindi* Decision").

[23] *Ibid*., para. 32.

pour enquêter sur les faits nouveaux allégués et préparer le procès sur la base du projet d'acte d'accusation modifié. En conséquence, la Chambre admet le projet d'acte d'accusation modifié dans les conditions précisées ci-après[22].

56. Enfin, la Chambre, en vertu de l'article 46 (A) du Règlement qui dispose qu'une partie peut être sanctionnée si son comportement «entrave la procédure ou va autrement à l'encontre des intérêts de la justice», adresse un avertissement au Procureur pour n'avoir pas fourni tous les renseignements nécessaires dans sa requête. Comme l'a clairement déclaré la Chambre de première instance dans la décision *Bikindi*,

> «[…] le Procureur a envers la Chambre et la défense l'obligation d'indiquer explicitement toute modification importante qu'il entend apporter à un acte d'accusation. Il est regrettable que le Procureur n'ait pas explicitement attiré l'attention de la Chambre sur les changements effectués en l'espèce»[23].

En particulier, la Chambre souligne que la requête ne renseigne pas suffisamment sur les modifications apportées et mélange inextricablement les modifications tendant à réduire le champ de l'acte d'accusation avec celles qui portent de nouvelles accusations fondées sur des allégations factuelles nouvelles.

PAR CES MOTIFS, LE TRIBUNAL :

AUTORISE le Procureur à modifier l'acte d'accusation comme prévu dans le projet d'acte d'accusation modifié, et notamment :

i) Retire le deuxième chef d'accusation [génocide] en ce qui concerne les accusés Nzuwonemeye et Sagahutu;

ii) Retire le troisième chef d'accusation [complicité dans le génocide] en ce qui concerne les accusés Nzuwonemeye et Sagahutu;

iii) Regroupe le quatrième et le cinquième chefs d'accusation pour en faire le quatrième chef nouveau suivant ce qui concerne tous les accusés : crime contre l'humanité (assassinat);

iv) Retire le huitième chef d'accusation [crime contre l'humanité (persécution)] en ce qui concerne tous les accusés;

v) Retire le neuvième chef d'accusation [crime contre l'humanité (actes inhumains)] en ce qui concerne tous les accusés;

vi) Regroupe le dixième et le onzième chefs d'accusation pour en faire le septième chef nouveau suivant : violation de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (meurtre);

MODIFIE le projet d'acte d'accusation modifié comme suit

i) Quatrième chef d'accusation : Crime contre l'humanité (assassinat);

ii) Cinquième chef d'ccusation : Crime contre l'humanité (extermination);

iii) Sixième chef d'accusation : Crime contre l'humanité (viol);

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[22] Voir l'affaire *Le Procureur c. Bikindi*, n° ICTR-2001-72-1, Décision relative à la requête de la défense intitulée «Motion by the Accused Simon Bikindi Challenging the Temporal Jurisdiction of the Tribunal and Objecting ta the Form of the Indictment» et à la requête du Procureur intitulée «Prosecutor's Motion for Leave ta File an Amended Indictment», 22 septembre 2003, paras. 27 et 29, (ci-après dénommée la «Décision *Bikindi*»).

[23] *Ibid*., para. 32.

DECIDES that the Prosecution clarify in Paragraph 47 of the proposed Amended Indictment whether Augustin Ndindiliyimana's rank should be Major;

ORDERS that the proposed amended Indictment with the aforementioned corrections, in French and in English, be filed with the Registry on 31 March 2004 and served immediately on the Accused and their Counsel;

DECIDES that in regard to the new charges, since the Accused have already appeared before a Trial Chamber in accordance with Rule 62 of the Rules, a further appearance shall be held as soon as practicable to enable them to enter a plea on the new Charges, pursuant to Rule 50 (B) of the Rules.

Arusha, 26 March 2004

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

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DEMANDE au Procureur de préciser au paragraphe 47 du projet d'acte d'accusation modifié si le grade d'Augustin Ndindiliyimana est bien celui de «major» en anglais;

ORDONNE que le projet d'acte d'accusation modifié, après insertion des corrections susmentionnées dans ses versions française et anglaise, soit déposé au Greffe le 31 mars 2004 et notifié immédiatement aux accusés et à leurs conseils;

DÉCIDE, en ce qui concerne les accusations nouvelles, qu'attendu que les accusés ont déjà comparu devant une Chambre de première instance conformément aux dispositions de l'article 62 du Règlement, une autre comparution se fera dès que possible pour leur permettre de plaider coupable ou non coupable de ces accusations nouvelles, en application de l'article 50 (B) du Règlement.

Arusha, le 26 mars 2004

[Signé] Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

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Décision relative à la requête orale déposée en procédure d'urgence et intitulée «Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council» 26 mars 2004 (ICTR-2000-56-I)

(Original : Anglais)

Chambre de première instance II

Juges : Arlette Ramaroson, Président de Chambre; William H. Sekule; Solomy Balungi Bossa

Ndindiliyimana – suspension de l'acte d'accusation – abus de procédure, violation du Statut et du Règlement de procédure et de preuve – discrimination dans les poursuites, Hutus, Front patriotique rwandais (FPR) – considérations d'ordre politique – saisie du Conseil de sécurité, Président du Tribunal seul habilité – jurisprudence Canada, Royaume-Uni, Etats-Unis, Cinquième amendement – pouvoir du Tribunal de surseoir à une procédure en cas d'abus de procédure – génocide, crimes de guerre, crimes contre l'humanité, violations graves de la Convention de Genève – pouvoir de poursuite discrétionnaire du Procureur, indépendance du parquet, secret, confidentialité – jurisprudence du Tribunal – pouvoir discrétionnaire du Procureur non absolu, égalité devant la loi, non discrimination – preuve, motif illégal ou illégitime, non poursuite de personnes placée dans une situation similaire – juges ad litem – requête rejetée

Instruments internationaux cités : Statut, art. 2, 3, 4, 5, 6, 15, 17, 19 (1), 20, 32 et 73 (A) – Règlement de procédure et de preuve, art. 5, 7 bis, 11, 24, 37, 42, 59, 61 et 73 – Code de déontologie à l'intention des conseils de la défense, art. 44 à 46

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Jean-Paul Akayesu*, arrêt, 1er juin 2001 (ICTR-96-4,* Recueil 2001*, p. 17) – Chambre de première instance I,* Le Procureur c. Elizaphan et Gérard Ntakirutimana*, jugement, 21 février 2003 (ICTR-96-10,* Recueil 2003*, p. 2752)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Delalic et consorts*, arrêt, 20 février 2001 (IT-96-21-A)*

Jurisprudence nationale citée : Regina c. Convoy*, [1989], S.C.R. 1659* - Regina c. Jewitt*, [1985] 2 S.C.R. 128* – Regina c. Horseferry Road Magistrate Court ex Parte Bennet*, [1993] A.C. 42.95 1994 (House of Lords)* – US c. Armstrong*, 5 17 U.S. 456 (1996)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIEGÉANT en la Chambre de première instance II, composée des juges Arlette Ramaroson, Président de Chambre, William H. Sekule et Solomy Balungi Bossa (la «Chambre»),

SAISI de la Requête orale d'Augustin Ndindiliyimana intitulée «*Urgent Oral Motion for a Stay of the Indictment, or in the alternative a Reference to the Security Council*», déposée le 16 mai 2003 (la «Requête»),

AYANT REÇU ET EXAMINÉ le Mémoire en réponse du Procureur, intitulé «Prosecutor's Brief in response to Motion Presented by Counsel for Augustin Ndindiliyimana for a Stay of the Indictment, Release of the Accused or, in the Alternative, to the Security Council», déposé le 27 juin 2003 («Réponse de Ndindiliyimana»),

VU le Statut du Tribunal (le «Statut»), en particulier ses articles 15, 17 et 20 ainsi que le Règlement de procédure et de preuve (le «Règlement»), en particulier ses articles 5, 37 et 73,

STATUANT CI-APRÈS sur la requête, sur la base des mémoires écrits déposés par les parties en application de l'article 73 (A) du Règlement,

QUESTIONS PRÉLIMINAIRES

1. Le juge Asoka de Zoysa Gunawardana est provisoirement absent du siège du Tribunal. Le 22 mars 2004, le Président du Tribunal a affecté des juges *ad litem* à la Chambre de première instance II pour statuer sur les questions préalables au procès dont elle serait saisie, en application de l'article 12 *quarter* (d) du Statut. En conséquence, la Chambre de première instance appelée à trancher la requête en question est composée des juges Arlette Ramaroson, Président de Chambre, William H. Sekule et Solomy Balungi Bossa.

ARGUMENTS DES PARTIES

Arguments de la défense

2. La défense de Ndindiliyimana soutient qu'il y a eu abus de procédure et violation du Statut et du Règlement du Tribunal par le Procureur du fait de sa politique sélective et discriminatoire caractérisée par la poursuite des seuls Hutus à l'exclusion des membres du Front patriotique rwandais (FPR). En conséquence, en vertu des dispositions des articles 5 (A) et 37 du Règlement ainsi que des articles 15, 17 et 20 du Statut, elle demande à la Chambre de première instance de surseoir à l'acte d'accusation, de libérer l'accusé, ou à défaut, de saisir le Conseil de sécurité de cette question.

3. À l'appui des arguments juridiques qu'elle avance, la défense cite l'affaire *Regina c. convoy*[1] pour affirmer que par souci d'équité le Tribunal peut user avec modération des pouvoirs dont il est investi pour écarter tout risque d'abus de procédure.

[1] *Regina c. Convoy*, [1989], S.C.R. 1659.

Se fondant sur l'affaire *Convoy*, elle fait valoir que si dans une affaire pénale l'abus de procédure est suffisamment disproportionné par rapport à l'«intérêt qu'a la société de voir punir une infraction», même la mauvaise foi du Procureur, et pas uniquement une conduite répréhensible de sa part, suffit pour que l'abus de procédure soit constaté.

4. La défense cite également d'autres affaires relevant de la jurisprudence du Canada et du Royaume-uni[2] pour affirmer qu'un Tribunal dispose d'un «pouvoir discrétionnaire implicite» lui permettant de surseoir à une procédure pour cause d'abus de procédure.

5. Enfin, elle fait fond sur l'affaire *US v. Armstrong*[3], dans laquelle la Cour suprême des États-Unis d'Amérique décide sur la base des dispositions pertinentes de la Constitution des États-Unis d'Amérique relatives aux garanties de procédure visées dans le Cinquième amendement, de proscrire les poursuites sélectives lorsque le «système de poursuites est pratiquement constitutif d'un refus à se conformer de la loi».

6. La défense fait valoir que pour des raisons beaucoup plus fondées sur des considérations politiques que sur les éléments de preuve disponibles, le Procureur a engagé des poursuites contre des Hutus à l'exclusion des membres du FPR ou de ses sympathisants. Elle reproche au Bureau du Procureur de souscrire à une «culture d'impunité» relativement au FPR.

7. La défense soutient qu'au regard de l'article 5 du Règlement, la politique de poursuites sélective conduite par le Procureur constitue un abus des procédures du Tribunal en ce qu'elle donne lieu à une violation du droit à une «protection égale de la loi» visé par l'article 20 (1) du Statut, et des devoirs et fonctions du Procureur énoncés aux articles 15 et 17 du Statut ainsi qu'à l'article 37 du Règlement.

8. La défense fait valoir que le Procureur est habilité à poursuivre le FPR dont les crimes relèvent de la compétence territoriale et temporelle du Tribunal. Elle affirme, sur la base de documents produits à l'appui de sa requête, que le FPR a commis des crimes de génocide, des crimes de guerre, des crimes contre l'humanité et des violations graves de la Convention de Genève, crimes visés aux articles 2,3,4, 5 et 6 du Statut.

9. Se fondant sur une interview du procureur[4] de l'époque diffusée à l'intention du grand public, elle soutient qu'aucun membre, agent ou allié du FPR ne sera mis en accusation.

10. Elle demande, à titre subsidiaire, que la Chambre use des pouvoirs qui lui sont conférés pour saisir le Conseil de sécurité afin de faire la lumière sur le rôle du Procureur relativement aux crimes commis par le FPR.

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[2] *Affaire Regina c. Jewitt*, [1985] 2 S.C.R. 128; *Regina c. Horseferry Road Magistrate Court ex Parte Bennet*, [1993] A.C. 42.95 1994 (House of Lords).

[3] *US c. Armstrong*, 5 17 U.S. 456 (1996).

[4] Interview accordée par le Procureur Carla Del Ponte à l'agence de presse Hirondelle le 19 décembre 2002.

Réponse du Procureur

11. Le Procureur fait valoir que sa compétence est limitée dans le temps et que son programme n'est pas préétabli. Il fait valoir que les articles 15 et 17 du Statut lui confèrent un pouvoir discrétionnaire conforme au principe judiciaire de l'indépendance du parquet et que nul ne peut lui prescrire de mettre en mouvement l'action publique. De plus, il résulte de la nature même du pouvoir discrétionnaire de poursuivre dont il est investi que son action doit être entourée de secret et de confidentialité.

12. Le Procureur fait valoir qu'en vertu de l'article 32 du Statut et des articles 7 *bis*, 11, 24, 59 et 61 du Règlement, seul le Président du Tribunal est habilité à saisir le Conseil de sécurité d'une question et ce, à travers son rapport annuel ou à la demande des Chambres ou du Procureur. Il fait valoir également que les conseils de la défense ne sont pas habilités à demander la saisine du Conseil de sécurité.

13. Le Procureur semble soutenir que c'est à tort que la défense s'est fondée sur l'article 20 du Statut qui vise exclusivement les droits de l'accusé devant le Tribunal.

14. Il demande à la Chambre de se déclarer incompétente pour statuer sur sa politique discrétionnaire de poursuites.

15. Il rejette les affirmations de la défense au motif qu'elles relèvent de la spéculation.

Réplique de Ndindiliyimana

16. La défense soutient que le Procureur n'a pas nié ses allégations tendant à établir que sa politique sélective visait spécifiquement les Hutus, et qu'il s'est borné à dire que les enquêtes se poursuivent. De même, la défense fait valoir que, tels qu'avancés par le Procureur, les arguments relatifs au secret et à la confidentialité de ses poursuites ne sont pas des raisons valables dès lors que la politique de poursuites sélectives qui lui est reprochée demeure inexpliquée.

17. La défense rejette les affirmations du Procureur selon lesquelles le Tribunal n'est pas compétent pour statuer sur son pouvoir discrétionnaire de poursuites et considère que ces propos constituent un outrage à la Chambre. Elle estime que la Chambre est compétente pour accorder réparation à un accusé dès lors que le Procureur abuse de son pouvoir discrétionnaire en procédant à des poursuites sélectives.

18. La défense fait valoir que le pouvoir discrétionnaire de poursuites doit être exercé de façon raisonnable. Elle reprend à son compte l'argument avancé dans sa requête précédente à l'effet d'établir, que pour que l'abus de procédure soit constaté, il n'est pas nécessaire de rapporter une conduite répréhensible du Procureur, attendu qu'il suffit de démontrer que l'un des deux groupes est poursuivi de façon sélective à l'exclusion de l'autre.

19. La défense soutient également que la Chambre est habilitée à saisir le Conseil de sécurité. En outre, elle affirme que, conformément aux prescriptions des Nations Unies, en particulier les articles 19 (1) du Statut, 42 du Règlement, et 44 à 46 du Code de déontologie à l'intention des conseils de la défense, la défense est tenue d'exercer tous les recours judiciaires qui lui sont ouverts.

20. La défense affirme que l'article 20 du Statut ne vise pas exclusivement les droits de l'accusé comparaissant devant le Tribunal.

APRÈS EN AVOIR DÉLIBÉRÉ,

21. La défense demande que soit suspendu l'acte d'accusation, en vertu de l'article 5 du Règlement qui dispose entre autres mesures que :

> 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; elle n'est accueillie que si la preuve de la violation présumée est rapportée et si celle-ci a effectivement fait subir un préjudice substantiel à cette partie.

La Chambre considère que les arguments alambiqués avancés par la défense tendent à établir qu'il y a eu violation des articles 20 du Statut et 37 du Règlement qui disposent respectivement que :

> Article 20 : Les droits de l'accusé
>
> 4. [sic] Tous sont égaux devant le Tribunal international pour le Rwanda.
>
> 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.

22. La Chambre reconnaît, comme le soutient le Procureur, et conformément à la jurisprudence du Tribunal, que le Procureur dispose «d'un large pouvoir d'appréciation concernant […] l'établissement des actes d'accusation»[5]. La Chambre fait observer que «l'étendue du pouvoir d'appréciation du Procureur, ainsi que son indépendance statutaire, créent la présomption qu'il a exercé comme il convient les fonctions […] en matière de poursuites»[6].

23. La Chambre estime cependant que l'argument avancé par le Procureur, sans s'appuyer sur le moindre précédent jurisprudentiel du Tribunal à l'effet de demander à la Chambre de se déclarer incompétente pour statuer sur sa politique discrétionnaire de poursuites est contraire à la jurisprudence du Tribunal. Les arrêts *Celibici* et *Akayesu*[7] ainsi que le jugement Ntakirutimana[8] établissent sans équivoque que le pouvoir discrétionnaire du Procureur n'est pas absolu, et qu'au contraire l'accusation doit «respecter le principe de l'égalité devant la loi et celui de la non-discrimination»[9].

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[5] *Le Procureur c. Akayesu*, affaire n° ICTR-96-4, arrêt du 1er juin 2001, para. 94 (citant *Le Procureur c. Delalic et consorts*, affaire n° IT-96-21-A, arrêt du 20 février 2001, para. 602 («l'arrêt *Celebici*») («l'arrêt *Akayesu*»).

[6] Arrêt *Celebici*, para. 611.

[7] Arrêt *Akayesu*, paras. 93 à 97.

[8] *Le Procureur c. Ntakirutimana*, affaire n° ICTR-96-10, jugement du 21 février 2003, paras. 870 et 871, (jugement *Ntakirutimana*).

[9] Arrêt *Celibici*, para. 605.

24. La Chambre estime que l'argument du Procureur tendant à établir que l'article 20 du Statut ne s'applique pas en l'espèce est sans fondement.

25. Quoique la défense n'ait pas cité la jurisprudence pertinente du Tribunal[10] et qu'elle se soit uniquement fondée sur des sources nationales, la Chambre réaffirme le critère articulé dans l'arrêt *Celebici* et repris dans l'arrêt *Akayesu*[11] ainsi que dans le jugement *Ntakirutimana*[12]. Elle relève que pour s'acquitter de la lourde tâche qui consiste à battre en brèche la présomption de pouvoir discrétionnaire de poursuites du Procureur la défense doit :

> […] i) démontrer l'existence d'un motif illégal ou illégitime (notamment discriminatoire) de poursuites et
>
> ii) démontrer que d'autres personnes placées dans une situation similaire n'ont pas fait l'objet de poursuites[13].

26. La Chambre rappelle le jugement *Ntakirutimana* dans lequel la Chambre de première instance a estimé que c'est à l'accusé qui se plaint de faire l'objet de poursuites sélectives que revient la lourde tâche de prouver que la décision du Procureur de le poursuivre est inspirée par des motifs inadmissibles, tels que l'appartenance ethnique ou politique. Dans l'affaire *Ntakirutimana*, la Chambre a conclu que les accusés n'ont rapporté aucun élément de preuve répondant à la rigueur des critères susmentionnés[14]. Elle rappelle également une décision similaire rendue dans l'arrêt *Akayesu*, où la Chambre d'appel a estimé qu'en soi, «l'omission de poursuivre les auteurs éventuels de crimes contre la population hutue» n'est pas suffisante pour permettre d'établir que le Procureur a fait preuve de discrimination dans sa politique de poursuites[15]. De plus, dans *Akayesu*, la défense n'a pas démontré «en quoi la prétendue politique pénale discriminatoire du Procureur lui a été préjudiciable dans le sens où elle remettrait en cause la légalité des poursuites intentées à son encontre»[16]. En conséquence, la Chambre rejette l'affirmation de la défense selon laquelle, il suffit d'établir qu'un seul groupe a été ciblé de façon sélective alors que l'autre ne l'a pas été. En l'espèce, la Chambre estime que la défense n'a rapporté aucune preuve établissant l'existence des motifs discriminatoires inadmissibles qui auraient inspiré le Procureur – en dehors de l'allégation générale selon laquelle l'action du Procureur serait motivée par des considérations d'ordre politique – pour satisfaire aux critères rigoureux requis pour démontrer que le Procureur a abusé de son pouvoir discrétionnaire.

27. La Chambre relève la conclusion dégagée dans le jugement Ntakirutimana, à savoir que :

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[10] La jurisprudence du Tribunal est en conformité avec les sources juridiques citées à l'appui des arguments de la défense. Toutefois, tel qu'il ressort de l'arrêt *Celibici*, «Il n'est pas nécessaire de choisir l'un de ces critères de droit interne, puisque la Chambre d'appel ne saurait se fonder uniquement sur la jurisprudence d'un système particulier pour déterminer les principes juridiques applicables. Les dispositions du Statut [. . .] et les principes pertinents du droit international fournissent un bon fil conducteur en l'espèce». Id. para. 611.

[11] Arrêt *Akayesu*, paras. 93 à 97.

[12] Jugement *Ntakirutimana*, paras. 870 et 871.

[13] Arrêt *Celebici*, para. 611.

[14] Jugement *Ntakirutimana*, para. 871.

[15] Arrêt *Akayesu*, para. 95.

[16] Arrêt *Akayesu*, para. 96.

> La défense n'ayant pas rapporté la preuve que la mise en accusation et la poursuite des accusés ont été inspirées par des motifs discriminatoires, ou de toute autre manière illégaux ou blâmables, la Chambre considère qu'il n'y a pas lieu de se pencher sur la question accessoire qui consiste à savoir s'il existe d'autres personnes se trouvant dans la même situation qui n'ont pas fait l'objet de poursuites, ou qui ont vu abandonner les poursuites engagées contre elles[17].

28. La Chambre fait sien ce raisonnement. Tel qu'indiqué plus haut, la défense n'a pas satisfait à l'obligation qui lui était faite de démontrer que la mise en accusation et la poursuite de l'accusé *Ndindiliyimana* ont été inspirées par des motifs inadmissibles. En conséquence, la Chambre ne s'attachera pas à examiner la question accessoire de savoir si d'autres personnes se trouvant dans la même situation, à savoir le FPR, n'ont pas fait l'objet de poursuites.

29. Enfin, sur la foi de ce qui précède, la Chambre estime que l'affirmation de la défense selon laquelle le Procureur a abusé de son pouvoir discrétionnaire en procédant à des poursuites sélectives est sans fondement. En conséquence, il n'y a pas lieu pour elle de se prononcer sur les mesures demandées par la défense, à savoir, soit de surseoir à la procédure, soit de saisir le Conseil de sécurité. Cela étant, la Chambre estime que, telle que sollicitée par la défense, la saisine du Conseil de sécurité n'est pas une solution envisageable.

POUR CES MOTIFS, LE TRIBUNAL :

REJETTE la requête dans son intégralité.

Fait à Arusha, le 26 mars 2004

[Signé] : Arlette Ramaroson ; William H. Sekule ; Solomy Balungi Bossa

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[17] Jugement *Ntakirutimana*, para. 871.

Decision on Defence Motion for Protective Measures for Defence Witnesses 8 June 2004 (ICTR-2000-56-I)

(Original : French)

Trial Chamber II

Judge : Arlette Ramaroson

Protective measures for defence witnesses, similar to those granted to Prosecution witnesses – equality – motion granted

International instruments cited : Statute art. 20, 21 – Rules of procedure and evidence, Rules 54, 69, 73 and 75

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

SITTING as Trial Chamber II, with Judge Arlettte Ramaroson presiding and designated pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules");

BEING SEIZED of the "Motion for Protective Measures for Defence Witnesses", filed on 4 May 2004 (the "Motion");

CONSIDERING "The Prosecutor's Response to the Defence Motion for Protective Measures for its Witnesses", filed on 6 May 2004 (the "Response");

DECIDING solely on the basis of the parties' written briefs, pursuant to Rule 73 of the Rules.

PARTIES' SUBMISSIONS

1. Pursuant to Article 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules, the Defence seeks for the witnesses that it intends to call in the instant case the application of protective measures similar to those granted to Prosecution witnesses, pursuant to the "Order for Protective Measures for Prosecution Witnesses" issued by Trial Chamber III on 12 July 2001, and extended by the Decision rendered by Trial Chamber II, dated 19 March 2004.

2. The Defence endorses Prosecution submissions in support of its "Motion for the Review, Variation and Extension of the Protective Measures for Victims and Witnesses", filed on 22 November 2002, especially those relating to "risks to witnesses living outside Rwanda". The Defence submits that such risks also apply to Defence witnesses who, compared to Prosecution witnesses, face similar, if not higher, risks of bodily harm as they are on their own.

Décision sur la requête de la défense aux fins de mesures de protection des témoins à décharge 8 juin 2004 (ICTR-2000-56-I)

(Original : Français)

Chambre de première instance II

Juge : Arlette Ramaroson

Mesures de protection des témoins à décharge, équivalentes à celles accordées aux témoins du Procureur – égalité des parties – requête accordée

Instruments internationaux cités : Statut, art. 20, 21 – Règlement de procédure et de preuve, art. 54, 69, 73 et 75

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (ci-après le «Tribunal»),

SIEGEANT en la Chambre de première instance II composée de la juge Arlette Ramaroson, Présidente, désignée conformément à l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement»);

ETANT SAISI de la («requête aux fins de mesures de protection des témoins à décharge»), déposée le 4 mai 2004 (la «requête»);

CONSIDERANT la «réponse du Procureur à la requête de la défense aux fins de mesures de protection de ses témoins», déposée le 6 mai 2004 (la «réponse»);

STATUANT uniquement sur la base des mémoires écrits déposés par les parties conformément à l'article 73 du Règlement;

SUR LES ARGUMENTATIONS DES PARTIES

1. Sur le fondement de l'article 21 du Statut et des articles 54, 69, 73 et 75 du Règlement, la défense sollicite, pour les témoins qu'elle entend appeler dans la présente affaire, l'application de mesures de protection identiques à celles accordées aux témoins du Procureur en vertu de l'ordonnance portant mesures de protection des témoins à charge rendue par la Chambre de première instance III le 12 juillet 2001 et étendues par décision de la Chambre de première instance II en date du 19 mars 2004.

2. La défense fait siens les arguments du Procureur développés à l'appui de sa requête aux fins de modification et d'extension des mesures de protection des victimes et témoins déposée le 22 novembre 2002, en particulier ceux relatifs aux «risques encourus par les témoins vivant hors du Rwanda». La défense soumet que ces risques concernent également les témoins à décharge qui risquent tout autant, sinon davantage, que les témoins à charge une atteinte à leur intégrité physique, du fait de leur isolement.

3. The Defence submits that the witnesses it has interviewed have all expressed concern, which has been compounded further by the judicial investigations being carried out by the French Judge Bruguière, and have indicated that they will not testify before the Tribunal unless they are afforded the same protective measures as Prosecution witnesses.

4. The Defence further submits that the principle of equality set forth in Article 20 (1) of the Statute, and reiterated in matters of witness protection in the Ruzindana case, Decision of 6 October 1997, implies that similar protective measures should be accorded to Prosecution and Defence witnesses.

5. The Defence seeks the following measures :

(a) designating for each Defence witness a pseudonym that shall be used whenever referring to such witness in Tribunal proceedings, communications and discussions between the parties and the public;

(b) requiring that the names, addresses, whereabouts and any other identifying information on witnesses be placed under seal by the Registry, and that such identifying information be communicated to the Victims and Witnesses Support Section in order to implement protection measures for such witnesses;

(c) redacting any such identifying information that is contained in the Tribunal's existing records;

(d) prohibiting disclosure to the public or the media of any such identifying information prior to, during, and after the trial;

(e) prohibiting the Prosecution from attempting to make any independent determination of the identity of any such witnesses or from encouraging or otherwise aiding any person to attempt to identify any such person;

(f) requiring the Prosecution to make a written request to the Trial Chamber prior to contacting any witness whose identity it knows or any relative of such person;

(g) prohibiting the photographing and audio and/or video recording sketching of any witness at any rime or place without leave of the Trial Chamber;

(h) prohibiting the Registry from disclosing to the Prosecution any identifying information on such protected witnesses that it may have on file;

(i) granting the Defence leave to make a prior disclosure to the Prosecution of versions of documents that have been redacted to conceal the names, addresses, and any other identifying information on such witness;

(J) granting the Defence leave to disclose to the Prosecution all identifying information on such witnesses no later than 21 days prior to each witness's testimony.

6. The Prosecution does not challenge the Defence requests and submits to the Chamber's discretion. It simply emphasizes the Defence's obligation, pursuant to point (j), to disclose to the Prosecution all identifying information on the witnesses later than 21 days prior to each witness's testimony, and appeals to the good faith of the Defence when redacting pursuant to point (i).

3. La défense soumet que les témoins qu'elle a interrogés ont tous manifesté leurs inquiétudes, qui ont été encore accrues par l'instruction judiciaire menée par le juge français Bruguière, et ont soumis leur déposition devant le Tribunal à la condition de bénéficier de mesures de protection équivalentes à celles accordées aux témoins du Procureur.

4. La défense soumet de surcroît que l'égalité entre les parties consacrée par l'article 20, alinéa 1er du Statut et rappelée, relativement à la protection des témoins, dans la décision Ruzindana du 6 octobre 1997, implique le parallélisme des mesures de protection accordées aux témoins des deux parties.

5. Les mesures requises par la défense sont les suivantes :

a) attribution à chaque témoin à décharge d'un pseudonyme par lequel il sera désigné dans le cadre de la procédure devant le Tribunal, dans la communication et les discussions ayant lieu entre les parties et vis-à-vis du public ;

b) placement sous scellés par le Greffe du nom de ces témoins, de leur adresse, des lieux où ils se trouvent et de toute autre information permettant de les identifier, ces données d'identification devant être communiquées à la section d'aide aux victimes et aux témoins aux fins de mise en oeuvre des mesures de protection ordonnées en faveur de ces personnes ;

c) caviardage de toutes données d'identification de ces témoins figurant dans les dossiers actuels du Tribunal ;

d) interdiction de divulguer toutes données d'identification de ces témoins au public ou aux médias avant, pendant et après le procès ;

e) interdiction au Procureur de tenter de découvrir par ses propres moyens l'identité de l'un de ces témoins et d'encourager ou aider de toute autre manière quiconque a tenté d'identifier une telle personne ;

f) obligations pour le Procureur de demander par écrit l'autorisation de la Chambre lorsqu'il souhaitera entrer en contact avec l'un de ces témoins dont il connaît l'identité ou tout membre de la famille d'une telle personne ;

g) interdiction de photographier l'un de ces témoins, d'enregistrer ses propos sur un support audio et/ou de filmer ainsi que de le dessiner en tout temps ou en tout lieu sans l'autorisation de la Chambre ;

h) interdiction pour le Greffe de communiquer au Procureur toute donnée d'identification de ces témoins protégés qui figurerait dans les pièces déposées au Greffe ;

i) autorisation pour la défense de communiquer dans un premier temps les pièces au Procureur en version caviardée pour dissimuler les noms de ces témoins protégés, leurs adresses et les autres informations permettant de les identifier ;

j) autorisation pour la défense de communiquer toutes les données d'identification des témoins au plus tard 21 jours avant la date fixée pour la comparution de chaque témoin.

6. Le Procureur ne s'oppose pas aux demandes de la défense et s'en rapporte à la sagesse de la Chambre. Il souligne simplement l'engagement pris par la défense, en vertu du point (j), de lui communiquer l'identité des témoins au plus tard 21 jours avant leur comparution et en appelle à la bonne foi de la défense dans la pratique du caviardage visée au point (i).

AFTER HAVING DELIBERATED

7. The Chamber recalls the measures adopted in the "Order for protective measures for [Prosecution] witnesses", as amended by this Chamber in its Decision of 19 March 2004, issued by Trial Chamber III, in the person of Judge Dolenc on 12 July 2001, and stresses that the requirement of ensuring equality between the parties also extends to the choice of protective measures for Prosecution and Defence witnesses.

8. Regarding the protective measures referred to under point (d), the Chamber however recalls that Rule 75 of the Rules, as amended during the Fourteenth Plenary Session of the Tribunal, now authorizes disclosure of the identity and testimony of the witness at a later date in another trial, after the witness has been informed prior to his or her testimony.

9. The Chamber shall order the other protective measures sought by the Defence, insofar as they are similar to those accorded to Prosecution witnesses, and are based on the same grounds as those previously set forth by the Prosecution in support of its motion for the protection of Prosecution witnesses.

FOR THE FOREGOING REASONS,

GRANTS the Motion,

ORDERS the following protective measures in respect of Defence witnesses :

(a) that the Defence designate for each Defence witness a pseudonym that shall be used whenever referring to such witness in Tribunal proceedings, communications and discussions between the parties and the public;

(b) that the names, addresses, whereabouts and any other identifying information of witnesses (hereinafter referred to as "identifying information") be placed under seal by the Registry, and that such identifying information be communicated to the Victims and Witnesses Support Section in order to implement protection measures for such witnesses;

(c) that any identifying information on such witnesses contained in the Tribunal's existing records be redacted;

(d) prohibiting disclosure to the public or the media of any identifying information, prior to, during and after the trial; however, pursuant to Rule 75 (E) of the Rules, the transcript of those proceedings relating the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal and, during such proceedings, the identifying information may be disclosed pursuant to Rule 75 (F) of the Rules. The Victims and Witnesses Support Section shall ensure that the witness has been informed that his or her identity may be disclosed;

(e) that the Prosecution be prohibited from attempting to make any independent determination of the identity of any such witnesses or from encouraging or otherwise aiding any person to attempt to identify any such person;

APRÈS EN AVOIR DÉLIBÉRÉ

7. La Chambre rappelle les mesures adoptées dans l'ordonnance rendue par la Chambre de première instance III en la personne du Juge Dolenc le 12 juillet 2001 pour la protection des témoins à charge, telles que modifiées par la présente Chambre dans sa décision du 19 mars 2004, et souligne que la nécessité de respecter l'égalité entre les parties s'applique également dans le choix des mesures de protection appliquées aux témoins à charge et à décharge.

8. En ce qui concerne la mesure de protection visée au point (d), la Chambre rappelle toutefois que l'article 75 du Règlement, tel que modifié lors de la quatorzième session plénière du Tribunal, autorise à présent la divulgation ultérieure de l'identité et du témoignage du témoin dans d'autres affaires, après en avoir informé le témoin avant sa comparution.

9. Quant aux autres mesures de protection réclamées par la défense, dès lors qu'elles sont équivalentes à celles accordées pour la protection des témoins à charge et qu'elles sont motivées par les mêmes éléments que ceux précédemment soumis par le Procureur à l'appui de sa demande de protection des témoins à charge, la Chambre ne s'oppose pas à leur adoption.

PAR CES MOTIFS,

REÇOIT la requête,

ORDONNE que les mesures suivantes soient mises en place pour la protection des témoins à décharge :

a) La défense doit attribuer à chaque témoin à décharge un pseudonyme par lequel il sera désigné dans le cadre de la procédure devant le Tribunal, dans les communications et les discussions ayant lieu entre les parties et vis-à-vis du public ;

b) Les noms de ces témoins, leurs adresses, les lieux où ils se trouvent et les autres informations permettant de les identifier (ci-après dénommés les « données d'identification ») doivent être placés sous scellés par le Greffe et ne figurer dans aucun dossier du Tribunal et ces données d'identification doivent être communiquées à la Section d'aide aux victimes et aux témoins aux fins de la mise en oeuvre des mesures de protection ordonnées en faveur de ces personnes ;

c) Toute donnée d'identification de ces témoins figurant dans les dossiers actuels du Tribunal doit être caviardée ;

d) Il est interdit de divulguer toute donnée d'identification de ces témoins au public ou aux médias avant, pendant et après le procès ; toutefois, conformément au paragraphe (E) de l'article 75 du Règlement, le compte rendu de la déposition de ces témoins pourra être communiqué et utilisé dans le cadre d'autres affaires portées devant le Tribunal et, à cette occasion, les informations relatives à son identité pourront être communiquées conformément aux dispositions du paragraphe (F) de l'article 75. La Section d'aide aux victimes et aux témoins s'assurera, qu'avant de comparaître, le témoin a bien été informé de la possibilité d'une telle divulgation ;

e) Il est interdit au Procureur de tenter de découvrir par ses propres moyens l'identité de l'un de ces témoins et d'encourager ou aider de toute autre manière quiconque à tenter d'identifier une telle personne ;

(f) that the Prosecution make a written request to the Trial Chamber prior to contacting any witness whose identity it knows or any relative of such person, and that, with leave of the Trial Chamber, the Defence take the necessary steps to facilitate such contact when the consent of the protected person or, if such person be under 18 years, ensure that the consent of his or her parents or guardian has been obtained;

(g) that the photographing and audio and/or video recording or sketching of any witness at any time or place without leave of the Trial Chamber and the parties be prohibited;

(h) that the Registry be prohibited from disclosing to the Prosecution any such identifying information that it may have on file;

(i) that the Defence be granted leave to make a prior disclosure to the Prosecution of versions of documents that have been redacted to conceal the names, addresses and any other information which might identify such protected witnesses;

(j) that the Defence be granted leave to disclose to the Prosecution all identifying information on such witnesses no later than 21 days prior to each witness's testimony.

Arusha, 8 June 2004

[Signed] : Arlette Ramaroson

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Decision on Augustin Bizimungu's Preliminary Motion 15 July 2004 (ICTR-00-56-1)

(Original : French)

Trial Chamber II

Judges : Arlette Ramaroson, presiding; William H. Sekule; Solomy Balungi Bossa

Bizimungu – preliminary motion – no personal jurisdiction of the Tribunal – impartiality, refusal to initiate prosecutions against some people – invalidity of the amended indictment – Tribunal' seal – defects – temporal jurisdiction – typographical error – deletion of paragraphs – copy of the amended indictment to the defence – vagueness – conspiracy to commit genocide – genocide, complicity in genocide, alternatively, not cumulative – separate trial – provisional release – events prior to 1 January 1994

f) Le Procureur est tenu de demander par écrit l'autorisation à la Chambre de première instance et d'aviser la défense en temps utile lorsqu'il souhaite entrer en contact avec l'un de ces témoins dont le Procureur connaît l'identité ou tout membre de la famille d'une telle personne. Sur instructions de la Chambre de première instance, la défense prend les dispositions nécessaires pour faciliter ce contact lorsque le consentement de la personne protégée ou, si celle-ci est âgée de moins de 18 ans, celui de ses parents ou de son tuteur a été obtenu ;

g) Il est interdit de photographier l'un de ces témoins, d'enregistrer ses propos sur un support audio et/ou de le filmer, ainsi que de le dessiner, en tout temps ou en tout lieu, sans l'autorisation de la Chambre de première instance et des parties ;

h) Le Greffe est tenu de ne communiquer au Procureur aucune donnée d'identification de ces témoins protégés qui figurerait dans les pièces déposées au Greffe ;

i) La défense peut, dans un premier temps, communiquer les pièces au Procureur en version caviardée pour dissimuler les noms de ces témoins protégés, leurs adresses et les autres informations permettant de les identifier ;

j) La défense communique au Procureur toute donnée d'identification des témoins protégés au plus tard 21 jours avant la date fixée pour la comparution de chaque témoin.

Arusha, le 8 juin 2004

[Signé] : Arlette Ramaroson

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Décision sur la requête de Augustin Bizimungu en exceptions préjudicielles 15 juillet 2004 (ICTR-00-56-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, présidente ; William H. Sekule ; Solomy Balungi Bossa

Bizimungu – exceptions préjudicielles – incompétence ratione personnae du Tribunal – refus d'engager des poursuites contre certaines personnes – non validité de l'acte d'accusation amendé – sceau du Tribunal – vices – compétence ratione temporis – signification de l'acte d'accusation modifié à la défense – erreur typographique – suppression de paragraphes – forme de l'acte d'accusation – imprécisions – entente en vue de commettre le génocide – génocide, complicité dans le génocide, alternatifs, non cumul – disjonction d'instance – mise en liberté provisoire – événements antérieurs au 1er janvier 1994

International instruments cited : Statute, art. 2 – Rules of procedure and evidence, Rules 47 (G), 50 (C), 53 bis *(B), 62, 65 (B), 72 and 73 – Security Council Resolutions 955 of 8 November 1994 and 1165 of 30 April 1998*

International cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana*, Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment, 24 November 1997 (ICTR-96-1l-T,* Reports 1995-1997*, p. 436) – Trial Chamber,* The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void Ab Initio, 13 Apri1 2000 (ICTR-96-34-I,* Reports 2000*, p. 960) – Trial Chamber II,* The Prosecutor v. Jérôme Clément Bicamumpaka*, Decision on Motion for Defects in the Form of the Indictment and Lack of Jurisdiction, 8 May 2000 (ICTR-99-50-I) – Trial Chamber II,* The Prosecutor v. Innocent Sagahutu*, Decision on Sagahutu's Preliminary, Provisional Release and Severance Motions", 25 September 2002 (ICTR-00-56-T,* Reports 2002*, p. X) – Trial Chamber,* The Prosecutor v. François-Xavier Nzuwonemeye*, Decision on Defence Preliminary Motions, 12 December 2002 (ICTR-00-56-I,* Reports 2002*, p. X) – Trial Chamber I,* The Prosecutor v. Eliézer Niyitegeka*, Judgment, 16 May 2003 (ICTR-96-14-T,* Reports 2003*, p. 2442)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Blaskic*, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997 (IT-95-114)*

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

SITTING AS Trial Chamber II, composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule, and Judge Solomy Balungi Bossa;

SEIZED OF :

(i) The "Preliminary Motion" filed on 21 June 2004 by Michel Croisier, Defence Counsel for Augustin Bizimungu (the "Motion");

(ii) The "Prosecutor's Brief in Response to the Preliminary Motion Filed by Augustin Bizimungu's Counsel Pursuant to Rules 50 (C) and 72 of the Rules of Procedure and Evidence", filed on 24 June 2004 (the "Prosecutor's Response");

(iii) The "Certified True Copy of the Amended Indictment in the Matter of *The Prosecutor v. Ndindiliyimana et al*.", filed by the Registry on 24 June 2004 (the "Amended Indictment");

(iv) The "Prosecutor's Supplementary Brief in Response to the Preliminary Motion Filed by Augustin Bizimungu's Counsel", filed 28 June 2004 (the "Prosecutor's Supplementary Brief");

(v) The "Corrigendum to the Brief in Response of 23 June 2004 : Augustin Bizimungu's Preliminary Motions", filed on 29 June 2004 (the "Prosecutor's Corrigendum");

Instruments internationaux cités : Statut, art. 2 – Règlement de procédure et de preuve, art. 47 (G), 50 (C), 53 bis *(B), 62, 65 (B), 72 et 73 (A) – Résolutions 955 du 8 novembre 1994 et 1165 du 30 avril 1998 du Conseil de Sécurité*

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Ferdinand Nahimana*, Décision relative à l'exception soulevée par la défense sur les vices de formes de l'acte d'accusation, 24 novembre 1997 (TPIR-96-11-T,* Recueil 1995-1997*, p. 437) – Chambre de première instance,* Le Procureur c. Gratien Kabiligi and Aloys Ntabakuze*, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void Ab Initio, 13 avril 2000 (ICTR-96-34-I,* Recueil 2000*, p. 960) – Chambre de première instance II,* Le Procureur c. Jérôme Clément Bicamumpaka*, Décision sur la requête pour vice de forme et pour exception d'incompétence, 8 mai 2000 (TPIR-99-50-I) – Chambre de première instance II,* Le Procureur c. Innocent Sagahutu*, Décision sur la requête de la défense soulevant des exceptions préjudicielles et demandant la mise en liberté provisoire de l'accusé et la disjonction d'instances, (ICTR-00-56-T,* Recueil 2002*, p. X) – Chambre de première instance,* Le Procureur c. François-Xavier Nzuwonemeye*, Décision sur la requête de la défense en exception préjudicielle, 12 décembre 2002 (ICTR-00-56-I,* Recueil 2002*, p. X) – Chambre de première instance I,* Le Procureur c. Eliézer Niyitegeka*, Jugement, 16 mai 2003 (ICTR-96-14-T,* Recueil 2003*, p. 2443)*

T.P.I.Y. : Chambre de première instance, Le Procureur c. Blaskic*, Décision sur l'exception préjudicielle soulevée par la défense aux fins de rejeter l'acte d'accusation pour vices de forme, 4 avril 1997 (IT-95-14)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée des juges Arlette Ramaroson, présidente, William H. Sekule et Solomy Balungi Bossa;

ÉTANT SAISI :

(i) d'une requête en «Exceptions préjudicielles» déposée par Me Michel Croisier, conseil de la défense de Augustin Bizimungu le 21 juin 2004 («la requête»);

(ii) du «Mémoire en réponse du Procureur à la requête en exceptions préjudicielles présentée sur le fondement des articles 50 (C) et 72 du Règlement de Procédure et de Preuve», déposé le 24 juin 2004 (la «réponse du Procureur»);

(iii) de la «Copie certifiée conforme de l'acte d'accusation amendé, affaire *Le Procureur contre Ndindilyimana et al.*» déposée par le Greffe le 24 juin 2004 (l' «acte d'accusation amendé»);

(iv) d'un «Mémoire additif du Procureur, suite à la requête en exceptions préjudicielles présentée par le conseil d'Augustin Bizimungu», déposé le 28 juin 2004 (le «mémoire additif du Procureur»);

(v) d'un «*Corrigendum* du mémoire en réponse daté du 23 juin 2004 : requête en exceptions préjudicielles d'Augustin Bizimungu», déposé le 29 juin 2004 (le «*corrigendum* du Procureur»);

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure Evidence (the "Rules"), particularly Rules 50 and 72;

DECIDES, on the basis of the briefs submitted by the parties pursuant to Rule 73 (A) of the Rules.

ARGUMENTS OF THE PARTIES

The Defence

1. The Defence submits that the Tribunal does not have personal jurisdiction over General Augustin Bizimungu and that it lacks the requisite impartiality to try him, since it continues to refuse to initiate any prosecutions against the "victors of the war".

2. The Defence submits that it is up to the Tribunal to prosecute all persons presumed responsible : the responsibility to initiate prosecutions should not fall on the Prosecutor, who in only responsible for preferring and substantiating charges. Leaving the discretion to initiate criminal proceedings with the Prosecutor compromises the impartiality of the Tribunal.

3. The Defence argues that the Amended Indictment of 31 March 2004 is invalid. The copy served on the Defence on 31 March 2003[sic] does not bear the Tribunal's seal, and that violates therefore the provisions of Rules 47 (G) and 53 *bis* (B) of the Rules. However, should the Chamber deem the Amended Indictment valid, the Defence requests the Chamber to take the following measures :

- To order the Prosecutor to identify the count of genocide in the introductory chapter by its correct and corresponding article in the Statute, so as to remove all ambiguity from the Amended Indictment. The Defence submits that Article 2 (3) (a) of the Statute, and not Article 2 (3) (b), as stipulated in the Indictment, provides for the crime of genocide.
- To strike paragraphs 25, 26, 27, and 28 from the Indictment, since they describe facts relating to the historical context of the war in Rwanda and in no way clarify the crime of conspiracy to commit genocide.
- To order the Prosecutor to clarify paragraph 46 to give the Defence an opportunity to prepare an effective defence and/or, failing such clarifications, to strike off the said paragraph altogether.
- To order the Prosecutor to review the layout of the Indictment so as to avoid any confusion and ambiguity with regard to the introductory paragraphs to each count.
- To strike paragraphs 25, 26, 27, 28, 29, 31, and 32 from the Amended Indictment, since they fall outside the temporal jurisdiction of the Tribunal.
- To strike off the paragraphs or references that make it impossible for the Accused to know exactly when the crimes alleged and charged in the Indictment occurred, specifically paragraphs 29, 31, 32, 33, and 62. The Defence submits that the above-mentioned paragraphs are not sufficiently specific with regard to the periods involved and the alleged victims.

VU le Statut du Tribunal (le «Statut») et le règlement de procédure et de preuve (le «Règlement»), notamment les articles 50 et 72;

STATUANT sur la base des mémoires déposés par les parties conformément aux articles 73 (A) du Règlement;

ARGUMENTS DES PARTIES

La défense

1. La défense soumet que le Tribunal est incompétent *ratione personae* et ne dispose pas de l'impartialité requise pour juger le Général Augustin Bizimungu, dans la mesure où il persiste à refuser d'engager toute poursuite à l'encontre des «vainqueurs de la guerre».

2. La défense prétend qu'il appartient au Tribunal de poursuivre toutes les personnes présumées coupables : l'engagement des poursuites ne devrait pas échoir au Procureur qui est uniquement chargé de formuler et de soutenir les accusations. L'abandon au Procureur de cette prérogative compromet l'impartialité du Tribunal.

3. La Défense avance que l'acte d'accusation amendé en date du 31 mars 2004 n'est pas valide. La copie qu'elle a reçue le 31 mars 2003 ne possède pas le sceau du Tribunal et ce, contrairement aux dispositions des articles 47 (G) et 53 *bis* (B) du Règlement. Cependant, si la Chambre estime que l'acte d'accusation amendé est valide, la défense demande à ce que les mesures suivantes soient prises :

- Ordonner au Procureur d'identifier le chef d'accusation de génocide par son article correspondant dans le chapitre introduction afin que l'acte d'accusation amendé soit exempt de toute ambiguïté possible. La défense allègue que c'est l'article 2, para. 3 (a) du Statut qui prévoit le génocide mais non pas l'article 2 §3 (b) comme il est mentionné dans l'acte d'accusation amendé.
- Rayer les paragraphes 25, 26, 27 et 28 de l'acte d'accusation qui sont des faits reliés au contexte historique de la guerre au Rwanda et n'apportent aucune précision quant au crime d'entente en vue de commettre le génocide.
- Ordonner au Procureur de spécifier le sens du paragraphe 46 afin que la défense soit en mesure de préparer une défense efficace, et/ou, à défaut d'obtenir de telles précisions, rayer tout simplement ce paragraphe.
- Ordonner au Procureur de revoir la présentation de son acte d'accusation afin d'éviter toute confusion et ambiguïté quant aux paragraphes introductifs de chaque chef d'accusation.
- Rayer les paragraphes 25, 26, 27, 28, 29, 31 et 32 de l'acte d'accusation amendé en raison du fait qu'ils se trouvent en dehors de la compétence *ratione temporis* du Tribunal.
- Rayer les paragraphes ou les mentions qui empêchent l'accusé de connaître précisément dans le temps les faits reprochés et allégués dans l'acte d'accusation, plus particulièrement les paragraphes 29, 31, 32, 33, 62. La Défense prétend que les paragraphes sus mentionnés sont insuffisamment précis quant aux périodes concernées ou aux victimes alléguées.

• To strike off the introductory paragraph to Count 1 due to the vague and imprecise nature of the wording or, alternatively, to strike off the phrase "with some or all of" contained therein.

• To order the Prosecutor to give the names of all those among the "numerous other administrators, soldiers and civilians who espoused their cause" who are purported to be part of the alleged conspiracy.

• To strike off paragraphs 120 to 126 of the Indictment and to drop the counts associated with those facts. The Defence submits that these paragraphs are vague and imprecise.

• To instruct the Prosecutor to make a choice in the Indictment between the crimes of genocide and complicity in genocide.

• To order that this trial be separated from that of Accused Mpiranya and, consequently, to order that all references to Mpiranya and the alleged crimes with which he is charged, either directly or indirectly, be expunged from the Indictment.

4. Lastly, the Defence submits that the many significant and serious defects highlighted in the Indictment justify the provisional release of Augustin Bizimungu. The Defence stresses, moreover, that detention on remand must be considered as a fundamental exception to personal liberty.

The Prosecutor

5. The Prosecutor submits that the grounds on which the Defence is challenging the Tribunal's personal jurisdiction to try the case are not among those specifically provided for in Rule 72 (B) and (D) of the Rules. The Prosecutor therefore prays the Chamber to find and rule that the motion is inadmissible, or at least unfounded.

6. With regard to the period preceding 1994, referred to in the count of conspiracy to commit genocide, the Prosecutor refers to paragraph 27 of the Decision on François-Xavier Nzuwonemeye's preliminary motions, rendered by Trial Chamber II on 12 December 2002[1].1

7. The Prosecutor maintains that under Rules 47 (G) and 53 *bis* (B) of the Rules, it is up to the Chamber to order the Registry to serve on the Defence a copy of the Amended Indictment in proper form.

8. The Prosecutor acknowledges that a typographical error crept into the wording of the count of genocide, where mention is made of Article 2 (3) (b) instead of Article 2 (3) (a). The Prosecutor undertakes to correct that error with a motion for separate trial that he intends to submit in a short rime.

[1] *The Prosecutor v. François-Xavier Nzuwonemeye*, Case n° ICTR-00-56-I, "Decision on Defence Preliminary Motions", 12 December 2002.

• Rayer le paragraphe introductif du premier chef d'accusation en raison du caractère ambigu et imprécis du libellé, ou, subsidiairement, rayer la formulation «partagé de manière indistincte ou particulière» qui s'y trouve.

• Ordonner au Procureur de donner les noms de toutes les personnes qui, parmi «les nombreux autres administrateurs, militaires et civils acquis à leur cause», font prétendument partie de l'entente alléguée.

• Rayer les paragraphes 120 à 126 de l'acte d'accusation et retirer les chefs d'accusation associés à ces faits. La défense allègue que ces paragraphes sont vagues et imprécis.

• Enjoindre le Procureur dans son acte d'acte d'accusation d'opérer un choix entre le génocide et la complicité de génocide.

• Prononcer la disjonction de la présente procédure avec celle formulée à l'encontre de l'accusé Mpiranya et, en conséquence, ordonner que toutes mentions de son nom, des agissements et incriminations allégués ou formulés directement ou indirectement à l'encontre de ce dernier soient rayées de l'acte d'accusation.

4. Enfin, la défense soumet que les nombreux vices majeurs et graves soulignés dans l'acte d'accusation justifient la mise en liberté provisoire de Augustin Bizimungu. La défense souligne en outre que la détention provisoire doit être considérée comme étant une exception fondamentale à la liberté de l'individu.

Le Procureur

5. Le Procureur soumet que les motifs invoqués par la défense pour demander l'exception d'incompétence *ratione personae* du Tribunal pour juger l'affaire ne figurent pas parmi ceux limitativement prévus par l'article 72 du Règlement dans ses paragraphes (B) et (D). Le Procureur prie ainsi la Chambre de dire et juger que la demande est irrecevable sur ce point ou du moins mal fondée.

6. S'agissant de la période antérieure à 1994, visée dans le crime d'entente en vue de commettre le génocide, le Procureur se réfère au paragraphe 27 de la décision rendue le 12 décembre 2002 par la Chambre de première instance II sur la requête en exceptions préjudicielles de François-Xavier Nzuwonemeye[1].

7. Le Procureur affirme qu'il appartient à la Chambre d'ordonner au service du Greffe qu'une copie en bonne et due forme de l'acte d'accusation amendée soit signifiée à la défense conformément aux dispositions des articles 47 (G) et 53 *bis* (B) du Règlement.

8. Le Procureur admet qu'une erreur typographique s'est glissée dans la formulation du chef d'accusation de génocide où l'article 2 (3) (b) est mentionné en lieu et place de l'article 2 (3) (a) et promet de la corriger à l'occasion de la présentation d'une requête aux fins de disjonction qu'il compte soumettre à la Chambre incessamment.

[1] *Le Procureur c. Nzuwonemeye*, aff. N° ICTR-00-56-I, Décision sur la requête de la défense en exception préjudicielle, 12 décembre 2002.

9. Concerning the deletion of paragraphs 25, 26, 27, and 28, the Prosecutor submits that the Defence's request on this issue lacks merit. These paragraphs intend to prove the existence of a criminal enterprise as regards the crime of conspiracy to commit genocide, which the Prosecutor intends to establish.

10. The Prosecutor submits that paragraph 46 of the Amended Indictment is simply transitional and as such may be deleted.

11. The Prosecutor submits that Rule 47 of the Rules does not outline any specific format for drafting indictments. Besides, the wording of the charges is in no way affected by the lack of numbering for the introductory paragraphs to each count. However, the Prosecutor has no problem numbering those paragraphs if it will make matters clearer.

12. The Prosecutor considers that paragraphs 28, 29, 31, and 32 contain essential information that may help the Accused to have a clear idea of the crimes with which he is charged. The Prosecutor points out that the information he has offered is the best available to him, but does not rule out the possibility that it may be improved.

13. The Prosecutor maintains that the Defence has no foundation to allege that the dates of the events specified in paragraphs 29, 31, 32, 33, and 62 are vague. Regarding paragraph 29, the Prosecutor submits that training of *Interahamwe* militiamen was organized during the period 1992 to 1994. The Prosecutor points out that during trial it will still be possible to ask witnesses if they recall the specific months and days when such training took place. Regarding paragraph 31, the Prosecutor maintains that, according to witnesses, the Saturday meetings at Joseph Nzirorera's residence continued to take place on a regular basis from 1992 to 1994. Regarding paragraphs 32 and 33, the Prosecutor submits that every Judgment handed down by the two *ad hoc* Tribunals acknowledges that an allegation of the sort "in January 1994, in Ruhengeri, X committed..." is specific and in no way infringes on the rights of the Accused. Lastly, regarding paragraph 62, the Prosecutor submits that the response letter that Augustin Bizimungu sent to the American diplomat has already been disclosed to the Defence as part of the exhibits on 17 March 2004.

14. Regarding the Defence's allegation that the introductory paragraph to Count 1 is vague and that the list of co-conspirators is incomplete, the Prosecutor recalls that in this count he is seeking to establish Augustin Bizimungu's criminal responsibility as part of a joint criminal enterprise : once the names of the major players in the conspiracy are disclosed, the requirement for a clear and specific charge is so met. Further, the Prosecutor points out that it takes two or more persons to commit the crime of conspiracy to commit genocide, and paragraph 31 clearly indicates that Augustin Bizimungu conspired with Joseph Nzirorera and Juvénal Kajelijeli.

15. The Prosecutor submits that the Defence request to strike off paragraphs 120-126 in the Indictment should be denied. The Defence has not explained why these paragraphs are vague and imprecise.

16. The Prosecutor acknowledges that the Amended Indictment includes eight counts. However, the Prosecutor points out that in fact there are only seven, since the count of complicity in genocide will be upheld only if the Trial Chamber finds

9. Quant à la suppression des paragraphes 25, 26, 27 et 28, le Procureur prétend que la demande de la défense sur ce point est mal fondée. Ces paragraphes sont destinés à faire la preuve de l'existence d'une entreprise criminelle en relation avec le crime d'entente en vue de commettre le génocide, dont le Procureur entend rapporter la preuve.

10. Le Procureur soutient que le paragraphe 46 de l'acte d'accusation amendé ne constitue qu'une phrase de transition et pourrait être supprimée.

11. Le Procureur allègue que l'article 47 du Règlement ne prescrit aucune forme particulière pour la rédaction des actes d'accusation. Aussi, l'absence de numérotation des paragraphes introduisant les chefs d'accusation n'affecte aucunement la formulation de l'accusation. Cependant, le Procureur ne trouve aucun inconvénient à numéroter ces paragraphes introductifs, s'il devait en résulter davantage de clarté.

12. Le Procureur estime que les paragraphes 28, 29, 31 et 32 contiennent les informations essentielles de nature à permettre à l'accusé d'avoir une idée précise du comportement fautif qui lui est reproché. Le Procureur souligne qu'il a livré ces informations au mieux de ses connaissances et n'exclut pas de pouvoir les parfaire.

13. Le Procureur affirme que les allégations d'imprécision quant aux dates des événements visés aux paragraphes 29, 31, 32, 33 et 62 soulevées par la défense ne sont pas fondées. Concernant le paragraphe 29, le Procureur prétend qu'il s'agit d'entraînements de miliciens *Interahamwe* qui ont été organisés durant les années 1992, 1993 et 1994. Il souligne qu'il sera toujours possible en cours du procès de demander aux témoins s'ils se rappellent les jours et mois précis durant lesquels ces entraînements se sont déroulés. Concernant le paragraphe 31, le Procureur affirme qu'aux dires des témoins, les réunions tenues au domicile de Joseph Nzirorera les samedis, se sont poursuivis avec une grande régularité entre 1992 et 1994. Pour les paragraphes 32 et 33, le Procureur soutient que tous les jugements rendus par les deux tribunaux *ad hoc* reconnaissent qu'une imputation du genre «en janvier 1994, à Ruhengeri, X a commis…» est précise et ne porte nullement atteinte aux droits de l'accusé. Finalement, en ce qui concerne le paragraphe 62, le Procureur allègue qu'il a déjà communiqué à la défense, en date du 17 mars 2004, au titre des pièces à conviction, la lettre en réponse qu'Augustin Bizimungu a envoyée au diplomate américain.

14. En ce qui concerne l'imprécision alléguée par la défense du paragraphe introductif du premier chef d'accusation et l'énumération non exhaustive des conspirateurs, le Procureur rappelle que la responsabilité pénale d'Augustin Bizimungu est recherchée de ce chef dans le cadre d'une entreprise criminelle commune : dès lors que les noms des acteurs clés de cette entente ont été communiqués, l'exigence d'une imputation claire et précise se trouve par conséquent satisfaite. En outre, le Procureur souligne que le crime d'entente en vue de commettre le génocide se commet par deux ou plusieurs personnes et le paragraphe 31 indique clairement qu'Augustin Bizimungu s'est entendu avec Joseph Nzirorera et Juvenal Kajelijeli.

15. Le Procureur allègue que la requête de la défense afin de supprimer les paragraphes 120 à 126 de l'acte d'accusation devrait être rejetée. La Défense n'explique pas en quoi ces paragraphes sont vagues et imprécis.

16. Le Procureur admet que l'acte d'accusation amendé comporte huit chefs d'accusation. Cependant, il souligne que, dans la réalité, il n'y en a que sept puisque la complicité dans le génocide ne sera retenue que dans l'hypothèse où le crime de

that the Accused's responsibility for committing the crime of genocide has not been established. The two charges are not cumulative.

17. The Prosecutor confirms that he will file an *ex-parte* motion for a separate trial for Protais Mpiranya, since Mpiranya is still at large.

18. The Prosecutor submits that the Defence request for provisional release is inadmissible as matters stand, in that the requisite criteria under Rule 65 (B) have not been met.

DELIBERATIONS

Challenge based on lack of personal jurisdiction

19. The Chamber recalls the provisions of Rule 72 (D) of the Rules which provides :

> 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.

20. The Chamber takes note of the Defence submission that the Tribunal does not have personal jurisdiction to try the Accused Augustin Bizimungu, since it failed in its obligations under Security Council Resolutions 955 of 8 November 1994 and 1165 of 30 April 1998.

21. The Chamber notes that the grounds raised by the Defence do not fall into any of the categories that would justify a jurisdictional challenge under Rule 72 (D) of the Rules : regarding the lack of personal jurisdiction, under Rule 72 (D) (i), the challenge must be based on the fact that the Accused does not fall into the category of persons indicated in Articles 1, 5, 6, and 8 of the Statute. Since the Defence submissions do not take that fact into account, the Chamber considers that the Defence request lacks merit.

Absence of the Tribunal's seal on the Indictment

22. The Chamber notes the Defence arguments that since the copy of the Indictment served on the Defence on 31 March 2004 does not bear the seal of the Tribunal, it is, as such, invalid.

23. The Chamber notes that on 24 June 2004 it received from the Registry a certified true copy of the Amended Indictment bearing the Tribunal's seal. Additional copies were sent to the parties on 29 June 2004.

génocide ne serait pas déclaré établi à l'encontre de l'accusé par la Chambre de première instance. Les deux chefs ne se cumulent pas.

17. Le Procureur confirme qu'il va déposer incessamment une requête ex-parte afin de demander la disjonction de l'instance suivie contre Protais Mpiranya, étant donné que l'intéressé n'a toujours pas été arrêté.

18. Le Procureur allègue que la demande de mise en liberté provisoire formulée par la défense est irrecevable en l'état, dans la mesure où les conditions requises par l'article 65 (B) du Règlement à cet effet ne sont pas réunies.

DÉLIBERATIONS

Sur l'exception d'incompétence *ratione personae*

19. La Chambre rappelle les dispositions de l'article 72 (D) du Règlement qui prévoit que :

> [A]ux 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.

20. La Chambre note les arguments de la défense qui prétend que le Tribunal n'a pas de compétence *ratione personae* pour juger l'accusé Augustin Bizimungu, puisqu'il a failli à ses obligations telles qu'elles ont été prescrites dans les résolutions 955 du 8 novembre 1994 et 1165 du 30 avril 1998 du Conseil de Sécurité.

21. La Chambre observe que les motifs invoqués par la défense n'entrent dans aucune des catégories d'exceptions d'incompétence prévues à l'article 72 (D) du Règlement : s'agissant d'une incompétence *ratione personae*, l'exception devrait être fondée, en vertu de l'article 72 (D) (i) sur le fait que l'accusé n'entre pas dans la catégorie des personnes visées aux articles 1, 5, 6 et 8 du Statut. Les soumissions de la défense étant sans rapport avec ce point, la Chambre considère que la demande de la défense n'est pas fondée en droit.

Sur la non apposition du sceau du Tribunal sur l'acte d'accusation

22. La Chambre note les arguments de la défense qui fait observer que la copie de l'acte d'accusation qu'elle a reçue le 31 mars 2004 ne porte pas le sceau du Tribunal et par conséquent, n'est pas valide.

23. La Chambre note qu'elle a reçu du Greffe le 24 juin 2004 une copie certifiée conforme de l'acte d'accusation amendé, qui porte le sceau du Tribunal. D'autres copies ont également été envoyées aux parties le 29 juin 2004.

24. The Defence does not contest the fact that the Indictment read out during the initial appearance of 30 April 2004 is the same one, a copy of which was served on the Defence on 31 March 2004, and on which the Accused entered a plea pursuant to Rule 62 of the Rules. The validity of the Indictment, as confirmed by the Chamber, is not affected by the absence of a Tribunal's seal on the certified copies distributed to the parties[2]. Furthermore, the Registry has since distributed a new copy of the Indictment to all the parties, bearing the Tribunal's seal pursuant to Rule 47 (G) of the Rules.

Typographical error in the wording of the count of genocide

25. The Chamber confirms that Article 2 (3) (a), and not Article 2 (3) (b), mentioned in the introductory paragraph to Count II, covers the crime of genocide. Accordingly, the Chamber directs the Prosecutor to correct the mistake as specified above.

Deletion of paragraphs 25, 26, 27, and 28

26. The Chamber notes that the Defence has requested that paragraphs 25, 26, 27, and 28 be struck from the Indictment, on the grounds these paragraphs simply describe facts relating to the historical context of the war in Rwanda, and in no way clarify the crime of conspiracy to commit genocide.

27. The Chamber is of the opinion that these particular paragraphs may be of great significance in establishing that there was a criminal enterprise for a conspiracy to commit genocide. Accordingly, the Chamber deems it appropriate to reject the Defence request on this point.

Deletion of paragraph 46

28. The Chamber sees no problem in the deletion of this paragraph, if the Parties so agree.

[2] *The Prosecutor v. Jérôme Clément Bicamumpaka*, Case n° ICTR-99-50-I, "Decision on Motion for Defects in the Form of the Indictment and Lack of Jurisdiction", 8 May 2000, para. 5.1 : "The absence of a seal on a copy of the Indictment reportedly submitted to the accused does not affect the validity of a duly confirmed indictment which is legally enforceable by such confirmation."

24. La défense ne conteste pas que l'acte d'accusation dont elle a reçu lecture lors de l'audience de comparution initiale, le 30 avril 2004, est le même que celui dont une copie lui a été remise le 31 mars 2004 et sur la base duquel l'accusé a plaidé conformément à l'article 62 du Règlement. La validité de l'acte d'accusation, tel qu'il a été confirmé par la Chambre, n'est pas affectée par l'absence d'apposition du sceau du Tribunal sur les copies certifiées distribuées aux parties[2]. En outre, le Greffe a depuis distribué à toutes les parties une nouvelle copie de l'acte d'accusation sur laquelle le sceau du Tribunal a été apposé conformément à l'article 47 (G) du Règlement.

Sur l'erreur typographique dans la formulation du chef d'accusation de génocide

25. La Chambre confirme que l'article qui prévoit le génocide dans le Statut est l'article 2 §3 (a), et non l'article 2 §3 (b), ainsi qu'il est fait mention au paragraphe introductif du deuxième chef d'accusation. La Chambre enjoint en conséquence au Procureur de rectifier cette erreur dans le sens ci-dessus spécifié.

Sur la suppression des paragraphes 25, 26, 27 et 28

26. La Chambre note que la défense demande la suppression des paragraphes 25, 26, 27 et 28 de l'acte d'accusation aux motifs que ces paragraphes ne relatent que des faits reliés au contexte historique de la guerre au Rwanda et n'apportent aucune précision au crime d'entente en vue de commettre le génocide.

27. La Chambre est de l'opinion que ces paragraphes particuliers pourraient être d'une importance considérable pour établir la preuve de l'existence d'une entreprise criminelle relevant de l'entente en vue de commettre le génocide; il échet ainsi de rejeter la demande de la défense sur ce point.

Sur la suppression du paragraphe 46

28. La Chambre ne trouve aucun inconvénient à ce que, en accord avec les Parties, ce paragraphe soit supprimé.

[2] *Le Procureur c. Jérôme Clément Bicamumpaka*, Affaire N° TPIR-99-50-I, Décision sur la requête pour vice de forme et pour exception d'incompétence, 8 mai 2000, para. 5.1 : «L'absence de sceau sur une copie de l'acte d'accusation qui aurait été présentée à l'accusé n'atteint pas la validité d'un acte d'accusation dûment confirmé et qui est rendu exécutoire par cette confirmation.»

Lack of numbering in the introductory paragraphs to the counts in the Indictment

29. The Chamber notes that the introductory paragraphs to each count in the Indictment are not numbered and that the Defence has requested that this be rectified. As the lack of numbers could bring about ambiguities, the Chamber orders that the rectifications be made.

Deletion of paragraphs 25, 26, 27, 28, 29, 31, and 32

30. The Defence has requested that paragraphs 25, 26, 27, 28, 29, 31, and 32 be struck from the Indictment on the grounds that they refer to a period before 1994, and that they are not specific.

31. The Chamber notes that those paragraphs concern the specific crime of conspiracy to commit genocide. The Chamber recalls the Decision of 13 April 2000 rendered on a similar motion by Trial Chamber II in the case of Kabiligi and Ntabakuze[3] :

> "As to the conspiracy charge, the Trial Chamber finds that the limited temporal jurisdiction of the Tribunal does not bar evidence of an alleged conspiracy of which the agreement was made before 1994. To the contrary, evidence of a pre-1994 conspiracy may be admissible and relevant in showing the commission of a conspiracy in 1994. Conspiracy is a "continuing crime". [...] Because conspiracy is a continuing crime, the events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute. Evidence before 1994 may show when the conspiracy actually commenced. All activities prior to 1 January 1994, so far as they related to the conspiracy, may be relevant."

32. The Chamber adheres to that Decision and concludes that references in the Indictment to events prior to 1 January 1994, which relate to the count of conspiracy to commit genocide, do not constitute a defect in the form of the Indictment.

33. Regarding the alleged ambiguity, the Chamber refers to the criteria established by Trial Chamber I in the *Niyitegeka* Judgment of 16 May 2003, which were upheld by the Appeals Chamber on 9 July 2004[4]

> "The Chamber recalls the recent Judgement in *Ntakirutimana*, following *Kupreskic*, wherein the degree of specificity required in Indictments was discussed. It was decided that material facts ought to be pleaded in respect of specific acts, although a high degree of specificity would be impracticable in the case of large-scale crimes; however, where the Prosecution is able to provide details, it should do so. Disclosure of witness statements, the Pre-trial Brief or

[3] *The Prosecutor v. Kabiligi and Ntabakuze*, Case n° ICTR-96-34-I, "Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment *Void Ab Initio*", 13 Apri12000, para. 39.

[4] *The Prosecutor v. Niyitegeka*, Case n° ICTR-96-14-T, Judgment (TC), 16 May 2003, para. 44.

Sur l'absence de numérotation des paragraphes introduisant les chefs d'accusation

29. La Chambre note que les paragraphes introductifs de chaque chef d'accusation ne comportent pas de numérotation et que la défense demande à ce que cela soit complété. L'absence de ces numérotations pouvant engendrer des ambiguïtés, la Chambre ordonne qu'il soit procédé à la rectification.

Sur la suppression des paragraphes 25, 26, 27 28, 29, 31 et 32

30. La défense sollicite que les paragraphes 25, 26, 27, 28, 29, 31 et 32 soient rayés de l'acte d'accusation aux motifs qu'ils font référence à une période antérieure à 1994 et qu'ils sont imprécis.

31. La Chambre note que ces paragraphes se rapportent au crime spécifique d'entente en vue de commettre le génocide. La Chambre tient à rappeler la décision du 13 avril 2000 rendue sur une requête similaire par la Chambre de première instance II dans l'affaire *Gratien Kabiligi et Aloys Ntabakuze*[3]

> "As to the conspiracy charge, the Trial Chamber finds that the limited temporal jurisdiction of the Tribunal does not bar evidence of an alleged conspiracy of which the agreement was made before 1994. To the contrary, evidence of pre-1994 conspiracy may be admissible and relevant in showing that commission of a conspiracy in 1994. Conspiracy is a "continuing crime". […] Because conspiracy is a continuing crime, the events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute. Evidence before 1994 may show when the conspiracy actually commenced. All activities prior to 1994, so far as they related to the conspiracy, may be relevant."

32. La Chambre fait sienne cette jurisprudence et déduit que la mention des événements antérieurs au 1er janvier 1994 dans l'acte d'accusation et se rapportant au chef d'entente en vue de commettre le génocide ne constitue pas un vice de forme.

33. En ce qui concerne l'imprécision alléguée, la Chambre se réfère aux critères dégagés par la Chambre de première instance I dans le Jugement Niyitegeka du 16 mai 2003 et confirmés par la Chambre d'appel en date du 9 Juillet 2004[4].

> «La Chambre rappelle le récent jugement rendu en l'affaire *Ntakirutimana*, à la suite de l'arrêt *Kupreskic*, et dans lequel la question du degré de précision requis dans les actes d'accusation a été examinée. Dans ledit arrêt, la Chambre d'appel a décidé qu'au regard de chaque acte particulier, des faits matériels doivent être articulés, encore que pour les crimes à grande échelle, il soit pratiquement impossible de faire preuve d'un degré élevé de précision, sauf à remarquer que dès lors que le Procureur est en mesure de fournir des précisions, il est tenu

[3] *Prosecutor v. Kabiligi and Ntabakuze*, Aff. N° ICTR-96-34-I, *Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment* Void Ab Initio (TC), 13 April 2000, para. 39.

[4] *Le Procureur c. Niyitegeka*, Aff. N° ICTR-96-14-T, Jugement (TC), 16 mai 2003, para. 44.

other materials, and knowledge acquired during the course of the trial, may have the effect of curing any lack of notice in the Indictment."

34. The Chamber notes that the challenged paragraphs refer to material acts with which the Accused is charged, as well as when and where those acts allegedly occurred. In light of the above-mentioned case law, the Chamber is therefore of the opinion that the challenged paragraphs are sufficiently specific.

35. Accordingly, the Chamber finds that the Defence request to strike off paragraphs 25, 26, 27, 28, 29, 31, and 32 lacks merit.

Ambiguity regarding the dates in paragraphs 29, 31, 32, 33, and 62

36. The Chamber notes the Defence contention that the above-mentioned paragraphs are not sufficiently specific with regard to the period of the alleged facts and to the identity of victims.

37. The Chamber considers that the references in the Indictment "between 1992 and 1994" and "in May 1994" in no way violate the rights of the Accused. The Chamber furthermore considers that during trial, both in examination-in-chief and cross-examination, it will always be possible to ask witnesses to give more information on the alleged facts. The Chamber finds that with regard to this issue, the Indictment has no defects in its form.

Ambiguity in the introductory paragraph to Count I

38. The Chamber finds that the Defence request to strike off the introductory paragraph in Count 1 is unfounded. The Defence has failed to demonstrate how that paragraph is ambiguous and imprecise. The same applies to the phrase "with some or all of".

Incomplete list of co-conspirators

39. The Chamber notes the Defence argument that the introductory paragraph to Count 1 in the Indictment contains a defect of form, since the Prosecutor has failed to provide the names of all the "numerous other administrators, soldiers and civilians who espoused their cause" and who are purported to be part of the alleged conspiracy.

40. The Chamber recalls the Decision of Trial Chamber II of 25 September 2002[5] :

[5] *The Prosecutor v. Sagahutu*, Case n° ICTR-00-56-T, "Decision on Sagahutu's Prelimlnary, Provisional Release and Severance Motions" (TC), [25 September 2002] para. 34.

de ce faire. La communication de déclarations de témoins, du mémoire préalable au procès et d'autres pièces et information obtenues dans le cadre du procès, peut contribuer à remédier à tout défaut de précision entachant l'acte d'accusation.»

34. La Chambre observe que les paragraphes contestés mentionnent les actes matériels reprochés à l'accusé, ainsi que la période et le lieu où les faits se seraient déroulés. La Chambre est donc de l'opinion que les paragraphes contestés sont suffisamment précis par rapport à la jurisprudence ci-dessus indiquée.

35. La Chambre conclut ainsi que la requête de la défense pour la suppression des paragraphes 25, 26, 27, 28, 29 31 et 32 n'est pas fondée.

Sur l'imprécision, quant aux dates, des paragraphes 29, 31, 32, 33 et 62

36. La Chambre note les prétentions de la défense selon lesquelles les paragraphes sus mentionnés sont insuffisamment précis quant aux périodes des faits allégués et à l'identité des victimes.

37. La Chambre considère que les mentions «entre 1992 et 1994» ou «en mai 1994» dans l'acte d'accusation ne portent nullement atteinte aux droits de l'accusé. La Chambre estime en outre qu'il serait toujours possible en cours de procès, aussi bien lors de l'interrogatoire principal que lors du contre-interrogatoire, de demander aux témoins de donner des plus amples informations quant aux faits allégués. La Chambre conclut qu'à cet endroit l'acte d'accusation ne comporte pas de vice de forme, et qu'il n'est pas justifié de supprimer les paragraphes 29, 31, 32, 33 et 62.

Sur l'imprécision du paragraphe introductif du premier chef d'accusation

38. La Chambre trouve sans fondement les allégations de la défense requérant la suppression du paragraphe en-tête du premier chef d'accusation. La défense ne démontre pas en quoi ce paragraphe est ambigu ou imprécis; il en est de même pour la formulation «partagé de manière indistincte ou particulière».

Sur l'énumération non exhaustive des co-conspirateurs

39. La Chambre note les arguments de la défense qui soutient que l'acte d'accusation comporte un vice de forme dans le paragraphe introductif du premier chef d'accusation, du fait que le Procureur n'a pas fourni les noms de toutes les personnes qui, «parmi les nombreux autres administrateurs, militaires et civils acquis à leur cause», font prétendument partie de l'entente alléguée.

40. La Chambre rappelle la décision de la Chambre de première instance II du 25 septembre 2002[5] :

[5] *Le Procureur c. Sagahutu*, Aff. N° ICTR-00-56-T, Décision sur la requête de la défense soulevant des exceptions préjudicielles et demandant la mise en liberté provisoire de l'accusé et la disjonction d'instances (TC), para. 34.

> "With respect to Count 1 of Conspiracy to commit Genocide, the Defence submits that the Prosecutor fails to state whether Sagahutu is charged as an accomplice, a perpetrator, or a co-perpetrator. The Chamber is of the view that in order for the Accused to understand the charges against him, he must know the role that he is accused of playing, with whom he is alleged to have conspired, and with whom he is alleged to have acted in complicity. Therefore the Chamber holds that Count I should be amended so as to complete the phrase "conspired with others" by indicating some of the names of the people with whom Sagahutu, and the other Accused, are alleged to have conspired to commit Genocide in line with the jurisprudence with regard to the count of Conspiracy."[6]

41. The Chamber notes that in the introductory paragraph to Count 1, some names were cited as being those of Accused Augustin Bizimungu's alleged co-conspirators. Hence, the Chamber finds that the Prosecutor has adhered to the Tribunal's case law by indicating the names of those with whom Bizimungu is alleged to have conspired to commit genocide. Consequently, there is no need to order the Prosecutor to produce a comprehensive list of the people who are purported to be part of the alleged conspiracy.

Deletion of paragraphs 120 to 126

42. The Defence maintains that those paragraphs are vague and imprecise, and that they serve as a "patchwork" that allows the Prosecutor to charge the Accused with more than one count.

43. The Chamber notes that those paragraphs describe the circumstances and the alleged commission of rapes as a crime against humanity perpetrated during the period in question. Furthermore, the Chamber points out that the Defence has not provided adequate explanations that would enable the Chamber to determine that those paragraphs are in fact vague or imprecise. The Chamber thus finds that the Defence request to strike off paragraphs 120-126 lacks merit.

Ambiguity regarding the number of counts retained

44. The Defence argues that the Prosecutor must make a choice in the Indictment between the counts of genocide and complicity in genocide.

45. The Chamber recalls that Article 2 of the Statute stipulates that the Tribunal has the power to prosecute persons committing one or any of the acts enumerated in paragraph 3 including, among others, the punishable act of complicity in genocide. The Tribunal's practice has been to allow an Accused person to be charged alterna-

[6] See *The Prosecutor v. Nahimana*, Case n° ICTR-96-1 l-T, "Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment", 24 November 1997; *Prosecutor v. Blaskic*, Case n° IT-95-114, "Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof" (TC), 4 April 1997.

> «En ce qui concerne le chef 1 (entente en vue commettre le génocide), la défense soutient que le Procureur n'indique pas si Sagahutu est accusé en qualité de complice, d'auteur ou de co-auteur. La Chambre estime que l'accusé ne saurait comprendre les charges retenues contre lui sans connaître le rôle qu'on lui prête ou le nom des personnes avec lesquelles il se serait entendu et de celles avec lesquelles il aurait agi en qualité de complice. En conséquence, elle déclare que le chef 1 doit être modifié afin de compléter l'expression «se sont entendus avec d'autres» en indiquant certains noms des personnes avec lesquelles Sagahutu, et les autres accusés, se seraient entendus en vue de commettre le génocide, et ce, conformément à la jurisprudence relative au chef d'entente[6]»

41. La Chambre fait observer que des noms des personnes ont été cités au paragraphe introductif du premier chef d'accusation comme étant des co-conspirateurs allégués de l'accusé Augustin Bizimungu. La Chambre conclut ainsi que le Procureur s'est conformé à la jurisprudence du Tribunal en indiquant les noms de ces personnes, avec lesquelles Bizimungu se serait entendu en vue de commettre le génocide. Dès lors, il n'y a pas lieu d'ordonner au Procureur de donner une liste exhaustive des personnes qui font prétendument parti de l'entente alléguée.

Sur la suppression des paragraphes 120 à 126

42. La défense prétend que ces paragraphes sont vagues, imprécis et constituent des paragraphes «fourre-tout» afin de permettre au Procureur de poursuivre l'accusé sur plus d'un chef d'accusation.

43. La Chambre note que ces paragraphes décrivent les circonstances et la commission alléguée des viols en tant que crime contre l'humanité et qui ont été perpétrés durant la période incriminée. La Chambre souligne par ailleurs que la défense ne donne pas d'explications suffisantes afin de permettre à la Chambre de conclure que ces paragraphes sont effectivement vagues ou imprécis. La Chambre conclut ainsi que la demande de la défense afin de supprimer les paragraphes 120 à 126 n'est pas fondée.

Sur l'ambiguïté quant au nombre de chefs d'accusation retenus

44. La défense prétend que le Procureur devrait dans son acte d'accusation opérer un choix entre le chef de génocide et celui de complicité dans le génocide.

45. La Chambre rappelle que l'article 2 du Statut précise que le Tribunal est compétent pour poursuivre les personnes ayant commis l'un quelconque des actes énumérés au paragraphe 3, qui comprend, entre autres, la sanction de la complicité dans le génocide. La pratique constante du Tribunal autorise la mise en accusation alter-

[6] Voir *Le Procureur c. Nahimana*, Aff. N° TPIR-96-11-T, Décision relative à l'exception soulevée par la défense sur les vices de formes de l'acte d'accusation (TC), 24 novembre 1997; *Le Procureur c. Blaskic*, Aff. N° IT-95-14, Décision sur l'exception préjudicielle soulevée par la défense aux fins de rejeter l'acte d'accusation pour vices de forme (TC), 4 avril 1997.

tively on the same set of facts. The Chamber therefore finds that there is no defect in the form of the Indictment in this respect.

Separate trial for Protais Mpiranya

46. The Prosecutor has indicated that he will soon file a motion for a separate trial for Protais Mpiranya, since Mpiranya is still at large. The Chamber takes due note thereof and will rule on the matter at the appropriate time.

Request for provisional release

47. The Chamber recalls the Defence arguments requesting the provisional release of the Accused, on the grouds there are significant and serious defects that it bas pointed out in the Indictment.

48. The Chamber recalls that Rule 65 (B) of the Rules governs the provisional release of Accused persons. The Chamber notes that the Defence has not made a request under that Rule.

49. The request submitted to the Chamber is merely a proposal to remedy the alleged defects in the Indictment. The Chamber is of the view that the Applicant has not only failed to demonstrate the alleged defects, but also that the defects are insignificant and in no way justify the adoption of such measures. Accordingly, the Chamber denies the request for provisional release.

For the foregoing reasons

The Tribunal,

Orders the Prosecutor :

(a) To correct the article which provides for the crime of genocide in the introductory paragraph to Count II;

(b) To number all the paragraphs in the Indictment; and

REJECTS all the other challenges in the Defence Preliminary Motion; and

DENIES, as matters stand, the request for a separate trial for Protais Mpiranya; and

DENIES the Defence request for provisional release.

Arusha, 15 July 2004

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

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native d'un accusé sur la base des mêmes faits. La Chambre conclut ainsi que l'acte d'accusation ne comporte pas de vice à cet égard.

Sur la disjonction d'instance à l'encontre de Protais Mpiranya

46.. Le Procureur allègue qu'il va déposer incessamment une requête aux fins de disjonction d'instance à l'encontre de Protais Mpiranya étant donné qu'il n'a pas encore été arrêté. La Chambre en prend acte et conclut qu'elle statuera sur la question au moment opportun.

Sur la demande de mise en liberté provisoire

47. La Chambre rappelle les arguments de la défense selon lesquels elle sollicite la mise en liberté provisoire, compte tenu des nombreux vices majeurs et graves qu'elle a soulignés dans l'acte d'accusation.

48. La Chambre rappelle que la mise en liberté provisoire d'un accusé est régie par l'article 65 (B) du Règlement. La Chambre observe que la Défense ne formule pas de demande sur le fondement de cet article.

49. La demande qui est adressée à la Chambre vise seulement à proposer un remède aux vices allégués de l'acte d'accusation. La Chambre considère que les vices allégués n'ont pas été soit démontrés par le requérant, et ne soit sont que des vices mineurs ne justifiant en rien l'adoption d'une telle mesure. La Chambre rejette par conséquent la demande de mise en liberté provisoire.

PAR CES MOTIFS

LE TRIBUNAL,

ORDONNE au Procureur de :

(a) corriger l'article qui prévoit le génocide dans le paragraphe introductif du deuxième chef d'accusation.

(b) numéroter tous les paragraphes de l'acte d'accusation.

REJETTE toutes les autres exceptions préjudicielles soulevées par la défense;

REJETTE en l'état la demande afin de disjonction d'instance à l'encontre de Protais Mpiranya.

REJETTE la demande de mise en liberté provisoire formulée par la défense.

Arusha, 15 juillet 2004

[Signé] : Arlette Ramaroson, Présidente; William H. Sekule; Solomy B. Bossa

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Decision on the Prosecution Motion for a Separate Trial (Article 20 of the Statute and Rule 82 of the Rules of Procedure and Evidence) 20 August 2004 (ICTR-2000-56-1)

(Original : French)

Trial Chamber II

Judges : Arlette Ramaroson, presiding; William H. Sekule; Solomy B. Bossa

Mpiranya, Bizimungu – separate trial – accused not yet arrested – interest of due process – right to be tried within a reasonable time – amendment to the indictment, procedure to be followed – withdrawal of paragraphs in the indictment – ICTY – joint criminal enterprise – list of witnesses, testimonies, amendments – new ICTR number – request granted

International instruments cited : Statute, art. 6 (3), 19 (1) and 20 (4) (c) – Rules of procedure and evidence, Rules 47 (G), 50, 73 and 82 (B)

International cases cited :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Jean de Dieu Kamuhanda*, Decision on the Defence motion for Severance and Separate Trial, 7 November 2000 (ICTR-99-54A-1,* Reports 2000*, p. 1248)*

I.C.T.Y. : Trial Chamber II, The Prosecutor v. Dokmanoviç*, Decision of the Trial Chamber Concerning Separation of Trials, 28 November 1997 (IT-95-13a) – Trial Chamber,* The Prosecutor v. Vasiljevic*, Order, 24 July 2001 (IT-98-32)*

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

SITTING as Trial Chamber II composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule and Judge Solomy B. Bossa (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion for a Separate Trial for Protais Mpiranya" (the "Motion"), filed on 16 July 2004, appended thereto an Amended Indictment dated 16 July 2004;

CONSIDERING the "Réponse à la Requête du Procureur aux fins de disjonction de l'instance suivie contre Protais Mpiranya" (the "Reply") filed by Counsel for Augustin Bizimungu on 26 July 2004;

CONSIDERING the "Réplique du Procureur au mémoire en réponse du Conseil d'Augustin Bizimungu" (the "Response") filed on 2 August 2004;

Décision sur la requête du Procureur aux fins de disjonction d'instance (Articles 20 du Statut et 82 du Règlement de procédure et de preuve) 20 août 2004 (ICTR-2000-56-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente ; William H. Sekule ; Solomy B. Bossa

Mpiranya, Bizimungu – disjonction d'instance – accusé non encore arrêté – intérêt de la justice – droit à être jugé dans un délai raisonnable – modification de l'acte d'accusation, procédure à suivre – retrait de paragraphes de l'acte d'accusation – TPIY – entreprise criminelle conjointe – liste de témoins, interrogatoires, modifications – nouveau numéro TPIR – requête accordée

Instruments internationaux cités : Statut, art. 6 (3), 19 (1) et 20 (4) (c) – Règlement de procédure et de preuve, art. 47 (G), 50, 73 et 82 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance II, Le Procureur c. Jean de Dieu Kamuhanda*, Décision sur la requête de la défense en disjonction d'instances et aux fins de procès séparé, 7 novembre 2000 (ICTR-99-54A-I,* Recueil 2000*, p. 1249)*

T.P.I.Y. : Chambre de première instance II, Le Procureur c. Dokmanovic*, Décision de la Chambre de première instance II portant disjonction d'instance, 28 novembre 1997 (IT-95-13a) – Chambre de première instance,* Le Procureur c. Vasiljevic*, Ordonnance, 24 juillet 2001 (IT-98-32)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée de la juge Arlette Ramaroson, Présidente, du juge William H. Sekule et de la juge Solomy B. Bossa (la «Chambre»);

ÉTANT SAISI de la «Requête du Procureur aux fins de disjonction de l'instance suivie contre Protais Mpiranya», déposée le 16 juillet 2004 (la «Requête») à laquelle est annexé un acte d'accusation modifié en date du 16 juillet 2004;

VU la «Réponse à la requête du Procureur aux fins de disjonction de l'instance suivie contre Protais Mpiranya», déposée le 26 juillet 2004 par le conseil d'Augustin Bizimungu (la «Réponse»);

VU la «Réplique du Procureur au mémoire en réponse du conseil d'Augustin Bizimungu», déposée le 2 août 2004 (la «Réplique»);

CONSIDERING the Indictment of 20 January 2000, confirmed on 28 January 2000 by Judge Laïty Kama (the "Indictment of 20 January 2000");

CONSIDERING the Amended Indictment of 17 October 2002, as amended by Trial Chamber II Decision of 25 September 2002 (the "Indictment of 17 October 2002");

CONSIDERING the Amended Indictment of 29 March 2004, as amended by Trial Chamber II Decision of 26 March 2004 (the "Indictment of 29 March 2004");

CONSIDERING the Amended Indictment of 22 July 2004, duly noting the Trial Chamber II Decision of 15 July 2004 on Augustin Bizimungu's Preliminary Motion (the "Amended Indictment of 22 July 2004") and the Prosecutor's Transmission Memorandum of 26 July 2004 attached to the said Indictment;

CONSIDERING the Statute of the International Criminal Tribunal for Rwanda and the Rules of Procedure and Evidence (the "Rules");

HEREBY DECIDES solely on the basis of the written briefs filed by the Parties.

SUBMISSIONS BY THE PARTIES

The Prosecutor

1. The Prosecutor relies on Rule 82 (B) of the Rules in requesting a separate trial for the Accused Protais Mpiranya in the instant case. The Prosecutor submits that all due diligence exercised by both the Registry and the Office of the Prosecutor to secure the arrest of Protais Mpiranya has so far been in vain. He further submits that in view of the imminent commencement of the trial on 20 September 2004 and in the interests of due process, it is important to effect a severance in order to protect the rights of Mpiranya's Co-Accused, who have been in detention for three years, to be tried within a reasonable time.

2. As a consequence of the severance, the Prosecutor proposes to withdraw 15 paragraphs from the Indictment of 29 March 2004. An Amended Indictment dated 16 July 2004 incorporating the said amendments is submitted as an annexure to the Motion.

The Defence

3. In its Reply to the Prosecutor's Motion, the Defence for Augustin Bizimungu raises no objection to the proposed severance.

4. However, the Defence for Augustin Bizimungu objects to the amendment of the Indictment as proposed by the Prosecutor. It submits that Protais Mpiranya having been alleged to be a subordinate of Augustin Bizimungu, and the acts with which he is charged having been withdrawn, thus should entail withdrawal of the corresponding acts alleged against Protais Mpiranya and Augustin Bizimungu. It refers in particular to the acts mentioned in paragraphs 80, 111 and 120 of the Indictment of 29 March 2004.

VU l'acte d'accusation en date du 20 janvier 2000 confirmé le 28 janvier 2000 par le Juge Laïty Kama («l'acte d'accusation du 20 janvier 2000»);

VU l'acte d'accusation modifié en date du 17 octobre 2002 amendé par la Décision de la Chambre de première instance II du 25 septembre 2002 («l'acte d'accusation du 17 octobre 2002»);

VU l'acte d'accusation modifié en date du 29 mars 2004 amendé par la Décision de la Chambre de première instance II du 26 mars 2004 («l'acte d'accusation du 29 mars 2004»);

VU l'acte d'accusation modifié en date du 22 juillet 2004, qui prend acte de la Décision sur la Requête d'Augustin Bizimungu en exceptions préjudicielles rendue par la Chambre de première instance II en date du 15 juillet 2004 («l'acte d'accusation modifié du 22 juillet 2004») et le Mémorandum de transmission du Procureur attaché audit acte en date du 26 juillet 2004;

VU le Statut du Tribunal pénal international pour le Rwanda et le Règlement de procédure et de preuve (le «Règlement»),

STATUANT uniquement sur la base des mémoires écrits déposés par les parties;

SOUMISSIONS DES PARTIES

Le Procureur

1. Le Procureur se fonde sur l'article 82 (B) du Règlement pour demander la disjonction de l'instance à l'encontre de l'accusé Protais Mpiranya de la présente affaire. Le Procureur soumet que de toutes les diligences opérées tant par les services du Greffe que par le Bureau du Procureur en vue d'obtenir l'arrestation de Protais Mpiranya sont restées vaines à ce jour. Il soumet en outre que l'ouverture imminente du procès prévue pour le 20 septembre 2004 et l'intérêt de la justice entraînent *de facto* la disjonction de l'instance le concernant, afin de sauvegarder le droit de ses co-accusés, détenus depuis trois ans, à être jugés dans un délai raisonnable.

2. En conséquence de la disjonction, le Procureur propose de retirer 15 paragraphes de l'acte d'accusation du 29 mars 2004. Il présente en annexe de la présente requête un acte d'accusation modifié en date du 16 juillet 2004, qui inclue ces modifications.

La défense

3. Dans sa Réponse à la requête du Procureur, la défense d'Augustin Bizimungu ne s'oppose pas à la disjonction proposée.

4. En revanche, la défense d'Augustin Bizimungu s'oppose à la modification de l'acte d'accusation proposée par le Procureur. La défense soumet que Protais Mpiranya est un subordonné allégué d'Augustin Bizimungu et que le retrait des faits qui lui sont reprochés devrait entraîner le retrait des faits correspondants allégués à l'encontre de Protais Mpiranya et Augustin Bizimungu. La défense vise en particulier les faits mentionnés aux paragraphes 80, 111 et 120 de l'acte d'accusation du 29 mars 2004.

5. The Defence argues further that the Prosecutor may not, in the absence of Protais Mpiranya, make reference to acts allegedly committed by him as a subordinate of Augustin Bizimungu and likely to impute responsibility to Augustin Bizimungu pursuant to Article 6 (3) of the Statute. On the one hand, such acts, according to the Defence, ought not to be alluded to in the absence of Protais Mpiranya because that would be tantamount to condemning him *in absentia* on account of said acts. On the other hand, Article 6 (3) responsibility of the Statute requires, according to the Defence, a prior finding of guilt on the part of the perpetrator of the alleged acts, on account of those acts.

Prosecutor's Response

6. In his Response, the Prosecutor submits that a superior may be held responsible under Article 6(3) of the Statute regardless of any finding of guilt on the part of the subordinate who carried out the alleged acts.

HAVING DELIBERATED

1. On the Motion for a separate trial for Protais Mpiranya

7. Under Rule 82 (B) of the Rules, the Chamber may, in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice, order separate trials for persons accused jointly.

8. The Chamber, relying on the case-law of the ICTR as well as that of the International Criminal Tribunal for the former Yugoslavia[1], emphasizes that Rule 82 (B) is particularly aimed at protecting the right of the accused to a fair and expeditious hearing, and at the same time takes into account the interest of justice. This fundamental right is enshrined in Articles 19 (1) and 20 (4) (c) of the Statute.

9. The Chamber notes that the Defence does not object to the motion for severance.

10. In the instant case, the Prosecutor explains that all due diligence has been exercised both by the Registry and the Office of the Prosecutor to secure the arrest of Protais Mpiranya and notify him of the Indictment. By the Prosecutor's own admission, all due diligence exercised so far has been fruitless. The Prosecutor does not provide the slightest indication as to whether Protais Mpiranya could be arrested in the near future, and, were he to be arrested now, he could not be tried together with the other Accused without the date scheduled for commencement of trial, which is

[1] See in particular *The Prosecutor v. Kamuhanda*, Case N° ICTR-99-54A-1, "Decision on the Defence motion for Severance and Separate Trial", 7 November 2000; *Prosecutor v. Dokmanoviç*, Case N° IT-95-13a, "Decision of the Trial Chamber Concerning Separation of Trials", 28 November 1997; *Prosecutor v. Vasiljevic*, Case N° IT-98-32, Order, 24 July 2001.

5. La défense ajoute que le Procureur ne peut pas invoquer en l'absence de Protais Mpiranya des faits prétendument commis par ce dernier en tant que subordonné d'Augustin Bizimungu et susceptibles d'entraîner la responsabilité de ce dernier en vertu de l'article 6 paragraphe 3 du Statut. D'une part, de tels faits ne sauraient, selon la défense, être évoqués en l'absence de Protais Mpiranya car cela reviendrait à le condamner en son absence à raison desdits faits. D'autre part, le type de responsabilité prévu à l'article 6 paragraphe 3 du Statut nécessite, selon la défense, au préalable que l'auteur des faits allégués soit reconnu coupable à raison de ces faits.

Réplique du Procureur

6. Dans sa réplique, le Procureur soumet que la responsabilité du supérieur hiérarchique peut être engagée, en vertu de l'article 6 paragraphe 3 du Statut, indépendamment de toute déclaration de culpabilité du subordonné auteur des faits allégués.

APRÈS EN AVOIR DÉLIBÉRÉ

1. Sur la demande de disjonction de l'instance à l'encontre de Protais Mpiranya

7. En vertu de l'article 82 (B) du Règlement, la Chambre peut, pour éviter tout conflit d'intérêts de nature à causer un préjudice grave à un accusé ou pour sauvegarder l'intérêt de la justice, ordonner un procès séparé pour des accusés dont les instances avaient été jointes.

8. Se fondant sur la jurisprudence du Tribunal et celle du Tribunal pour l'ex-Yougoslavie[1], la Chambre souligne que l'article 82 (B) vise en particulier à sauvegarder le droit des accusés à un procès rapide et équitable, tout en tenant compte de l'intérêt de la justice. Ce droit fondamental est consacré par les articles 19 (1) et 20 (4) (c) du Statut.

9. La Chambre relève que la défense ne s'oppose pas à la demande de disjonction.

10. En l'espèce, le Procureur expose que toutes les diligences ont été entreprises, tant par les services du Greffe que par le Bureau du Procureur, en vue d'obtenir l'arrestation de Protais Mpiranya et de lui notifier l'acte d'accusation. De l'aveu du Procureur, ces diligences sont, à ce jour, demeurées vaines. Le Procureur n'a pas donné la moindre indication que Protais Mpiranya pourrait être arrêté dans un proche avenir et, dans l'hypothèse où ce dernier venait à être arrêté maintenant, il ne pourrait être jugé conjointement avec les autres accusés sans que soit reportée la date du pro-

[1] Voir en particulier, *Le Procureur c. Kamuhanda*, Aff. ICTR-99-54A-I, Décision sur la requête de la défense en disjonction d'instances et aux fins de procès séparé, 7 novembre 2000; *Le Procureur c. Dokmanovic*, Aff. IT-95-13a, Décision de la Chambre de première instance II portant disjonction d'instance, 28 novembre 1997; *Le Procureur c. Vasiljevic*, Aff. IT-98-32, Ordonnance, 24 juillet 2001.

20 September 2004, being postponed. A delay of this nature cannot but be prejudicial to the rights of his four Co-Accused, currently in provisional detention, to be tried without undue delay.

11. The Chamber therefore holds that the circumstances of this case constitute a showing of good cause and are relevant for ordering severance of the trial of Protais Mpiranya from that of the other Accused, Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu.

2. On the amendment of the Indictment

12. The Chamber notes that the Prosecutor requests that the Amended Indictment of 16 July 2004 appended to his Motion be notified without delay to the Accused Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu, as well as to their Counsel.

13. On a preliminary basis, and before examining the arguments of the parties on this point, the Chamber notes that, following its Decision of 15 July 2004 on Augustin Bizimungu's Preliminary Motion wherein it ordered the Prosecutor to modify the Indictment of 29 March 2004, the Prosecutor had filed on 26 July 2004 an Amended Indictment which contained not only the amendments ordered by the Chamber, but also the amendments presented in the document titled "Amended Indictment (Joinder)" of 16 July 2004 appended to the Motion for a Separate Trial. The Chamber notes that the Transmission Memorandum of the Amended Indictment of 26 July 2004 states the following : "This Indictment replaces the Indictment of 16 July 2004, which was transmitted at the same time as the Motion for a Separate Trial of 15 July 2004."

14. The Chamber emphasizes that, pursuant to Rule 50 of the Rules, an indictment may be amended after the initial appearance of the accused only with leave of the Trial Chamber granted in accordance with Rule 73. In the instant case, the Accused appeared *de novo* on 30 April 2004. Thereafter, the amendments ordered by the Trial Chamber in its Decision of 15 July 2004 on Augustin Bizimungu's Preliminary Motion should have been made on the basis of the Indictment of 29 March 2004, without *a priori* incorporating amendments resulting from a would-be severance. Similarly, the Prosecutor was not allowed to amend *proprio motu* the Amended Indictment of 29 March 2004 as a result of a would-be severance, and should have sought leave, as part of the Motion under review, to proceed with such amendment.

15. Accordingly, the Indictments filed by the Prosecutor on 16 and 22 July 2004 contain amendments which were never authorized by the Chamber pursuant to Rule 50 of the Rules, and should not be accepted in the circumstances. The Chamber therefore holds null and void the Indictments filed by the Prosecutor on 16 and 22 July 2004. Furthermore, the Chamber draws the Prosecutor's attention to the procedure to be followed under Rule 50 for amending an indictment.

16. In view of the above, the Chamber examines the amendments proposed by the Prosecutor following the severance on the basis of the Indictment of 29 March 2004,

cès prévue pour débuter le 20 septembre prochain. Un tel retard serait préjudiciable au droit de ses quatre actuels co-accusés, qui sont actuellement en détention provisoire, à être jugés sans retard excessif.

11. Par conséquent, la Chambre estime que les circonstances de la cause constituent des raisons valables et pertinentes pour ordonner la disjonction de l'instance entreprise à l'encontre de Protais Mpiranya de celle à l'encontre des accusés Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu.

2. Sur la modification de l'acte d'accusation

12. La Chambre note que le Procureur requiert que l'acte d'accusation modifié du 16 juillet 2004 annexé à la présente requête, soit signifié sans retard aux accusés Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu, ainsi qu'à leurs conseils.

13. A titre préliminaire, et avant de considérer les arguments des parties sur ce point, la Chambre note que, suite à sa Décision sur la requête d'Augustin Bizimungu en exceptions préjudicielles en date du 15 juillet 2004 par laquelle elle ordonnait au Procureur de modifier l'acte d'accusation du 29 mars 2004, le Procureur déposait le 26 juillet 2004 un acte d'accusation modifié qui comprenait non seulement les modifications ordonnées par la Chambre, mais, en outre, les modifications présentées dans le document intitulé «Acte d'accusation modifié» du 16 juillet 2004 annexé à la requête en disjonction d'instance. La Chambre note que le mémorandum de transmission de l'acte d'accusation modifié du 26 juillet 2004 énonce :

> «Cet acte d'accusation remplace celui en date du 16 juillet 2004, transmis en même temps que la requête aux fins de disjonction du 15 juillet 2004.»

14. La Chambre souligne qu'en vertu de l'article 50 du Règlement, l'acte d'accusation ne peut être modifié à la suite de la comparution initiale des accusés que sur autorisation d'une Chambre de première instance donnée conformément à l'article 73. En l'espèce, la nouvelle comparution des accusés s'est déroulée le 30 avril 2004. Dès lors, les modifications ordonnées par la Chambre dans sa Décision du 15 juillet 2004 sur la requête d'Augustin Bizimungu en exceptions préjudicielles auraient dû être opérées sur la base de l'acte d'accusation du 29 mars 2004, sans que soient intégrées *a priori* les modifications résultant d'une éventuelle disjonction d'instance. De même, le Procureur n'était pas autorisé à modifier *proprio motu* l'acte d'accusation modifié du 29 mars 2004 en conséquence de l'éventuelle disjonction d'instance et aurait dû demander, dans le cadre de la présente requête, l'autorisation de procéder à une telle modification.

15. Dès lors, les actes d'accusation déposés par le Procureur les 16 et 22 juillet 2004 contiennent des modifications qui n'ont jamais été autorisées par la Chambre en vertu de l'article 50 du Règlement et ne sauraient être acceptés en l'état. La Chambre déclare en conséquence nuls et non avenus les actes d'accusations déposés par le Procureur les 16 et 22 juillet 2004. En outre, la Chambre attire l'attention du Procureur sur la procédure à suivre conformément à l'article 50 dans le cadre des modifications de l'acte d'accusation.

16. Sur la base de ce qui précède, la Chambre examine les amendements proposés par le Procureur en conséquence de la disjonction d'instance sur la base de l'acte

with the understanding that the amendments ordered in its Decision of 15 July 2004 are still to be incorporated. The Prosecutor proposes the withdrawal of 15 paragraphs, namely paragraphs 7 to 9, 78 to 80 and 105 to 113 from the Indictment of 29 March 2004. Protais Mpiranya is no longer mentioned under Count 1 – conspiracy to commit genocide – but the Prosecutor emphasizes that he remains party to the criminal enterprise.

17. The Chamber finds that the instance severance is motivated by the fact that the Accused Protais Mpiranya has so far not been arrested, and by the right of the other Accused to be tried without undue delay pursuant to Article 20 of the Statute. The severance does not affect the reasons that led to the preparation of a single indictment against all five co-accused, and Protais Mpiranya is still wanted for his alleged participation in the same criminal enterprise. In these circumstances and from this viewpoint, the proposa1 by the Prosecutor to continue to maintain Protais Mpiranya's name in the Indictment as a participant in the joint criminal enterprise is warranted.

18. Furthermore, the Chamber notes that the paragraphs objected to the Defence do not make any reference to Protais Mpiranya :

- The Prosecutor proposes to delete paragraph 80 of the Amended Indictment of 29 March 2004;
- The Prosecutor proposes to delete paragraph 111 of the Amended Indictment of 29 March 2004;
- The Prosecutor proposes to amend paragraph 120 of the Amended Indictrnent of 29 March 2004, which would now become paragraph 11 1 of the new Amended Indictment and would no longer mention Protais Mpiranya.

19. Accordingly, the Chamber holds the amendments proposed by the Prosecutor valid.

20. Moreover, the Chamber notes that the Prosecutor's list of witnesses referenced in Annex 4 of his Pre-trial Brief of 17 June 2004 comprises certain witnesses concerning the Accused Protais Mpiranya alone. In view of the severance, the Chamber draws the attention of the Prosecutor to the fact that the list of witnesses may require some amendments, in particular the withdrawal of witnesses whose testimony concerns the Accused Protais Mpiranya alone, and a review of the estimated duration of the examination-in-chief of witnesses whose testimony concerned Protais Mpiranya as well as some of his Co-Accused.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Prosecutor's Motion for a Separate Trial for Protais Mpiranya;

ORDERS that the Accused Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu be tried separately from Protais Mpiranya;

HOLDS null and void the Amended Indictment of 16 July 2004 appended to the Motion under review insofar as it contains amendments not authorized by the Chamber;

HOLDS null and void the Amended Indictment of 22 July 2004 insofar as it contains amendments not authorized by the Chamber;

d'accusation du 29 mars 2004, étant entendu que les modifications ordonnées dans sa Décision du 15 Juillet 2004 demeurent à inclure. Le Procureur propose la suppression de 15 paragraphes de l'acte d'accusation, à savoir les paragraphes 7 à 9, 78 à 80 et 105 à 113 de l'acte d'accusation du 29 mars 2004. Protais Mpiranya n'est plus cité sous le premier chef d'accusation d'entente en vue de commettre le génocide, mais le Procureur souligne qu'il demeure l'un des membres de l'entreprise criminelle.

17. La Chambre considère que la présente disjonction d'instance est motivée par le fait que l'accusé Protais Mpiranya n'a, à ce jour, toujours pas été arrêté et par le droit des autres accusés à être jugés sans retard excessif conformément à l'article 20 du Statut. Cette disjonction n'affecte pas les motivations ayant amené à la rédaction d'un acte d'accusation unique à l'encontre des cinq co-accusés et Protais Mpiranya demeure poursuivi à raison de sa participation alléguée à la même entreprise criminelle. Dès lors, la proposition du Procureur que le nom de Protais Mpiranya continue d'apparaître dans l'acte d'accusation en qualité de participant à l'entreprise criminelle conjointe est de ce point de vue justifiée.

18. En outre, la Chambre note que les paragraphes contestés par la défense ne font nulle part référence à Protais Mpiranya :

- Le Procureur propose de supprimer le paragraphe 80 de l'acte d'accusation modifié du 29 mars 2004;
- Le Procureur propose de supprimer le paragraphe 111 de l'acte d'accusation modifié du 29 mars 2004;
- Le Procureur propose de modifier le paragraphe 120 de l'acte d'accusation modifié du 29 mars 2004, qui deviendrait le paragraphe 111 du nouvel acte d'accusation modifié et ne porterait plus la mention de Protais Mpiranya.

19. Dès lors, la Chambre estime valables les amendements proposés par le Procureur.

20. Par ailleurs, la Chambre observe que la liste des témoins du Procureur communiquée en annexe 4 de son mémoire préalable au procès en date du 17 juin 2004 comprend certains témoins qui concernaient uniquement l'accusé Protais Mpiranya. En conséquence de la présente disjonction, la Chambre attire l'attention du Procureur sur le fait que sa liste des témoins pourrait nécessiter certaines modifications, notamment le retrait des témoins dont le témoignage concernait exclusivement l'accusé Protais Mpiranya, et la révision de la durée prévue de l'interrogatoire principal des témoins dont le témoignage était relatif à Protais Mpiranya ainsi qu'à d'autres de ses co-accusés.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête du Procureur aux fins de disjonction de l'instance suivie contre Protais Mpiranya;

ORDONNE que les accusés Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu aient un procès séparé de celui de Protais Mpiranya;

DECLARE nul et non avenu l'acte d'accusation modifié en date du 16 juillet 2004 annexé à la présente requête en ce qu'il contient des modifications non autorisées par la Chambre;

DECLARE nul et non avenu l'acte d'accusation modifié en date du 22 juillet 2004 en ce qu'il contient des modifications non autorisées par la Chambre;

ORDERS the Prosecutor to file, within three days, a new Indictment amended in relation to the Indictment of 29 March 2004 in French and English : the new Amended Indictment should include not only the amendments proposed as a result of the separate trial for Protais Mpiranya, but the amendments ordered by the Chamber in its Decision of 15 July 2004 as well;

ORDERS that the new Amended Indictment be kept by the Registrar and that certified true copies thereof bearing the seal of the Tribunal be made in accordance with Rule 47 (G) of the Rules;

ORDERS the Registry to notify the Accused Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu, as well as their Counsels of the new Amended Indictment without delay;

ORDERS further that the Prosecutor file, within fifteen days in French and English, a separate Indictment against Protais Mpiranya alone on the basis of the Amended Indictment of 29 March 2004 and include the amendments ordered by the Chamber in its 15 July 2004 Decision on Augustin Bizimungu's Preliminary Motion;

ORDERS the Registry to assign the number ICTR-2000-56A-I to the separate Indictment mentioned above against Protais Mpiranya.

Arusha, 20 August 2004

[Signed] :Arlette Ramaroson; William H. Sekule; Solomy B. Bossa

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Amended Indictment
(Joinder)
23 August 2004 (ICTR-2000-56-I)

(Original : French)

The Prosecutor of the International Criminal Tribunal for Rwanda, by virtue of the power vested in him under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute of the Tribunal") charges :

Augustin BIZIMUNGU, Augustin NDINDILIYIMANA, François-Xavier NZUWONEMEYE and Innocent SAGAHUTU

with CONSPIRACY TO COMMIT GENOCIDE, GENOCIDE or in the alternative, COMPLICITY IN GENOCIDE, CRIMES AGAINST HUMANITY, and VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II, offences punishable under Articles 2, 3, 4, 22 and 23 of the Statute of the Tribunal and under Rwandan Criminal Law, to the extent that the latter is not contrary to the Statute of the Tribunal.

ORDONNE au Procureur de déposer dans un délai de trois jours un nouvel acte d'accusation modifié par rapport à celui du 29 mars 2004 en langue française et anglaise : le nouvel acte d'accusation modifié devra inclure non seulement les modifications proposées en conséquence de la disjonction de l'instance à l'encontre de Protais Mpiranya, mais aussi les modifications ordonnées par la Chambre dans sa décision en date du 15 juillet 2004;

ORDONNE que le nouvel acte d'accusation modifié soit conservé par le Greffier et qu'il en soit fait, conformément à l'article 47 (G) du Règlement des copies certifiées conformes portant le sceau du Tribunal;

ORDONNE que le nouvel acte d'accusation modifié soit signifié sans retard par le Greffe aux accusés Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu, ainsi qu'à leurs conseils;

ORDONNE en outre au Procureur de déposer dans un délai de quinze jours en langues française et anglaise un acte d'accusation distinct concernant uniquement Protais Mpiranya sur la base de l'acte d'accusation modifié du 29 mars 2004 et comportant les modifications ordonnées par la Chambre dans sa décision sur les exceptions préjudicielles d'Augustin Bizimungu en date du 15 juillet 2004;

ORDONNE au Greffe d'affecter le numéro ICTR-2000-56A-I à l'acte d'accusation distinct susvisé à l'encontre de Protais Mpiranya.

Arusha, le 20 Août 2004

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy B. Bossa

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Acte d'accusation modifié 23 août 2004 (ICTR-2000-56-I)

(Original : Français)

Le Procureur du Tribunal Pénal International pour le Rwanda, en vertu des pouvoirs à lui conférés par l'article 17 du Statut du Tribunal Pénal International pour le Rwanda («le Statut du Tribunal») accuse :

Augustin BIZIMUNGU, Augustin NDINDILIYIMANA, François-Xavier NZUWONEMEYE et Innocent SAGAHUTU

D'ENTENTE EN VUE DE COMMETTRE LE GÉNOCIDE, de GÉNOCIDE ou alternativement de COMPLICITÉ DANS LE GÉNOCIDE, de CRIMES CONTRE L'HUMANITÉ, de VIOLATIONS DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÈVE ET DU PROTOCOLE ADDITIONNEL II, crimes prévus et punis par les articles 2, 3, 4, 22 et 23 du Statut du Tribunal et par les lois pénales rwandaises, en tout ce que celles-ci n'ont pas de contraire audit Statut.

I. The Accused

Augustin Bizimungu

1. Augustin Bizimungu was born on 28 August 1952 in Mukaranje commune, Byumba *préfecture*, Rwanda.

2. At the time of the events referred to in this indictment, Augustin Bizimungu held the post of Chief of Staff of the Rwandan Army. He was appointed to that post on 16 April 1994 and was promoted to the rank of Major-General at the same time. Previously, he had been the Commander of Military Operations in Ruhengeri *préfecture*.

3. In his capacity as Chief of Staff of the Rwandan Army, Augustin Bizimungu exercised authority over all soldiers in the Rwandan Army.

Augustin Ndindiliyimana

4. Augustin Ndindiliyimana was born in 1943, in Nyaruhengeri commune, Butare *préfecture*, Rwanda.

5. At the time of the events referred to in this indictment, Augustin Ndindiliyimana held the post of Chief of Staff of the *Gendarmerie nationale*. He was appointed to that post on 2 September 1992.

6. In his capacity as Chief of Staff of the *Gendarmerie nationale*, Augustin Ndindiliyimana exercised authority over the entire *Gendarmerie nationale* and had disciplinary power over all gendarmes, even when the latter were on temporary detachment.

François-Xavier Nzuwonemeye

7. François-Xavier Nzuwonemeye was born on 30 August 1955 in Kigali-rural *préfecture*, Rwanda.

8. At the time of the events referred to in this indictment, François-Xavier Nzuwonemeye held the post of Commander of the Reconnaissance Battalion (RECCE) within the Rwandan Army.

9. In his capacity as Commander of the Reconnaissance Battalion of the Rwandan Army, François-Xavier Nzuwonemeye exercised authority over all the units of that Battalion.

Innocent Sagahutu

10. Innocent Sagahutu was born in Cyangugu *préfecture*, Rwanda.

11. At the time of the events referred to in this indictment, Innocent Sagahutu held the post of Second-in-Command of the Reconnaissance Battalion (RECCE) within the Rwandan Army and of company commander of A Company of the said Battalion. He held the rank of Captain.

I. LES ACCUSÉS

Augustin Bizimungu

1. Augustin Bizimungu est né le 28 août 1952 dans la préfecture de Byumba, commune de Mukaranje, au Rwanda.

2. Lors des événements visés dans le présent acte d'accusation, Augustin Bizimungu exerçait les fonctions de chef d'état-major de l'armée rwandaise. Il a été nommé à ce poste le 16 avril 1994 et promu Général major à la même date. Auparavant, il a été le commandant des opérations militaires pour la préfecture de Ruhengeri.

3. En sa qualité de chef d'état-major de l'armée rwandaise, Augustin Bizimungu était investi du pouvoir d'exercer son autorité sur tous les militaires appartenant à ladite armée.

Augustin Ndindiliyimana

4. Augustin Ndindiliyimana est né en 1943 dans la commune de Nyaruhengeri, préfecture de Butare, au Rwanda.

5. Lors des événements visés dans le présent acte d'accusation, Augustin Ndindiliyimana exerçait les fonctions de chef d'état-major de la Gendarmerie nationale. Il a été nommé à ces fonctions le 2 septembre 1992.

6. En sa qualité de chef d'état-major de la gendarmerie nationale, Augustin Ndindiliyimana exerçait une autorité sur l'ensemble de la gendarmerie. Il exerçait son pouvoir disciplinaire sur tous les gendarmes, même lorsque ceux-ci étaient placés en position de détachement.

François-Xavier Nzuwonemeye

7. François-Xavier Nzuwonemeye est né le 30 août 1955 dans la préfecture de Kigali-rural, au Rwanda.

8. Lors des événements visés dans le présent acte d'accusation, François-Xavier Nzuwonemeye exerçait les fonctions de commandant du bataillon de reconnaissance (RECCE) de l'armée rwandaise.

9. En sa qualité de Commandant du bataillon de reconnaissance, François-Xavier Nzuwonemeye exerçait son autorité sur l'ensemble des unités de ce bataillon.

Innocent Sagahutu

10. Innocent Sagahutu est né dans la préfecture de Cyangugu, au Rwanda.

11. Lors des événements visés dans le présent acte d'accusation, Innocent Sagahutu avait les attributions de Commandant en second du bataillon de reconnaissance (RECCE) de l'armée rwandaise et était responsable de la Compagnie A dudit bataillon. Il avait le grade de capitaine.

12. In his capacity as Second-in-Command or Acting Commander of the Reconnaissance Battalion of the Rwandan Army, Innocent Sagahutu exercised authority over all the units of that Battalion.

II. The Military Power Structure

13. The *Forces armées rwandaises* (FAR) was composed of the *Armée rwandaise* (AR) and the *Gendarmerie nationale* (GN).

14. The *Forces armées rwandaises* did hot have a unified general staff. They were supervised by the Minister of Defence, under the direct authority of the President of the Republic, the Commander-in-Chief of the *Forces armées rwandaises*.

15. Both the Chief of Staff of the Rwandan Army and that oft he *Gendarmerie nationale* were each assisted by four *bureaux* : G-1 (Personnel and Administration), G-2 (Intelligence), G-3 (Military Operations) and G-4 (Logistics).

16. Regarding the Army, the territory of Rwanda was divided into various sectors of military operations. Each sector was headed by a military commander. The troops were divided into companies and units within each sector. There were several elite units in the Rwandan Army, including the Presidential Guard, the Para-Commando Battalion and the Reconnaissance Battalion.

17. According to the laws in force in Rwanda in 1994, the Rwandan Army was responsible for defending the national territory and, if necessary, cooperating with the *Gendarmerie nationale* in maintaining public order (see *ordonnance législative n°R85/25 du l0 mai 1962 portant création de l'Armée rwandaise*) [Legislative Ordinance n° R85/25 of 10 May 1962 relating to the establishment of the Rwandan Army].

18. The *Gendarmerie nationale* was, for its part, responsible for maintaining public law and order and enforcing the laws in force in Rwanda. Its members were assigned to public security territorial companies and brigades (see *Décret-Loi du 23 janvier 1974 portant création de l'Armée rwandaise*) [Legislative decree of 23 January 1974 relating to the establishment of the *Gendarmerie*].

19. As of 1973, in Rwanda, the Gendarmerie had replaced the National Police force which had been abolished and integrated into the National Army (see *Arrêté Présidentiel n° 86/08 du 26 juin 1973 portant integration de la police dans l'armée rwandaise*) [Presidential Decree n° 86/08 of 26 June 1973 relating to the integration of the Police force into the Rwandan Army].

20. Each of the military forces (Army and Gendarmerie) could, following well defined procedures, when necessary, join forces in order to fulfil its public service mandate (see *Décret-Loi du 23 janvier 1974 supra*) [Legislative decree of 23 January 1974, *supra*].

21. Under law, officers of the Rwandan Army had the duty to enforce general rules of discipline in respect of all soldiers under their authority, even those who were not members of their units (see *Arrêté Présidentiel n° 413/02 du 13 décembre 1978 modifié, portant règlement de discipline des Forces armées rwandaises*) [Amended Presidential Decree n° 413/02 of 13 December 1978 establishing the Rules of Discipline of the Rwandan Armed Forces].

12. En sa qualité de Commandant en second du bataillon de reconnaissance ou de faisant-fonction, Innocent Sagahutu était investi d'une autorité sur l'ensemble des unités de ce bataillon.

II. LA STRUCTURE DU POUVOIR MILITAIRE

13. Les Forces armées rwandaises (FAR) étaient composées de l'armée rwandaise (AR) et de la gendarmerie nationale (GN).

14. Les Forces armées rwandaises ne disposaient pas d'un état-major unifié. Leur tutelle était assurée par le Ministre de la défense, sous l'autorité directe du Président de la République, Chef suprême des armées.

15. Les deux chefs d'état-major de l'armée et de la gendarmerie étaient assistés chacun par quatre bureaux : le bureau du G1 (personnel et administration), le bureau du (renseignements et intelligence), le bureau du G3 (opérations militaires) et le bureau G4 (logistique).

16. Au niveau de l'armée, le territoire du Rwanda était divisé en différents secteurs d'opérations militaires. Chaque secteur était dirigé par un commandant militaire. Les troupes étaient divisées en compagnies au sein des secteurs et des unités. L'armée rwandaise comptait en son sein plusieurs unités d'élite parmi lesquelles : la garde présidentielle, le bataillon para-commando et le bataillon de reconnaissance (RECCE).

17. Aux termes des lois en vigueur au Rwanda en 1994, la mission de l'armée rwandaise était d'assurer la défense du territoire national et de veiller en cas de besoin, aux côtés de la gendarmerie nationale, à la préservation de l'ordre public (voir ordonnance législative n° R85/25 du 10 mai 1962 portant création de l'armée rwandaise).

18. La gendarmerie nationale était chargée, quant à elle, du maintien de l'ordre et de la paix publics et de l'exécution des lois en vigueur au Rwanda. Ses effectifs étaient disposés au sein des compagnies et des brigades territoriales de sécurité publique (voir décret-loi du 23 janvier 1974 portant création de la gendarmerie).

19. A partir de 1973, au Rwanda, la gendarmerie avait supplanté la police nationale qui avait été dissoute et intégrée dans l'armée nationale. (voir arrêté présidentiel no° 86/08 du 26 juin 1973 portant intégration de la police dans l'armée rwandaise).

20. Chacune des deux forces militaires (armée et gendarmerie)- suivant des procédures bien définies- pouvait s'adjoindre, en tant que de besoin, une partie des effectifs de l'autre pour l'exécution de ses missions de service public (voir décret-loi du 23 janvier 1974 précité).

21. De par la loi, les officiers de l'armée rwandaise avaient le devoir de faire respecter les règles générales de discipline par tous les militaires placés sous leur autorité, lors même que ces derniers n'appartiendraient pas à leurs unités (voir arrêté présidentiel n° 413/02 du 13 décembre 1978 modifié, portant règlement de discipline des Forces armées rwandaises).

III. CHARGES, INCLUDING A CONSISE STATEMENT OF THE FACTS :

Count 1 : Conspiracy to Commit Genocide

22. The Prosecutor of the International Criminal Tribunal for Rwanda charges Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu with Conspiracy to Commit Genocide, an offence punishable under Article 2 (3) (b) of the Statute, in that, before 6 April 1994, and, after the tragic death of President Juvénal Habyarimana, between 6 April and July 1994, in Rwanda, Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu decided and executed a common scheme with some or all of the following : Presidents Juvénal Habyarimana and Théodore Sindikubwabo, Prime Minister Jean Kambanda, Defence Minister Augustin Bizimana, General Déogratias Nsabimana, Colonels Théoneste Bagosora, Gratien Kabiligi and Anatole Nsengiyumva, Major Aloys Ntabakuze, Major Protais Mpiranya, the MRND Chairman and officials, Mathieu Ngirumpatse, Joseph Nzirorera and Juvénal Kajelijeli, *Préfet*-Colonel Tharcisse Renzaho, Nyaruhengeri *Bourgmestre* Charles Kabeza, Joseph Kanyabashi from Butare, and numerous other administrators, soldiers and civilians who espoused their cause to destroy, in whole or in part, the Tutsi ethnic group which was one of the component elements of the Rwandan population ;

Pursuant to Article 6 (1) of the Statute : either by their acts or obstinate refusal to mobilise the *Forces armées rwandaises* to fulfill their legal mandate to maintain and safeguard public peace, the Accused, in concert with the other actors mentioned above, planned, incited, ordered, committed, or otherwise, aided and abetted the planning, preparation or execution of the planned extermination of the Tutsi ethnic group, as follows :

23. In late 1990, after the massive attack launched inside Rwandan territory by the Rwandan Patriotic Front (RPF) – a politico-military movement which recruited its members essentially from the Tutsi of the diaspora – Government officials from the *Mouvement Républicain National pour la Democratie et le Développement (MRND)* and a number of Hutu military officers in positions of authority in the *Forces armées rwandaises* had conceived the idea that the neutralization, indeed even the extermination of the Tutsi population of Rwanda would be the best approach in order to defeat the invaders and, by the same stroke, prevent the sharing of power, which seemed increasingly inevitable, given the configuration of forces at the time.

24. Between 1991 and July 1994, that radical doctrine steadily gained in consistency, focusing on specific objectives and adopting bellicose plans of action that heralded exclusion.

25. The visible components of the strategy for perpetrating the genocide were as follows : the definition of the enemy by the most senior officials of the Habyarimana regime, incitement to hatred and the vindication of ethnically motivated crimes by the elite who claimed to be the "conscience of the Hutu", without any judicial measures whatsoever, the training of MRND *Interahamwe* militiamen and the distribution of

III. FAITS ET CHARGES RETENUS PAR L'ACCUSATION

Premier chef d'accusation :
entente en vue de commettre le génocide

22. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu d'entente en vue de commettre le génocide, sous l'empire de l'article 2 (3) (b) du Statut, en ce que avant le 6 avril 1994 puis, après la mort tragique du Président Juvénal Habyarimana, entre le 6 avril et juillet 1994, au Rwanda, Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu ont arrêté et mis à exécution un dessein commun, partagé de manière indistincte ou particulière avec les Présidents Juvénal Habyarimana et Théodore Sindikubwabo, le Premier ministre Jean Kambanda, le Ministre de la défense Augustin Bizimana, le général Déogratias Nsabimana, les colonels Théoneste Bagosora, Gratien Kabiligi et Anatole Nsengiyumva, les majors Aloys Ntabakuze et Protais Mpiranya, le Président et les responsables du MRND Mathieu Ngirumpatse, Joseph Nzirorera et Juvénal Kajelijeli, le préfet-colonel Tharcisse Renzaho, le bourgmestre de Nyaruhengeri Kabeza Charles, le ressortissant de Butare Joseph Kanyabashi ainsi qu'avec de nombreux autres administrateurs, militaires et civils acquis à leur cause, pour détruire, en tout ou en partie, le groupe ethnique Tutsi qui était l'une des composantes de la population rwandaise ;

En vertu de l'article 6 (1) du Statut : en ce que par leurs actes positifs ou par leur refus obstiné d'engager les Forces armées rwandaises à assurer leur mission légale de maintien de l'ordre et de sauvegarde de la paix publique, les accusés, de concert avec les autres acteurs susvisés, ont planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter l'extermination programmée du groupe ethnique Tutsi, comme il suit :

23. A la fin de l'année 1990, après l'attaque massive que le Front patriotique rwandais (FPR) – mouvement politico-militaire qui recrutait l'essentiel de ses membres auprès des Tutsi de la diaspora – avait lancée en territoire rwandais, l'idée s'était fait jour parmi les gouvernants issus des rangs du Mouvement républicain national pour la démocratie et le développement (MRND) et chez nombre d'officiers Hutu qui tenaient les rênes du pouvoir au sein des Forces armées rwandaises qu'une neutralisation, voire, à terme, une extermination des populations Tutsi du Rwanda, serait le meilleur gage pour défaire les envahisseurs et éviter, du même coup, un partage du pouvoir que la configuration des forces en présence semblait rendre de plus en plus inévitable.

24. Entre 1991 et juillet 1994, cette doctrine radicale allait gagner en consistance en se focalisant sur des objectifs précis et en adoptant des plans d'actions bellicistes, annonciateurs d'exclusion.

25. Les éléments d'une stratégie en vue de perpétrer le génocide qu'il a été donné d'observer sont les suivants : la définition de l'ennemi donnée par les plus hautes autorités du régime Habyarimana, l'incitation à la haine et l'apologie de crimes à motivation ethnique faites par des élites se réclamant de la «conscience Hutu», sans la moindre suite judiciaire, l'entraînement et la dotation en armes des miliciens *Inte-*

Weapons to them by elements of the *Forces armées rwandaises*, the establishment, by senior military officers, of lists of people to be eliminated, the numerous obstructions to the implementation of the Arusha Accords consecrating the return to peace and institutionalised power-sharing between the various political and/or military factions, the deliberate refusal, after the massacres of the civilian population had begun, to restore order, to quell the upheaval and to seek out the perpetrators.

a. Preparation for the genocide

26. In the above context, in December 1991, Juvénal Habyarimana, then Commander-in-Chief of the *Forces armées rwandaises* and Head of State, set up a military commission to formulate a plan to defeat the enemy militarily, in the media and politically. That commission, in whose deliberations Théoneste Bagosora and Anatole Nsengiyumva took part, issued a report in which the enemy was defined as : "*... le Tutsi de l'intérieur ou de l'extérieur, extrémiste et nostalgique du pouvoir, qui n'a jamais reconnu et ne reconnaît toujours pas les acquis de la révolution sociale de 1959 et qui cherche a reconquérir le pouvoir par tous les moyens, y compris pas les armes*". [Tutsi from inside or outside the country, who are extremists and nostalgic for power, who do not recognize and have never recognized the realities of the Social Revolution of 1959, and are seeking to regain power in Rwanda by any means, including taking up arms.] The document specified that the enemy was being recruited from amongst the Tutsi inside the country, the Hutu who were dissatisfied with the present regime and foreigners married to Tutsi women. The then Chief of Staff of the Rwandan Army, Déogratias Nsabimana, ordered that extracts from the commission report be circulated among the troops.

27. In the course of 1992, 1993 and 1994, the political and military authorities, including Théoneste Bagosora, Augustin Bizimungu and Protais Mpiranya, provided military training and weapons to MRND *lnterahamwe* militiamen. The training took place in Ruhengeri, Cyangugu, Gisenyi, Butare *préfectures* and in Mutara *secteur.* The training sites were the Gako, Gabiro, Mukamira and Bigogwe military camps.

28. To legitimize, if necessary, the process, President Juvénal Habyarimana declared in 1993 in Ruhengeri that the *Interahamwe* had to be equipped so that, come the right time, "ils descendent" [they should swing into action].

29. At the same time, in Ruhengeri, between 1992 and 1994, Augustin Bizimungu, accompanied by Juvénal Kajelijeli and others, regularly took part in meetings that were generally held on Saturdays at the home of Joseph Nzirorera, the MRND National Secretary. The purpose of the meetings was to devise a strategy for fighting the Tutsi enemy.

30. In January 1993, Augustin Bizimungu, in his capacity as Commander of Ruhengeri Operational sector, while addressing his troops, stated that the enemy was known and the enemy was the Tutsi, thereby echoing the speech made by President Habyarimana and the doctrine professed by senior officers in the Army.

31. Augustin Bizimungu reiterated that statement in February 1994 when he declared that if the RPF attacked Rwanda again, he did not want to see one Tutsi alive in his sector of operations.

rahamwe du MRND par des soldats des Forces armées rwandaises, la confection par les hautes instances militaires de listes de personnes à éliminer, les entraves multiples apportées à l'application des accords d'Arusha qui devaient consacrer le retour à la paix et le partage institutionnalisé du pouvoir entre les différentes factions politiques et/ou militaires, le refus délibéré, après que les massacres commis sur la population civile ont commencé, de rétablir l'ordre, de faire cesser les troubles et d'en rechercher les fauteurs.

a. Préparation du Génocide

26. Dans le cadre que voilà, en décembre 1991, Juvénal Habyarimana, à l'époque Commandant en Chef des Forces armées rwandaises et Chef d'Etat avait mis en place une commission militaire chargée d'élaborer un programme visant à vaincre l'ennemi sur les plans militaire, médiatique et politique. Cette commission, aux travaux de laquelle avaient pris part Théoneste Bagosora et Anatole Nsengiyumva, produisait un rapport définissant l'ennemi comme étant. «... le Tutsi de l'intérieur ou de l'extérieur, extrémiste et nostalgique du pouvoir, qui n'a jamais reconnu et ne reconnaît toujours pas les acquis de la révolution sociale de 1959 et qui cherche à reconquérir le pouvoir par tous les moyens, y compris par les armes». Le document précisait que les recrutements de l'ennemi se faisaient parmi les Tutsi de l'intérieur, les Hutu mécontents du régime en placet les étrangers mariés à des femmes Tutsi Le chef d'état-major de l'armée, à l'époque Deogratias Nsabimana, avait ordonné une diffusion d'extraits de ce rapport auprès des troupes.

27. Dans le courant des années 1992, 1993 et 1994, les autorités politiques et militaires dont Théoneste Bagosora, Augustin Bizimungu et Protais Mpiranya ont fait subir un entraînement militaire à des miliciens *Interahamwe* du MRND et ont pourvu à leur armement. Ces entraînements se sont déroulés dans les préfectures de Ruhengeri, de Cyangugu, de Gisenyi, de Butare ainsi que dans le secteur du Mutara. Ils ont eu pour cadre les camps militaires de Gako, de Gabiro, de Mukamira et de Bigogwe.

28. Pour légitimer s'il en était besoin ce processus, le Président Juvénal Habvarimana déclarait en 1993, à Ruhengeri, qu'il fallait équiper les *Interahamwe* pour qu'au moment opportun «ils descendent».

29. Dans le même temps, à Ruhengeri, entre 1992 et 1994, Augustin Bizimungu a régulièrement participé en compagnie de Juvénal Kajelijeli et d'autres à des réunions tenues généralement les samedis au domicile de Joseph Nzirorera, secrétaire national du MRND, destinées à asseoir une stratégie en vue de combattre l'ennemi Tutsi.

30. Aussi pour se faire l'écho du discours prononcé par le Président Habyarimana et de la doctrine professée par la haute hiérarchie militaire, Augustin Bizimungu, en sa qualité de commandant du secteur opérationnel de Ruhengeri, a déclaré en janvier 1993, s'adressant à ses troupes, que l'ennemi était connu et que l'ennemi était le Tutsi.

31. Augustin Bizimungu a réitéré ce propos en février 1994 en déclarant que si le FPR attaquait de nouveau le Rwanda, il ne voulait plus voir un Tutsi vivant dans son secteur opérationnel.

32. During the same period preceding the genocide, on 7 January 1994, Augustin Ndindiliyimana and other influential MRND members participated in a meeting at the MRND headquarters in Kigali to oppose the disarmament program that was included in the Arusha Accords and which was to be supervised by the United Nations Mission (UNAMIR). It was decided at the meeting to resist by all possible means the implementation of the program and to hide weapons at various locations in Kigali.

33. Furthermore, in early 1994, due to the proliferation of weapons in Kigali-city *préfecture*, UNAMIR put in place a disarmament program entitled Kigali Weapon Security Area (KWSA). Concurrently, in cooperation with the Chief of Staff of the *Gendarmerie*, Augustin Ndindiliyimana, UNAMIR organized search operations in Kigali. The effectiveness of the operations was compromised by Augustin Ndindiliyimana who gave information on the search targets to Mathieu Ngirumpatse, MRND Chairman. The latter passed the information on to his *Interahamwe* militiamen.

34. In January and February 1994, Major François-Xavier Nzuwonemeye, in keeping with the same dissimulation strategy as Ndiudiliyimana, had about 20 armoured vehicles and about ten jeeps equipped with machine guns, belonging to the Reconnaissance Battalion, hidden in Gisenyi and at certain of President Habyarimana' s residences in Kiyovu and Rambura. Early in the morning of 7 April 1994, those vehicles were brought back to Kigali to assist the ground troops charged with tracking down the civilian population.

35. Moreover, on 5 January 1994, at the swearing-in ceremony of the Broad-Based Transitional Government in Kigali, the *Interahamwe* organized a demonstration in cooperation with members of the Presidential Guard. On that occasion, Major Protais Mpiranya, despite several attempts by UNAMIR to negotiate with him, prevented access by political opponents or a significant number of them into the premises of the CND. In the end, only President Juvénal Habyarimana was sworn in on that day and the Broad-Based Transitional Government provided for in the Arusha Accords never came into being.

36. In this regard, it should also be noted that, when *Radio Télévision Libre des Milles Collines* (RTLM), of sad memory, was founded, Innocent Sagahutu subscribed a certain number of shares in that company and blatantly campaigned among the *Forces armées rwandaises* to encourage the buying of shares in that new media organ which advocated total war against the Tutsi.

37. Lastly, although incitement to ethnic or racial hatred and violence against the Tutsi were rife in the broadcasts of that radio station, Augustin Ndindiliyimana, the highest ranking judicial police officer in Rwanda, for his part, avoided investigating or ordering any judicial probe whatsoever of the journalists who were, on a daily basis, committing criminal offences (incitement to ethnic or racial hatred and violence)...

b. Acts associated with Genocide

38. On 7 April 1994, in Kigali, elements of the Reconnaissance Battalion commanded by François-Xavier Nzuwonemeye and Innocent Sagahutu, in concert with

32. Durant cette même période précédant le génocide, à Kigali, le 7 janvier 1994, Augustin Ndindiliyimana et d'autres membres influents du MRND ont participé à une réunion tenue au quartier général de ce parti pour s'opposer au programme de désarmement arrêté par les accords de paix d'Arusha et que devait superviser la mission des Nations Unies (MINUAR). Ils ont décidé, au cours de cette réunion, de résister par tous les moyens à programme et de cacher des armes dans différents endroits de la ville.

33. De plus, au début de l'année 1994, en raison de la prolifération des armes dans la préfecture de Kigali-ville, la MINUAR avait mis en place un programme de désarmement dénommé Kigali Weapon Security Area (KWSA). Parallèlement, et en collaboration avec le chef d'état-major de la gendarmerie, Augustin Ndindiliyimana, la MINUAR avait organisé des opérations de fouille dans Kigali. L'efficacité de ces opérations a été compromise par Augustin Ndindiliyimana qui avait informé Mathieu Ngirumpatse, Président du MRND, du lieu de la perquisition. Ce dernier en avisa, naturellement, ses miliciens *Interahamwe*.

34. Le Major François-Xavier Nzuwonemeye s'inscrira dans la même logique de dissimulation que Ndindiliyimana en ordonnant, en janvier ou février 1994, qu'une vingtaine de véhicules blindés et une dizaine de jeeps équipées de mitrailleuses, propriété du bataillon de reconnaissance qu'il dirigeait, soient cachés dans la région de Gisenyi et dans certaines résidences du Président Habyarimana situées à Kiyovu et à Rambura. Dès les premières heures de la matinée du 7 avril 1994, ces engins furent rapatriés à Kigali pour assister les troupes au sol chargées de traquer la population civile.

35. Par ailleurs, à Kigali, le 5 janvier 1994, lors de la cérémonie prévue pour la prestation de serment du gouvernement de transition à base élargie (GTBE), les *Interahamwe* ont organisé une manifestation en collaboration avec des éléments de la garde présidentielle. A cette occasion, le Major Protais Mpiranya, malgré plusieurs tentatives faites par I'UNAMIR de négocier avec lui, a interdit l'accès du CND à l'opposition ou à une partie significative de celle-ci. Finalement, seul le Président Juvénal Habyarimana a prêté serment ce jour là et le gouvernement de transition à base élargie, prévu par les accords d'Arusha, n'a jamais vu le jour.

36. Il importe de relever également sur ce chapitre, qu'à la naissance de la Radio Télévision Libre des Mille Collines (RTLM), de triste mémoire, Innocent Sagahutu s'est porté acquéreur d'un certain nombre d'actions de cette société et a fait une campagne remarquée, au sein des Forces armées rwandaises, pour inciter à la souscription d'actions de ce nouvel organe de presse, adepte de la guerre totale contre les Tutsi.

37. Enfin, bien que les incitations à la haine et à la violence ethnique ou raciale – dirigées contre les Tutsi – fussent légion dans les programmes de cette radio, Augustin Ndindiliyimana, officier de police judiciaire le plus gradé du Rwanda, s'est gardé, en ce qui le concerne, d'ouvrir ou de faire ouvrir la moindre enquête judiciaire contre les journalistes, auteurs, au quotidien, d'actes délictueux (incitations à la haine et à la violence ethnique ou raciale).

b. Actes concomitants au génocide

38. A Kigali, le 7 avril 1994, des militaires du bataillon de reconnaissance dirigé par François-Xavier Nzuwonemeye et Innocent Sagahutu, agissant de concert avec des

elements of the Presidential Guard commanded by Protais Mpiranya, killed the Prime Minister of the Transitional Government, Agatha Uwilingiyimana, and the ten Belgian UNAMIR soldiers who had been assigned to escort her. The Prime Minister had intended to go to the radio station to address the nation and forewarn the various protagonists about engaging in excesses and to make an appeal for calm. Those murders, and others, annihilated several obstacles that stood in the way of the genocide.

39. Shortly before those murders were committed, François-Xavier Nzuwonemeye, had assembled his troops at Kigali military camp and informed them of the death of President Juvénal Habyarimana and that of the Chief of Staff of the Rwandan Army, Déogratias Nsabimana. In his address, François-Xavier Nzuwonemeye identified the enemy as the RPF; he also called on his troops to eliminate all its accomplices within the country before taking on the enemy.

40. Between 7 and 11 April 1994, elements of the Presidential Guard commanded by Protais Mpiranya assassinated many Rwandan political figures, including Boniface Ngulinzira, the Minister of Foreign Affairs of the out-going Government, who was the main architect of the Arusha Accords. RTLM announced the death of Minister Ngulinzira in the following terms : "*nous avons exterminé tous les complices du FPR; Boniface Ngulinzira n'ira plus vendre le pays au profit du FPR, à Arusha. Les Accords de paix ne sont plus que des chiffons de papier, comme l'avait prédit notre papa Habyarimana*" [we have exterminated all the accomplices of the RPF; Boniface Ngulinzira will no longer go and sell the country to the RPF in Arusha. The Peace Accords are now only scraps of paper, as our father, Habyarimana, had predicted].

41. In Kigali, in April and May 1994, Innocent Sagahutu and Protais Mpiranya distributed weapons on several occasions to fanaticized militiamen, whose criminal activities were well known to them, while asking them to persevere in the undertaking to exterminate file Rwandan Tutsi.

42. In Butare, on or about 19 April 1994, the interim President, Théodore Sindikubwabo, gave a speech at a public rally, advocating nothing less than ethnic cleansing. After the message had been delivered, elements of the Presidential Guard, commanded by Protais Mpiranya, set out to concretize that sinister scheme by murdering several thousand Tutsi in Butare and the vicinity.

43. In Gitarama, on or about 21 April 1994, the Prime Minister of the interim Government, Jean Kambanda, praised RTLM, knowing full well that that radio station was calling for the extermination of the Tutsi and their supposed accomplices. At the time, he described the radio station as the "*arme indispensable pour combattre l'ennemi*" [indispensable weapon for fighting the enemy].

44. Augustin Ndindiliyimana and Augustin Bizimungu were not uninvolved in all this.

45. On 7 April 1994, following the death of President Juvénal Habyarimana and the Chief of Staff of the Rwandan Army, Major General Déogratias Nsabimana, Major Augustin Ndindiliyimana, the highest ranking officer in active service in the Rwandan Army, was appointed by his peers to chair the Military Crisis Committee which was to fill the power vacuum, pending the establishment of new institutions.

éléments de la garde présidentielle commandée par Protais Mpiranya, ont tué le Premier ministre du gouvernement de transition, Agathe Uwilingiyimana, et les 10 casques bleus belges de la MINUAR qui avaient été commis pour lui fournir une escorte. Le Premier ministre entendait se rendre à la station de radio pour s'adresser à la nation, prévenir les différents acteurs contre les débordements et lancer un appel au calme. Ces assassinats, et d'autres, annihilèrent maints obstacles qui se dressaient sur le chemin du génocide.

39. Peu avant que ces meurtres ne fussent commis, François-Xavier Nzuwonemeye avait réuni au camp-Kigali ses troupes pour leur apprendre la mort du Président Juvénal Habvarimana et du chef d'état-major de l'armée rwandaise, Déogratias Nsabimana. Dans son adresse, François-Xavier Nzuwonemeye avait désigné l'ennemi comme étant le FPR; il avait aussi exhorté ses troupes, avant d'en découdre avec cet ennemi, d'éliminer tous ses complices intérieurs.

40. Entre le 7 et le 11 avril 1994, des soldats de la garde présidentielle, placés sous le commandement de Protais Mpiranya, ont assassiné plusieurs personnalités politiques rwandaises, dont Boniface Ngulinzira, ministre des Affaires étrangères du gouvernement sortant, grand ordonnateur des accords de paix d'Arusha. La RTLM a annoncé la mort du ministre Ngulinzira, en ces termes «nous avons exterminé tous les complices du FPR; Boniface Ngulinzira n'ira plus vendre le pays au profit du FPR, à Arusha. Les accords de paix ne sont plus que des chiffons de papier, comme l'avait prédit notre papa Habyarimana».

41. A Kigali, en avril et mai 1994, Innocent Sagahutu et Protais Mpiranya ont distribué plusieurs fois des armes à des miliciens fanatisés, dont les activités criminelles leur étaient connues, en leur demandant de persévérer dans l'entreprise d'extermination dirigée contre les Tutsis rwandais.

42. A Butare, le ou vers le 19 avril 1994, le Président intérimaire Théodore Sindikubwabo a, au cours d'une réunion publique, prononcé un discours prônant rien moins qu'une épuration ethnique. Des soldats de la garde présidentielle placée sous le commandement de Protais Mpiranya se sont chargés, après que le message a été délivré, de donner corps à ce sinistre dessein en tuant plusieurs milliers de Tutsi à Butare et dans ses environs.

43. A Gitarama vers le 21 avril 1994, le Premier ministre du gouvernement intérimaire, Jean Kambanda, a décerné un satisfecit à la RTLM tout en sachant que cette station appelait à l'extermination des Tutsi et de leurs supposés complices. Il avait qualifié à cette occasion la radio «d'arme indispensable pour combattre l'ennemi».

44. Dans tout cela, Augustin Ndindiliyimana et Augustin Bizimungu n'ont pas été en reste.

45. Le 7 avril 1994, après la mort du Président de la République Juvénal Habyarimana et du chef d'état-major de l'armée rwandaise, le Général major Déogratias Nsabimana, Augustin Ndindiliyimana, officier d'active le plus gradé des armées rwandaises, a été porté par ses pairs à la tête du Comité de crise militaire qui devait suppléer à la vacance du pouvoir en attendant la mise en place de nouvelles institutions.

46. Augustin Ndindiliyimana and Théoneste Bagosora, in full agreement, supported the institution of an interim Government composed solely of Hutu extremists.

47. On 7 April 1994, between 10 a.m. and 1 p.m., the Military Crisis Committee met at the *École Supérieure Militaire* (ESM), about 50 meters from Kigali camp. In the course of the meeting, Commander Nubaha of Kigali camp came and informed Augustin Ndindiliyimana and Théoneste Bagosora who were chairing the meeting that Rwandan soldiers were killing Belgian UNAMIR soldiers. Augustin Ndindiliyimana and Théoneste Bagosora allowed the meeting to continue without taking the slightest action either directly or through the intermediary of the commanders whose subordinates were implicated in the killings. Hence, the assassination of the ten soldiers from the Belgian contingent, the largest in the UN peacekeeping mission, and the withdrawal of the Belgian contingent as of 11 April 1994.

48. Between 7 and 11 Apri11994, elements of the Presidential Guard, the Reconnaissance Battalion and *Interahamwe* militiamen murdered or sought to murder all political figures in the opposition who had been designated to occupy prominent positions in the Broad-Based Transitional Government which was to be put in place pursuant to the Arusha Accords. The Prime Minister of the Transitional Government who was in office until 7 April, Agathe Uwilingiyimana, Ministers Frédéric Nzamurambaho, Faustin Rucogoza, Landouald Ndasingwa, Boniface Ngulinzira as well as the President of the Constitutional Court, Joseph Kavaruganda, were among the unfortunate victims.

49. Although the Gendarmerie which he commended was responsible for protecting the said authorities, and although he had been informed of the threat to the lives of those political figures, well before the events, Augustin Ndindiliyimana took no adequate steps to protect them from being killed.; nor did he in any way reorganize the security system after the first massacres were committed.

50. The murder of the Belgian soldiers prompted the withdrawal of the Belgian contingent; the murder of political figures who supported the implementation of the Arusha Accords had created an institutional vacuum which was perniciously filled by Augustin Ndindiliyimana and Théoneste Bagosora. Two major obstacles to the spread and continuation of the massacres were thus removed.

51. In April 1994, had Majors Cyriaque Habyarimana and Jabo, who had refused to be involved with the massacres in Butare and Kibuye, transferred to the frontline.

52. From April to June 1994, Augustin Ndindiliyimana, Chief of Staff of the Gendarmerie, issued many *laissez-passer* to *Interahamwe* leaders to enable them to scour the country and coordinate the massacres of the Tutsi population.

53. From April to June 1994, General Augustin Ndindiliyimana received daily situation reports (SITREP S) from his troops, notably during meetings held at the *Gendarmerie* headquarters at Kacyiru camp. Those reports indicated the scale and scope of the massacres being perpetrated against the civilian population. Moreover, he went to various *préfectures* to assess the situation. Although he had at his disposal several *Gendarmerie* units, not involved in combat to defend Rwandan territory, Augustin Ndindiliyimana, Chief of Staff of the Gendarmerie who, under law, was responsible

46. Augustin Ndindiliyimana et Théoneste Bagosora, dans une parfaite entente, ont favorisé la mise en place d'un gouvernement intérimaire, comprenant uniquement des Hutu extrémistes.

47. Le 7 avril 1994, entre 10 heures et 13 heures, une réunion du Comité de crise militaire s'est tenue à l'Ecole supérieure militaire (ESM), distante d'une cinquantaine de mètres du camp-Kigali. Au cours de cette réunion, le commandant Nubaha du camp-Kigali est venu informer Augustin Ndindiliyimana et Théoneste Bagosora qui dirigeaient les débats que les soldats rwandais étaient en train de tuer des militaires belges appartenant à la MINUAR. Augustin Ndindiliyimana et Théoneste Bagosora ont laissé la réunion se poursuivre sans entreprendre la moindre action par eux-mêmes, ou par l'intermédiaire des chefs de corps dont les subordonnés étaient impliqués dans la tuerie. Il en est résulté l'assassinat de 10 soldats belges dont le pays fournissait le plus gros contingent à la force de paix onusienne, et le retrait de la Belgique du Rwanda, dès le 11 avril 1994.

48. Entre le 7 et le 11 avril 1994, des soldats de la Garde présidentielle, du bataillon de reconnaissance et des miliciens *Interahamwe* ont tué ou cherché à tuer toutes les personnalités politiques de l'opposition qui avaient été pressenties pour occuper d'éminentes fonctions dans le gouvernement de transition à base élargie dont la mise en place avait été préconisée par les accords d'Arusha. Le Premier ministre du gouvernement de transition en poste jusqu'au 7 avril, Agathe Uwilingiyimana, les ministres Frédérick Nzamurambaho, Faustin Rocogoza, Landouald Ndasingwa, Boniface Ngulinzira ainsi que le Président de la Cour constitutionnelle, Joseph Kavaruganda, furent parmi les malheureuses victimes.

49. Bien que la gendarmerie qu'il commandait fût en charge de la protection de ces autorités, et bien qu'il fût instruit longtemps avant les évènements des menaces qui pesaient sur elles, Augustin Ndindiliyimana n'avait pris aucune mesure adéquate pour les soustraire à ces tueries; il n'avait non plus nullement réadapté le dispositif de protection après la commission des premiers massacres.

50. L'assassinat des soldats belges avait provoqué le retrait du contingent fourni par la Belgique; l'assassinat des politiciens favorables à l'application des accords d'Arusha avait créé un vide institutionnel, pernicieusement comblé par Augustin Ndindiliyimana et Théoneste Bagosora. Deux obstacles majeurs à la généralisation et à la poursuite des massacres étaient ainsi levés.

51. En avril 1994, Augustin Ndindiliyimana a fait muter au front les majors Cyriaque Habyarabatuma et Jabo qui, à Butare et à Kibuye, avaient refusé de s'associer aux massacres.

52. D'avril à juin 1994, Augustin Ndindiliyimana, chef d'état-major de la gendarmerie, a délivré plusieurs laissez-passer à des chefs *Interahamwe* pour leur permettre de sillonner le Rwanda et de coordonner les massacres commis à l'encontre de la population Tutsi.

53. D'avril à juin 1994, le général Augustin Ndindiliyimana a reçu des rapports de situation quotidiens (SITREP) de ses troupes, notamment au cours des réunions tenues à l'état-major de la gendarmerie, au camp Kacyiru. Ces rapports faisaient état de l'ampleur et de l'étendue des massacres contre la population civile. Il s'est, de plus, rendu dans différentes préfectures afin d'évaluer la situation. Bien qu'il eût à sa disposition plusieurs unités de gendarmerie non impliquées dans les combats pour la défense du territoire rwandais, Augustin Ndindiliyimana, chef d'état-major de la gen-

for maintaining public order, and protecting people and their property, took no significant action to quell the upheaval or to seek out the perpetrators.

54. On 7 April 1994, in Ruhengeri, Augustin Bizimungu congratulated a *Conseiller* of Mukamira *secteur* for successfully tracking down Tutsi and encouraged him to continue his work in "*exterminant les petits cancrelats*" [exterminating the small cockroaches].

55. During the morning of 7 April 1994, Augustin Bizimungu went to Joseph Nzirorera's house in Ruhengeri and told MRND militants that "*l'heure est venue de mettre en pratique les recommendations qui vous avaient été faites. Je viens de m'entretenir au téléphone avec Nzirorera et nous avons convenu que vous devez commencer à tuer tous les Tutsis. Commencez par vos quartiers respectifs, avant de vous déplacer dans les autres endroits de la commune...*" [the time has come to put into practice the recommendations made to you. I have just been taken taking on the phone with Nzirorera and we have agreed that you should start killing all the Tutsi. Start with your respective neighbourhoods before moving into the other areas of the commune…]. He then assured them that weapons had been placed at their disposal at the Ruhehe armoury and he promised to provide them with fuel for burning the homes of Tutsi. The following day he made good his promise by distributing fuel in Cyohoha-Rukeri in the company of Lieutenant Mburuburengero.

56. On 8 April 1994, at a meeting in Ruhengeri attended by over 700 people, Augustin Bizimungu castigated the *Inkotanyi* calling them perpetrators of genocide and urging the audience to follow the example of the *Interahamwe* in Mukingo *commune* whose performance he praised : over 200 Tutsi killed in Busogo parish. He then called for the murder of all the Tutsi.

57. On or about 18 May 1994, Augustin Bizimungu took part in a meeting during which the military hierarchy of which he was a member praised the performance of the militiamen and underscored the need to better arm them.

58. On or about 21 May 1994, Augustin Bizimungu visited Remera-Rukoma Hospital where he congratulated the militiamen who had just killed about ten people at the hospital and in its vicinity, and he asked them to double their vigilance in hunting down the Tutsi.

59. From mid-April to late June 1994, while the genocide was being perpetrated, Augustin Bizimungu deliberately abstained from ensuring that the Rwandan Army, which was under his command, fulfilled its duty to restore order, as required by Rwandan laws and regulations.

60. In May 1994, when the US State Department approached him, asking that he put an end to the killings, Augustin Bizimungu refused to take any action whatsoever. His response to the American diplomat was : "*faites cesser les bombardements du FPR, et je m'engage à arrêter les tueries*" [Tell the RPF to stop the bombings and I will undertake to stop the killings].

Count 2 : Genocide

61. The Prosecutor of the International Criminal Tribunal for Rwanda charges Augustin Bizimungu and Augustin Ndindiliyimana with Genocide, an offence punish-

darmerie chargée, aux termes des lois, du maintien de l'ordre, de la protection des personnes et de leurs biens, n'entreprit aucune action significative pour faire cesser les troubles ou pour en rechercher les fauteurs.

54. Quant à Augustin Bizimungu, il a félicité le 7 avril 1994, à Ruhengeri, un conseiller de secteur de Mukamira pour sa traque réussie des Tutsi et l'a encouragé à poursuivre son travail en «exterminant les petits cancrelats».

55. Durant la matinée du 7 avril 1994, Augustin Bizimungu s'est rendu au domicile de Joseph Nzirorera, à Ruhengeri, et a tenu aux militants du MRND le langage suivant : «l'heure est venue de mettre en pratique les recommandations qui vous avaient été faites. Je viens de m'entretenir au téléphone avec Nzirorera et nous avons convenu que vous devez commencer à tuer tous les Tutsi. Commencez par vos quartiers respectifs, avant de vous déplacer dans les autres endroits de la commune...». Il leur a ensuite assuré que des armes avaient été disposées à leur intention au dépôt du Ruhehe et leur a promis une dotation en essence pour mettre le feu aux habitations des Tutsi. Il tint promesse le lendemain en livrant le combustible à Cyohoha-Rukeri, en compagnie du lieutenant Mburuburengero.

56. Le 8 avril 1994, au cours d'une réunion à laquelle il a pris part à Ruhengeri, devant plus de 700 personnes, Augustin Bizimungu s'en est pris aux *Inkontanyi* qu'il a traités de génocidaires et a exhorté l'assistance à suivre l'exemple des *Interahamwe* de la commune de Mukingo dont il a loué les performances : plus de 200 Tutsi tués à la paroisse de Busogo. Il a ensuite appelé au meurtre de tous les Tutsi.

57. Le ou vers le 18 mai 1994, Augustin Bizimungu a pris part à une réunion au cours de laquelle la hiérarchie militaire dont il faisait partie s'est réjouie des performances accomplies par les miliciens et a souligné la nécessité de mieux les armer.

58. Le ou vers le 21 mai 1994, Augustin Bizimungu a effectué une visite à l'hôpital de Remera-Rukoma où il a félicité des miliciens qui venaient de tuer une dizaine de personnes à l'hôpital et dans ses environs et leur a demandé de redoubler de vigilance dans leur traque du Tutsi.

59. De la mi-avril à la fin juin 1994, alors que le génocide se perpétuait, Augustin Bizimungu s'est abstenu volontairement de faire exécuter à l'Armée rwandaise, placée sous son commandement, la mission de rétablissement de l'ordre que les lois et règlements du Rwanda lui impartissaient.

60. En mai 1994, saisi par le Département d'Etat américain pour faire cesser les tueries, Augustin Bizimungu a refusé d'entreprendre quelque action que ce soit. Il a répondu au diplomate américain en ces termes : «faites cesser les bombardements du FPR, et je m'engage à arrêter les tueries».

Deuxième chef d'accusation : génocide

61. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu et Augustin Ndindiliyimana de génocide, sous l'empire de l'article 2 (2)

able under Article 2 (2) (a) and (b), 2 (3) (a) of the Statute, in that in 1994, in Rwanda, Augustin Bizimungu and Augustin Ndindiliyimana were responsible for killing and causing serious bodily or mental harm, committed by soldiers, gendarmes and *lnterahamwe* and *lmpuzamugambi* militiamen, against members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group;

Pursuant to Article 6 (1) of the Statute : by their acts referred to in paragraphs 63 to 66, 71 and 72 below, in that the Accused, Augustin Bizimungu and Augustin Ndindiliyimana planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the said crimes; and

Pursuant to Article 6 (3) of the Statute : in that the Accused knew or had reason to know that their subordinates had committed or were about to commit the acts referred to in paragraphs 67 to 70, 73 to 77 below, and did not take the reasonable and necessary measures to prevent such acts or to punish the perpetrators thereof.

Alternatively to Count 2

Count 3 : Complicity in Genocide

62. The Prosecutor of the International Criminal Tribunal for Rwanda charges Augustin Bizimungu and Augustin Ndindiliyimana with Complicity in Genocide, an offence punishable by Article 2 (3) (e) of the Stature, in that in ordering, providing the means, aiding and abetting, the Accused knowingly assisted the perpetrators of the crimes referred to in paragraphs 63 to 66, 71 and 72, as follows :

Augustin BIZIMUNGU

63. On or about 7 April 1994, following the speech made to them by Augustin Bizimungn in Joseph Nzirorera's home, cited in paragraph 55 above, the MRND *Interahamwe* militiamen killed 150 Tutsi in Rwankeri *secteur*, in Ruhengeri, and, on the same day, under the supervision of soldiers from Kanombe and Bigogwe camps, which were under the authority of Augustin Bizimungu, participated in the attack in which more than 200 Tutsi were killed in Busogo Parish.

64. On or about 8 April 1994, Augustin Bizimungu, accompanied by *Sous-Préfet* Nzanana, went to meet the said group of militiamen, and asked them to prepare to intervene at the Ruhengeri Court of Appeal where Tutsi, who, according to him, were destined for extermination, had sought refuge.

65. Those militiamen, and others, went to meet Augustin Bizimungu on or about 14 April, shortly before 12 noon, in front of the building in which the "refugees" had sought refuge. Augustin Bizimungu pointed to the building and withdrew after the first grenade was thrown. Over 100 people were killed at that location following the said attack. In the evening, Augustin Bizimungu had broadcast an announcement on the radio, alleging that the refugees had died under RPF bombs.

(a) et (b), 2.(3) (a) du Statut, en ce que courant 1994, au Rwanda, Augustin Bizimungu et Augustin Ndindiliyimana ont été responsables de meurtres et d'atteintes graves à l'intégrité physique ou mentale, commis par des soldats, des gendarmes et des miliciens *Interahamwe* et *Impuzamugambi* sur des membres de la communauté Tutsi, dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique;

En vertu de l'article 6 (1) du Statut : par leurs actes positifs relatés dans les paragraphes 63 à 66, 71 et 72 ci-dessous, en ce que les accusés Augustin Bizimungu et Augustin Ndindiliyimana ont planifié, incité à commettre, ordonné de commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter lesdits crimes; et

En vertu de l'article 6 (3) du Statut : du fait que les accusés savaient ou avaient ou avaient des raisons de savoir que leurs subordonnés avaient commis ou s'apprêtaient à commettre les actes rapportés dans les paragraphes 67 à 70 et 73 à 77 et qu'ils n'ont pas pris les mesures raisonnables et nécessaires pour en empêcher la commission ou pour en punir les auteurs.

Alternativement

Troisième chef d'accusation : complicité dans le génocide

62. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu et Augustin Ndindiliyimana de complicité dans le génocide, sous l'empire de l'article 2 (3) (e) du Statut, en ce que par instructions, fourniture de moyens, aide ou assistance, les accusés, en connaissance de cause, ont apporté leur concours aux auteurs des crimes mentionnés dans les paragraphes 63 à 66, 71 et 72 ci-dessous :

Augustin BIZIMUNGU

63. Le ou vers le 7 avril 1994, après l'adresse que leur a faite Augustin Bizimungu au domicile de Joseph Nzirorera, rapportée dans le paragraphe 55 ci-dessus, les miliciens *Interahamwe* du MRND ont tué plus de 150 Tutsi dans le secteur de Rwankeri, à Ruhengeri, et ont participé le même jour, encadrés par des militaires en provenance des camps de Kanombet de Bigogwe, placés sous l'autorité de Augustin Bizimungu, à l'attaque qui fit plus de 200 morts - Tutsi - à la paroisse de Busogo.

64. Le ou vers le 8 avril 1994, Augustin Bizimungu est allé retrouver ce groupe de miliciens, en compagnie du sous-préfet Nzanana, et a demandé à ses membres de se tenir prêts à intervenir à la Cour d'appel de Ruhengeri où avaient trouvé refuge des Tutsi, promis, selon lui, à l'extermination.

65. Ces miliciens, avec d'autres, sont allés rejoindre Augustin Bizimungu le ou vers le 14 avril, peu avant 12 heures, devant l'édifice qui abritait les «réfugiés». Augustin Bizimungu leur a désigné du doigt le bâtiment, et s'est retiré après que la première grenade a été lancée. Plus de 100 personnes ont été tuées en ces lieux à la suite de cette attaque. Dans la soirée, Augustin Bizimungu a fait passer un communiqué à la radio indiquant que ces infortunés avaient péri sous les bombes du FPR.

66. On 16 June 1994, at a meeting held at EGENA, Augustin Bizimungu told militiamen to set up roadblocks to unmask the *Inkotanyi* who had hidden among Hutu fleeing the combat zones. As a result of those orders, a large number of Tutsi civilians and Hutu mistaken for Tutsi were killed in that area in the following hours and days.

67. On 7 April 1994, Lieutenant Mburuburengero of Mukamira camp, subordinate to Augustin Bizimungu, told a group of militiamen to exterminate the Tutsi in Ruhengeri. As a result of that order, and by dint of the weapons and fuel provided by the soldiers, 60 to 70 Tutsi were killed in the morning in the Byangabo neighbourhood, after their houses had been set aflame in order to flush them out.

68. Finally, from mid-April to late June 1994, while Augustin Bizimungu was exercising his functions as Chief of Staff of the Rwandan Army, soldiers under his command committed murders and caused serious bodily or mental harm to many Tutsi, with the intent to destroy, in whole or in part, the Tutsi ethnic group, at places in Kigali, Gitarama, Butare, Gisenyi, Cyangugu, Kibuye and Ruhengeri.

69. Such acts of violence were specifically observed at Charles Lwanga Church on 8 and 10 June 1994; at the Josephite Brothers compound, on 8 April and 7 June 1994; at ETO-Nyanza, on 11 April 1994; at the *Centre Hospitalier de Kigali*, during the months of April, May and June 1994; at the Kicukiro *conseiller*'s office, during the months of April and May 1994; at Kabgayi Primary School, from April to June 1994; a the Musambira *commune* office and Dispensary, in April and May 1994; at TRAFIPRO, in April and May 1994; in Butare, from 19 April to late June 1994; in Gisenyi, Kibuye and Ruhengeri, during the months of April, May and June 1994.

70. Although he knew or had reason to know – in view of the intelligence resources at his disposal – hat his subordinates were about to commit or had committed such acts of violence, Augustin Bizimungu did not take any of the necessary and reasonable steps to prevent the said crimes and he did not at any time use his statutory powers to punish the perpetrators or to institute proceedings against them.

Augustin NDINDILIYIMANA

71. On or about 15 April 1994, Augustin Ndindiliyimana went to Kabakubwa hill accompanied by Colonel Tharcisse Muvunyi and instructed the latter to make sure that all the Tutsi refugees who had gathered there were killed within 24 hours. As a result of those instructions, the following day, Joseph Kanyabashi, Colonels Muvunyi and Alphonse Nteziryayo mobilised a number of youths in Butare to go and fulfill that vile task. That day, between 3 p.m. and 6 p.m., several hundred Tutsi refugees were murdered on Kabakubwa hill.

72. Around late May or early June 1994, Augustin Ndindiliyimana, accompanied by Nzabirinda, also known as Biroto, and gendarmes, led six Tutsi civilians to the outskirts of Butare. When they got there, very near a bridge, he drew his gun and

66. Le 16 juin 1994, au cours d'une réunion tenue à EGENA, Augustin Bizimungu a demandé aux miliciens d'ériger des barrages en vue de débusquer les *Inkontanyi* qui s'étaient mêlés aux Hutu fuyant les zones de combat. En conséquence de ces directives, un grand nombre de civils Tutsi ainsi que des Hutu confondus avec des Tutsi ont été tués, dans les heures et jours qui ont suivi, dans la localité.

67. Le 7 avril 1994, le lieutenant Mburuburengero du camp de Mukamira, un subordonné de Augustin Bizimungu, a demandé à un groupe de miliciens d'exterminer les Tutsi de Ruhengeri. En conséquence de cet ordre, et grâce à l'aide en armes et en pétrole fournie par les militaires, entre 60 et 70 Tutsi ont été tués durant la matinée dans le quartier de Byangabo, après que leurs habitations ont été brûlées pour les en déloger.

68. Enfin, de la mi-avril à la fin juin 1994, alors qu'il exerçait les fonctions de chef d'état-major de l'armée rwandaise, des militaires qui étaient placés sous le commandement de Augustin Bizimungu ont commis des meurtres et porté des atteintes graves à l'intégrité physique ou mentale d'un nombre important de membres de la communauté Tutsi, dans l'intention de détruire, en tout ou en partie, ledit groupe ethnique et ce, dans les localités de Kigali, de Gitarama, de Butare, de Gisenyi, de Cyangugu, de Kibuye et de Ruhengeri.

69. Ces violences ont été particulièrement notées à l'église Charles Lwanga,, les 8 et 10 juin 1994; à la maison des Frères Joséphite, les 8 avril et 7 juin 1994; à l'ETO-Nyanza, le 11 avril 1994; au centre hospitalier de Kigali, durant les mois d'avril, de mai et de juin 1994; au bureau du conseiller de Kicukiro, durant les mois d'avril et de mai 1994; à l'école primaire de Kabgayi, d'avril à juin 1994; au bureau communal et au dispensaire de Musambira, en avril et mai 1994; à Trafipro, en avril et mai 1994; à Butare, du 19 avril à la fin juin 1994; à Gisenyi, à Kibuye et Ruhengeri, durant les mois d'avril, de mai et de juin 1994.

70. Alors qu'il savait ou avait des raisons de savoir – au vu des moyens de renseignements dont il disposait – que ses subordonnés s'apprêtaient à commettre ou avaient commis de telles violences, Augustin Bizimungu n'a pris aucune des mesures nécessaires et raisonnables pour empêcher que lesdits crimes ne soient commis et n'a usé à aucun moment de sonpouvoir réglementaire pour en punir les auteurs ou les traduire en justice.

Augustin NDINDILIYIMANA

71. Le ou vers le 15 avril 1994, Augustin Ndindiliyimana s'est rendu sur la colline Kabakubwa en compagnie du colonel Tharcise Muvunyi et a instruit ce dernier de faire en sorte que, dans les 24 heures, tous les réfugiés Tutsi qui s'y étaient rassemblés soient tués. En conséquence de ces instructions, dès le lendemain, Joseph Kanyabashi, les colonels Muvunyi et Alphonse Nteziryayo ont mobilisé une partie de la jeunesse de Butare pour aller exécuter cette immonde besogne. Entre 15 heures et 18 heures, ce jour là, plusieurs centaines de réfugiés Tutsi ont été tués sur la colline de Kabakubwa.

72. Vers la fin mai ou au début du mois de juin 1994, Augustin Ndindiliyimana accompagné de Nzabirinda alias Biroto et de gendarmes, a acheminé 6 civils Tutsi dans les faubourgs Butare. Parvenus en ces lieux, tout près d'un pont, il a tiré avec

shot and killed two of them – a woman and her baby – leaving his companions to kill the four others. Augustin Ndindiliyimaua later urged those present to treat all Tutsi in the same way so as to prevent them from giving their testimony to future investigators from the international community.

73. On 20, 21 and 22 April 1994, many massacres were committed in Nyaruhengeri commune while Augustin Ndindiliyimana was present there. Those massacres, which were orchestrated and supervised by gendarmes assigned to guard Augustin Ndindiliyimana's family; they provided weapons and fuel to the killers who caused the death of over a thousand people in Nyaruhengeri and its vicinity, particularly in Kansi Church where more than 10,000 Tutsi had sought refuge.

74. On or about 21 April 1994, gendarmes on duty at Augustin Ndindiliyimana's residence opposite Nyaruhengeri gave two grenades to an *Interahamwe* militiaman known as Kajuga Pierre and told him to use them to exterminate the Tutsi. The grenades were handed over quite openly, during the day, at Augustin Ndindiliyimana's residence, where his wife and children were living.

75. On or about 22 April 1994, Pierre Kajuga threw a grenade into the Nyaruhengeri *secteur* office where many Tutsi had sought refuge, blowing off both legs of Adolphe Karakesi and wounding many other refugees.

76. On or about 13 April 1994, gendarmes from the Nyamirambo unit, accompanied by militiamen, attacked Saint-André College, in Kigali, where hundreds of people, mainly Tutsi, had sought refuge between 7 and 8 April 1994. After checking their identity, the attackers selected all the Tutsi men and killed them outside the college. The said gendarmes were under Augustin Ndindiliyimana's command.

77. On or about 22 April 1994, a group of about 60 Tutsi was selected at the CELA, where they had sought refuge, and led to the Muhima *Gendarmerie* unit purportedly for questioning. In fact, the *gendarmes*, instead of questioning them, handed them over to *Interahamwe* militiamen who killed them on the road leading to the CND. Not more than five people survived that massacre. Those *gendarmes* were under Augustin Ndindiliyimana command.

Count 4 : Crimes Against Humanity (Murder)

78. The Prosecutor of the International Criminal Tribunal for Rwanda charges Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu with Murder, as a Crime against Humanity, an offence punishable under Article (3) (a) of the Statute, in that, in 1994, in Rwanda, Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu were responsible for several murders committed against Rwandan nationals, as part of widespread or systematic attacks against a civilian population, on national, political, ethnic, racial or religious grounds; in that also, at the same time and place, François-Xavier Nzuwonemeye and Innocent Sagahutu were responsible for the murder of ten UNAMIR peacekeeping troops, whose mandate did not include combat and who were,

son arme et tué 2 de ces civils –une femme et son bébé – laissant le soin à ses compagnons d'en faire autant avec les 4 autres. Augustin Ndindiliyimana devait par la suite exhorter l'assistance à traiter de la sorte tous les Tutsi, pour éviter qu'ils ne livrent leurs témoignages aux futurs enquêteurs de la communauté internationale.

73. Les 20, 21 et 22 avril 1994, plusieurs massacres ont eu lieu dans la commune de Nyaruhengeri, à un moment où Augustin Ndindiliyimana était présent dans la localité. Ces massacres, orchestrés et dirigés par les gendarmes préposés à la garde de la famille de Augustin Ndindiliyimana, qui ont fourni armes et combustible aux tueurs, ont causé la mort de plus d'un millier de personnes à Nyaruhengeri et dans ses environs, particulièrement à l'église de Kansi où s'étaient réfugiés plus de 10.000 Tutsi.

74. Le ou vers le 21 avril 1994, des gendarmes en poste au domicile de Augustin Ndindiliyimana, sis à Nyaruhengeri, ont remis à un milicien *Interahamwe* répondant au nom de Kajugu Pierre deus grenades et lui ont demandé d'en faire usage pour aider à exterminer les Tutsi. Cette remis s'est faite de jour, sans dissimulation aucune, au domicile de Augustin Ndindiliyimana où résidaient son épouse et ses enfants.

75. Le 22 avril 1994 ou vers cette date, Pierre Kajugu a balancé une grenade dans le bureau de secteur de Nyaruhengeri où avaient trouvé refuge plusieurs Tutsi, sectionnant les deux jambes de Karakesi Adolphe et blessant plusieurs autres réfugiés.

76. Le ou vers le 13 avril 1994, des gendarmes de la brigade territoriale de Nyamirambo, accompagnés par des milicien, ont attaqué le collège Saint-André de Kigali où des centaines de personnes, principalement des Tutsi, avaient trouvé refuge entre le 7 et le 8 avril 1994. Après avoir vérifié leur identité, les assaillants ont sélectionné tous les hommes Tutsi et les ont tués à l'extérieur du Collège. Ces gendarmes étaient placés sous le commandement de Augustin Ndindiliyimana.

77. Le ou vers le 22 avril 1994, un groupe d'une soixantaine de Tutsi a été sélectionné au CELA, où ces personnes avaient trouvé refuge, et conduit à la brigade territoriale de gendarmerie de Muhima pour un soi-disant interrogatoire. En fait d'interrogatoire, les gendarmes les ont livrés à des miliciens *Interahamwe* qui les ont tués sur la route qui mène au CND. Il n'y eut pas plus de 5 survivants à cette tuerie. Ces gendarmes relevaient du commandement de Augustin Ndindiliyimana.

Quatrième chef d'accusation :
crime contre l'humanité (assassinat)

78. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu d'assassinat en tant que crime contre l'humanité, sous l'empire de l'article 3 (a) du Statut, en ce que courant 1994, au Rwanda, Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu ont été responsables de plusieurs assassinats dont ont été victimes des ressortissants rwandais, dans le cadre d'attaques généralisées ou systématiques dirigées contre une population civile, en raison de son appartenance nationale, religieuse, politique, raciale ou ethnique; en ce qu'également, dans les mêmes circonstances de temps et de lieu, François-Xavier Nzuwonemeye et Innocent Sagahutu ont été responsables de l'assassinat de 10 casques bleus de la MINUAR, non investis d'une mission de combat et désarmés de

moreover, disarmed, during the same attacks led against the victims on national, racial or ethnic grounds;

Pursuant to Article 6 (1) of the Statute : by their individual acts, the Accused planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the crimes referred to in paragraphs 79, 80 and 81, 92 and 93, 103 and 107 below; and

Pursuant to Article 6 (3) of the Statute : because the Accused knew or had reason to know that soldiers under their command or civilians obeying their orders had committed or were about to commit the crimes referred to in paragraphs 82 to 91, 94 to 102, 103 to 108 below, and did not take the reasonable and necessary measures to prevent such crimes or to punish the perpetrators thereof.

Augustin BIZIMUNGU

79. On or about 7 April 1994, Augustin Bizimungu, Commander of Military Operations in Ruhengeri *préfecture*, was informed that massacres of the civilian population had begun and that several civilians had sought refuge at Ruhengeri military camp. He ordered his subordinates to chase the civilians out of the camp and prevent them in the future from coming in. As he left the camp, two civilians begged him for his assistance; he ordered that they be pushed away and armed civilians executed them in his presence. Finally, as he was continuing on his way, that same group of armed civilians set upon a group of women and children and massacred them in front of Augustin Bizimungu, who took no action whatsoever.

80. On or about 7 April 1994, in a complex near Rwankeri, Augustin Bizimungu came across militiamen busy killing refugees and he vigorously encouraged them. During that attack, the militiamen had found a young women in her twenties, hidden under the roof of a building, Augustin Bizimungu asked that she be burnt alive and watched the unbearable scene. Augustin Bizimungu then rewarded the militiamen with money for what they had done.

81. Between 11 and 14 April 1994, Augustin Bizimungu went to a roadblock located near the Ruhengeri Agronomic centre with four bound Tutsi in the rear cabin of his vehicle that the soldiers of his escort were stamping on without restraint. Augustin Bizimungu asked the militiamen manning the roadblock to do their duty by killing the four Tutsi. The militiamen complied.

82. As of 7 April 1994, in Kigali, thousands of civilians had sought refuge at the *Ecole Technique Officielle* (ETO) in order to place themselves under the protection of the UNAMIR Belgian contingent. On 11 April 1994, immediately after the Belgian contingent withdrew, soldiers from the Presidential Guard and the Para-commando battalion, assisted by militiamen, lead the refugees in the direction of Nyanza on a two-kilometre forced match, after which they massacred several thousands of civilians : men, women, the elderly and children.

surcroît, dans le cadre des mêmes attaques, conduites en raison de l'appartenance nationale, raciale ou ethnique des victimes;

En vertu de l'article 6 (1) du Statut : en ce que de leur fait personnel, les accusés ont planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter les crimes mentionnés dans les paragraphes 79, 80 et 81, 92 et 93, 103 à 107 ci-dessous; et

En vertu de l'article 6 (3) du Statut : du fait que les accusés savaient ou avaient des raisons de savoir que des militaires placés sous leur commandement ou des civils obéissant à leurs ordres avaient commis ou s'apprêtaient à commettre les crimes rapportés dans les paragraphes 82 à 91, 94 à 102, 103 à 108 ci-dessous et qu'ils n'ont pas pris les mesures raisonnables et nécessaires pour en empêcher la commission ou pour en punir les auteurs.

Augustin BIZIMUNGU

79. Le ou vers le 7 avril 1994, Augustin Bizimungu, Commandant des opérations militaires de la préfecture de Ruhengeri, a été informé que les massacres contre la population civile avaient commencé et que plusieurs civils avaient trouvé refuge dans le camp militaire de Ruhengeri. Il a ordonné à ses subordonnés de chasser les civils du camp et de les empêcher à l'avenir d'y pénétrer. A sa sortie du camp, deux civils l'ont supplié de leur venir en aide; il a ordonné que ces personnes soient repoussées et elles ont été exécutées, en sa présence, par des civils armés. Enfin, alors qu'il poursuivait sa route, un groupe de femmes et d'enfants a été pris à partie et massacré par ces mêmes civils armés, devant Augustin Bizimungu, qui s'est gardé de toute réaction.

80. Le ou vers le 7 avril 1994, à Ruhengeri, dans un complexe sis à Rwankeri, Augustin Bizimungu a trouvé des miliciens occupés à tuer des refugiés et leur a prodigué des encouragements. Durant cette attaque, les miliciens ayant découvert une jeune fille, âgée d'une vingtaine d'années, cachée sous le toit d'un bâtiment, Augustin Bizimungu a demandé qu'elle soit brûlée vive et a assisté à l'insoutenable scène. Augustin Bizimungu a donné par la suite une gratification en argent aux miliciens pour les performances qu'ils venaient de réaliser.

81. Entre le 11 et le 14 avril 1994, Augustin Bizimungu s'est rendu à une barrière située à côté du centre agronomique de Ruhengeri avec, à bord de son véhicule, 4 Tutsi ligotés dans la cabine arrière que les militaires de son escorte piétinaient sans ménagement. Augustin Bizimungu a demandé aux miliciens postés à ce barrage de s'acquitter de leur devoir en tuant les 4 Tutsi. Ces miliciens se sont exécutés.

82. A partir du 7 avril 1994, à Kigali, des milliers de civils ont trouvé refuge à l'Ecole Technique Officielle (ETO) en vue de se placer sous la protection du contingent belge de la MINUAR. Le 11 avril 1994, immédiatement après le retrait du contingent belge, des militaires de la Garde présidentielle et du bataillon para-commando, aidés par des miliciens, ont conduit ces réfugiés en direction de Nyanza où, après une marche forcée de près de deux kilomètres, ils ont massacré plusieurs milliers de civils : hommes, femmes, vieux et enfants.

83. Right from the beginning of the massacres, the *Centre hospitalier de Kigali* (CHK) took many injured Tutsi from the various districts of the city. Soldiers from the Reconnaissance battalion guarded the hospital. On several occasions, those soldiers selected Tutsi patients and killed them on the spot. Moreover, a list of Tutsi staff members was drawn up and several of them were killed.

84. On 10 June 1994, at the Charles Lwanga church in Kigali, soldiers from the Rwandan Army and militiamen forced the refugees hiding there into trucks. They took the refugees in the direction of Rwampara and executed them along the way.

85. On or about 7 June 1994, soldiers from the Rwandan Army surrounded the house of the Josephite brothers in Kigali, they made those who were inside come out and shot them.

86. Between April and June 1994, several persons sought refuge at Kabgayi primary school in Gitarama *préfecture*. Throughout this whole period, soldiers from the Rwandan Army and *Interahamwe* abducted and killed young boys who had sought refuge at that location.

87. In April and May 1994, a large number of civilians sought refuge at Musambira *commune* office and dispensary, in Gitarama *préfecture*. During that period, soldiers from the Rwandan Army and militiamen abducted and killed several Tutsi men and young boys who had sought refuge at that location.

88. In April and May 1994, thousands of civilians gathered in the TRAFIPRO compound in Gitarama in order to protect themselves from ethnic violence that was rampant in the region. Throughout that period, soldiers from the Rwandan Army abducted and killed several Tutsi men and young boys who had sought refuge at that location.

89. In Butare, starting on 19 April 1994, soldiers from the Rwandan Army and *lnterahamwe* abducted and killed many civilians from the *préfecture* office, the Episcopal church of Rwanda (EER), Gishamvu church and Nyumba parish.

90. In Gisenyi, on 7 April 1994, Anatole Nsengiyumva, the military area commander, ordered certain political leaders, local authorities and militiamen to assemble at the military camp. Anatole Nsengiyumva addressed the gathering, ordering all present to kill all RPF accomplices and all Tutsi, after which Anatole Nsengiyumva ordered his subordinates to distribute rifles and grenades to the militiamen that were present. Thus, between April and July 1994, militiamen acting under the orders of Anatole Nsengiyumva tracked down, abducted and killed several members of the Tutsi and moderate Hutu population of Gisenyi.

91. In Cyangugu *préfecture*, in the course of April and May 1994, members of the Tutsi population who were being hunted down in their *communes* sought refuge at Kamarampaka stadium, as well as in the Nyarushishi camp compound. During this period, soldiers from the Rwandan Army and Interahamwe abducted and killed many of those civilian refugees.

83. Dès le début des massacres, le Centre hospitalier de Kigali (CHK) a accueilli de nombreux Tutsi blessés venant des différents quartiers de la ville. Des soldats du bataillon de reconnaissance gardaient l'hôpital. A plusieurs reprises, ces soldats ont sélectionné des patients Tutsi et les ont tués sur place. En outre, une liste des membres du personnel d'origine Tutsi a été dressée et plusieurs d'entre eux ont été tués.

84. Le 10 juin 1994, à l'église Charles Lwanga de Kigali des militaires de l'armée rwandaise et des miliciens ont forcé les réfugiés qui s'y cachaient à monter à bord de camions et les ont conduits en direction du site de Rwampara; ils les ont exécutés en chemin.

85. Le ou vers le 7 juin 1994, des militaires de l'armée rwandaise ont encerclé la maison des les personnes qui s'y trouvaient et les ont fusillées.

86. Entre avril et juin 1994, plusieurs personnes ont trouvé refuge à l'école primaire de Kabgayi, dans la préfecture de Gitarama. Durant toute cette période des militaires de l'armée rwandaise et des *Interahamwe* ont enlevé et tué des jeunes garçons réfugiés à cet endroit.

87. En avril et mai 1994, un nombre important de civils ont trouvé refuge au bureau communal et au dispensaire de Musambira, dans la préfecture de Gitarama. Durant cette période, des militaires de l'armée rwandaise et des miliciens ont enlevé et tué plusieurs hommes et jeunes garçons Tutsi qui étaient réfugiés à cet endroit.

88. En avril et mai 1994, des milliers de civils se sont rassemblés dans l'enceinte de TRAFIPRO, à Gitarama, en vue de se prémunir contre la violence ethnique qui sévissait dans la région. Durant toute cette période, des militaires de l'armée rwandaise ont enlevé et tué plusieurs hommes et jeunes garçons Tutsi qui s'étaient réfugiés à cet endroit.

89. A Butare, à partir du 19 avril 1994, au bureau préfectoral, à l'église épiscopale du Rwanda (EER), à l'église Gishamvu et à la paroisse de Nyumba, des militaires de l'armée rwandaise et des *Interahamwe* ont enlevé et tué plusieurs civils.

90. A Gisenyi, le 7 avril 1994, le commandant de la zone militaire, Anatole Nsengiyumva, a ordonné le rassemblement au camp militaire de certains dirigeants politiques, des autorités locales et des miliciens. Lors de ce rassemblement, Anatole Nsengiyumva a donné l'ordre aux participants de tuer tous les complices du FPR et tous les Tutsi. A la fin de ce rassemblement, Anatole Nsengiyumva a ordonné à ses subordonnés de distribuer des fusils et des grenades aux miliciens présents. Ainsi, entre avril et juillet 1994, des miliciens qui agissaient sous les ordres de Anatole Nsengiyumva ont traqué, enlevé et tué plusieurs membres de la population Tutsi et Hutu modérée à Gisenyi.

91. Dans la préfecture de Cyangugu, courant avril et mai 1994, des membres de la population Tutsi qui étaient traqués dans leurs communes unes ont trouvé refuge dans le stade Kamarampaka ainsi que dans l'enceinte du camp de Nyarushishi. Durant cette période, des militaires de l'armée rwandaise et des *Interahamwe* ont enlevé et tué plusieurs de ces réfugiés civils.

Augustin NDINDILIYIMANA

92. Towards the end of April 1994, Augustin Ndindiliyimana, accompanied by armed back-up troops, went to a compound in Butare where civilian Tutsis had sought refuge. One Nzabirinda was amongst those accompanying him and he called out the names of 12 ill-fated persons who were immediately led to the banks of the Cyamwakiza River and killed. On this occasion, Augustin Ndindiliyimana killed four of the persons thus abducted with an assault rifle.

93. On 5 May 1994, in Nyaruhengeri, a group of *Interahamwe* including Pierre Kajuga went to the residence of Ignace Habimana and killed the latter, as well as Célestin Munyanshagore, following orders the murderers claimed to have received from Augustin Ndindiliyimana.

94. On or about 7 April 1994, in Kigali, gendarmes under the command of Augustin Ndindiliyimana, accompanied by *Interahamwe*, went to Kabeza where they killed Gerard Kalinditwari and the members of his family composed of seven to eight persons. Those persons were killed because they were Tutsi.

95. On or about 8 April 1994, a group of gendarmes under the command of Augustin Ndindiliyimana, led by Sergeant Major Come, went to Kabeza led by an *Interahamwe* militiaman and massacred a Rwandan civilian answering to the name Kanamugire and all of the members of his family.

96. In the month of April 1994, militiamen erected a roadblock near Kacyiru Camp, the headquarters of the *Gendarmerie*. At the roadblock, which was supervised by two NCO *gendarmes*, the militiamen killed several Tutsi as well as some Hutu who had come to seek refuge at the camp and whom the gendarmes had handed over to them.

97. Towards the end of April, on the orders of Appollinaire Biganiro, commander of the Gisenyi *gendarmerie* unit, and a subordinate of Augustin Ndindiliyimana, Omar Serushago, Bernard Munyagishari, Thomas Mugiraneza, one Damas and others, went to Rwandex, a company located in Gisenyi, to abduct and kill the Tutsi who had sought refuge there. When they arrived, they beat to death a man of Tutsi origin who attempted to dissuade them from so doing. Subsequently, they abducted four persons of Tutsi origin, identified by *gendarmes* present at that location, and took them to the cemetery where they were executed.

98. Still towards the end of April, on the orders of the same Apollinaire Biganiro, Omar Serushago, Thomas Mugiraneza, Bernard Munyagishari, Hassan Gitoki, Damas and Michel Abuba went to the military camp to collect several Tutsi civilians detained at the *gendarmerie* unit's gaol. With the assistance of the guards who were present at that location and a few *Interahamwe*, they led some ten Tutsi to the place called "commune rouge" and executed them there.

99. In the last few days of April 1994, Antoine Bisonimbwa, Augustin Ndindiliyimana's uncle, was informed that the people of Nyaruhengeri refused to kill Gahoki, a Tutsi tradesman. He went to the residence of Augustin Ndindiliyimana, to collect three gendarmes who went to kill the tradesman. After killing him, the gendarmes seized the motorcycle belonging to the deceased and took it to the residence of Augustin Ndindiliyimana to be used in their daily movements.

Augustin NDINDILIYIMANA

92. Vers la fin avril 1994, Augustin Ndindiliyimana, accompagné par des supplétifs armés, s'est rendu dans une concession de Butare où avaient trouvé refuge des civils Tutsi. Le dénommé Nzabirinda qui faisait partie de ses accompagnateurs y a fait l'appel de 12 noms d'infortunés qui ont été conduits, séance tenante, vers les abords de la rivière Cyamwakiza où ils ont été tués. Augustin Ndindiliyimana a abattu en la circonstance quatre des personnes enlevées, à l'aide d'un fusil d'assaut.

93. Le 5 mai 1994, à Nyaruhengeri, un groupe d'*Interahamwe* parmi lesquels se trouvait Kajugu Pierre s'est rendu au domicile de Ignace Habimana et y a tué ce dernier ainsi que Célestin Munyanshagore, suivant des ordres que les assassins ont prétendu avoir reçus de Augustin bldindiliyimana.

94. Le ou vers le 7 avril 1994, à Kigali, des gendarmes placés sous le commandement de Augustin Ndindiliyimana, accompagnés par des *Interahamwe*, se sont rendus à Kabeza où ils ont tué Gérard Kalinditwari et les membres de sa famille composée de 7 à 8 personnes. Ces personnes ont été tuées parce qu'elles étaient Tutsi.

95. Le ou vers le 8 avril 1994, un groupe de gendarmes placés sous le commandement de Augustin Ndindiliyimana, dirigé par l'adjudant Come, s'est rendu à Kabeza sous la conduite d'un milicien *Interahamwe* et y a massacré le civil rwandais répondant au nom de Kanamugire avec l'ensemble des membres de sa famille.

96. Courant avril 1994, des miliciens ont érigé une barrière à proximité du Camp-Kacyiru, quartier général de la gendarmerie. A cette barrière, du reste supervisée par deux sous-officiers gendarmes, les miliciens ont tué plusieurs Tutsi ainsi que des Hutu venus chercher refuge dans le camp, que les gendarmes leur ont livrés.

97. Vers la fin du mois d'avril 1994, sur ordre d'Apollinaire Biganiro, commandant du groupement de gendarmerie de Gisenyi, un subordonné d'Augustin Ndindiliyimana, Omar Serushago, Bernard Munyagishari, Thomas Mugiraneza, le dénommé Damas et d' autres, se sont rendus à la compagnie Rwandex située à Gisenyi, pour enlever et tuer les Tutsi qui s'y étaient réfugiés. A leur arrivée, ils ont battu à mort un homme d'origine Tutsi qui tentait de les en empêcher. Par la suite, ils ont enlevé quatre personnes d'origine Tutsi, identifiées par les gendarmes présents sur les lieux, et les ont conduites au cimetière où elles ont été exécutées.

98. Vers la fin du mois d'avril toujours, sur ordre du même Apollinaire Biganiro, Omar Serushago, Thomas Mugiraneza, Bernard Munyagishari, Hassan Gitoki, Damas et Michel Abuba se sont rendus au camp militaire pour chercher plusieurs civils Tutsi détenus au cachot de la brigade de gendarmerie. Avec l'aide des gardes présents sur les lieux et de quelques *Interahamwe*, ils ont conduit une dizaine de Tutsi au lieu dit «commune rouge» et les ont exécutés.

99. Dans les derniers jours d'avril 1994, Bisonimbwa Antoine, oncle de Augustin Ndindiliyimana, a été instruit du refus de la population de Nyaruhengeri de tuer le commerçant Tutsi Gashoki. Il s'est rendu au domicile de Augustin Ndindiliyimana, pour y quérir 3 gendarmes qui sont allés tuer le commerçant. Ces gendarmes se sont emparés, après le meurtre, de la moto du défunt qu'ils ont emportée au domicile de Augustin Ndindiliyimana pour s'en servir dans leurs déplacements quotidiens.

100. In Kigali, in early May 1994, gendarmes under the command of Augustin Ndindiliyimana killed Aloys Niyoyita, a Tutsi civilian, member of the Liberal Party.

101. In Kigali, in early May 1994, gendarmes under the command of Augustin Ndindiliyimana killed Phocus Kananeri, a Tutsi civilian, inside his house.

102. In Kigali, in April 1994, at Nyamirambo, gendarmes under the command of Augustin Ndindiliyimana occupied one of the many roadblocks erected in that *secteur.* They would check the ethnic origin of the passers-by at the roadblock by examining their identity cards. Anyone who was of Tutsi origin or was suspected of belonging to that ethnic group was summarily executed. The executioners would then invariably accuse their victims of being "*Inkotanyi* accomplices".

François-Xavier NZUWONEMEYE and Innocent SAGAHUTU

103. During the morning of 7 April 1994, elements of the Reconnaissance battalion under the command of François-Xavier Nzuwonemeye and led by Innocent Sagahutu, acting in concert with members of the Presidential Guard and *Interahamwe* militiamen hunted down, tortured and killed Prime Minister Agathe Uwilingiyimana. They also killed three members of the Prime Minister's entourage, including her husband.

104. Shortly before the Prime Minister was murdered Captain Innocent Sagahutu informed his hierarchical supervisor, François-Xavier Nzuwonemeye, by radio that "*tous avaient été déjà tués à l'exception de Agathe Uwilingiyimana et de Faustin Twagiramungu*" [everyone had already been killed except Agathe Uwilingiyimana and Faustin Twagiramungu].

105. During the morning of 7 April 1994, ten UNAMIR Belgian peacekeepers were arrested at the residence of Agathe Uwilingiyimana by soldiers from the Reconnaissance battalion under the command of François-Xavier Nzuwonemeye and led by Innocent Sagahutu, assisted by their colleagues from the Presidential Guard. After being disarmed, the Belgian peacekeepers were led to Kigali Camp where they were horribly killed and mutilated by an unleashed horde composed of soldiers from the Reconnaissance Battalion, the Presidential Guard and the Music Company.

106. During the whole of that morning of 7 April, Sergent Major Bizimungu who led the Reconnaissance battalion unit that had participated in the arrest of the peacekeepers had remained in radio contact with Captain Innocent Sagahutu.

107. Thus, when at the beginning of the morning of 7 April, the NCO asked Captain Innocent Sagahutu what he should do if the Belgian soldiers were to resist the arrest of the Prime Minister, he was ordered to use his armoured vehicles if that were to be the case. Later that same day when Sergeant Major Bizimungu asked Innocent Sagahutu if Prime Minister Agathe Uwilingiyimana should be taken to Kigali Camp he answered scathingly "*pour quoi faire*?" [what for?]. Thereupon Prime Minister Agathe Uwilingiyimana was killed.

100. A Kigali, au début du mois de mai 1994, des gendarmes placés sous le commandement de Augustin Ndindiliyimana ont tué Aloys Niyoyita, un civil Tutsi, membre du parti libéral.

101. A Kigali, au début du mois de mai 1994, des gendarmes placés sous le commandement de Augustin Ndindiliyimana ont tué le civil Tutsi Kananeri Phocus à l'intérieur de son domicile.

102. A Kigali en avril 1994, dans le quartier de Nyamirambo, des gendarmes placés sous le commandement de Augustin Ndindiliyimana ont occupé l'un des nombreux barrages érigés dans le secteur. A ce barrage, ils contrôlaient, sur présentation d'une pièce d'identité, l'origine ethnique des passants. Quiconque était d'origine Tutsi, ou était soupçonné d'appartenance à cette ethnie, y était sommairement exécuté. Les bourreaux taxaient alors invariablement leurs victimes de «complices de *Inkontanyi*».

François-Xavier NZUWONEMEYE et Innocent SAGAHUTU

103. Dans la matinée du 7 avril 1994, des éléments du bataillon de reconnaissance, placés sous le commandement de François-Xavier Nzuwonemeye et dirigés par Innocent Sagahutu, agissant de concert avec des membres de la garde présidentielle et des miliciens *Interahamwe*, ont traqué, torturé et tué le Premier ministre Agathe Uwilingiyimana. Trois membres de l'entourage du Premier ministre, dont son époux, furent également tués par ces assaillants.

104. Peu de temps avant que n'intervienne le meurtre du Premier ministre, dans une communication radio établie avec son supérieur hiérarchique, François-Xavier Nzuwonemeye, le Capitaine Innocent Sagahutu lui a appris que «tous avaient été déjà tués à l'exception de Agathe Uwilingiyimana et de Faustin Twagiramungu».

105. Dans la matinée du 7 avril 1994, 10 casques bleus belges de la MINUAR ont été arrêtés au domicile de Agathe Uwilingiyimana par des militaires du bataillon de reconnaissance, placés sous le commandement de François-Xavier Nzuwonemeye et dirigés par le Capitaine Innocent Sagahutu, aidés par leur homologues de la garde présidentielle. Les casques bleus belges, après avoir été désarmés, ont été conduits au Camp-Kigali où ils ont été affreusement tués et mutilés par une horde déchaînée composée par des soldats du bataillon de reconnaissance, de la garde présidentielle et de la Compagnie de musique.

106. Durant toute cette matinée du 7 avril 1994, l'adjudant Bizimungu qui dirigeait l'unité du bataillon de reconnaissance qui avait participé à l'arrestation des casques bleus était resté en contact radio avec le capitaine Innocent Sagahutu.

107. Aussi, lorsqu'en début de matinée du 7 avril, ce sous-officier a demandé au capitaine Innocent Sagahutu la conduite à tenir en cas de résistance des soldats belges à l'arrestation du Premier ministre, celui-ci lui a ordonné d'user de ses blindés en une telle occurrence. Innocent Sagahutu a fourni à l'adjudant Bizimungu une réponse de la même veine, plus tard dans la journée, lorsqu'il s'est agi de savoir si, après son arrestation, le Premier ministre Agathe Uwilingiyimana devait être conduite au Camp-Kigali. Il lui a répondu, en effet, par un cinglant «pour quoi faire?». Le Premier ministre Agathe Uwilingiyimana a été ruée aussitôt après.

108. In Kigali, as soon as the massacres began in April 1994, the *Centre hospitalier de Kigali* (CHK) took in many Tutsi who were injured or simply refugees from the various districts of the city. Soldiers from the Reconnaissance battalion under the command of François-Xavier Nzuwonemeye and belonging to the A squad led by Innocent Sagahutu guarded the hospital. On several occasions, those soldiers selected patients or refugees and killed them there. Moreover, a list of Tutsi staff members was drawn up and several of them were killed

Count 5 : Crimes Against Humanity (Extermination)

109. The Prosecutor of the International Criminal Tribunal for Rwanda charges Augustin Bizimungu and Augustin Ndindiliyimana with Extermination, as a Crime against Humanity, an offence punishable under Article (3) (b) of the Statute, in that, in 1994, in Rwanda, Augustin Bizimungu and Augustin Ndindiliyimana were responsible for murders committed on a large scale against the Rwandan civilian population, as part of widespread or systematic attacks, on ethnic, facial or political grounds ;

Pursuant to Article 6 (1) of the Statute : the Accused Augustin Bizimungu by his acts planned, incited to commit, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the crimes referred to in paragraph 79 above ; and

Pursuant to Article 6 (3) of the Stature : in that the Accused Augustin Bizimungu and Augustin Ndindiliyimana knew or had reason to know that soldiers under their command or militiamen obeying their orders had committed or were about to commit the crimes referred to in the paragraphs 82, 84, 85, 89, 90, 73 and 102 above and did not take reasonable and necessary measures to prevent such crimes or to punish the perpetrators thereof.

Cont 6 : Crimes Against Humanity (Rape)

110. The Prosecutor of the International Criminal Tribunal for Rwanda charges Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu with Rape, as a Crime against Humanity, an offence punishable under Article (3) (g) of the Statute, in that, in 1994, in Rwanda, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu were responsible for several rapes committed against Tutsi civilians by soldiers under their command or by civilians over whom they had authority, as part of widespread or systematic attacks against a civilian population, on national, racial, ethnic, or political grounds, as follows :

Pursuant to Article 6 (3) of the Statute : in that the Accused knew or had reason to know that their subordinates had committed or were about to commit the rapes referred to in paragraphs 111 to 117, in respect of Augustin Bizimungu, in paragraph 112 in respect of Innocent Sagahutu and François-Xavier Nzuwonemeye, and did not

108. A Kigali, dès le début des massacres, en avril 1994, le Centre hospitalier de Kigali (CHK) accueilli de nombreux civils Tutsi, blessés ou simplement réfugiés, qui venaient des différents quartiers de la ville. Des soldats du bataillon de reconnaissance, placés sous le commandement de François-Xavier Nzuwonemeye et appartenant à l'escadron A dirigé par Innocent Sagahutu, gardaient l'hôpital. A plusieurs reprises, ces soldats ont sélectionné des patients ou des réfugiés et les ont tués sur place. En outre, une liste des membres du personnel d'origine Tutsi a été dressée et plusieurs d'entre eux ont été tués.

Cinquième chef d'accusation :
crime contre l'humanité (extermination)

109. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu et Augustin Ndindiliyimana d'extermination en tant que crime contre l'humanité, sous l'empire de l'article 3 (b) du Statut, en ce que courant 1994, au Rwanda, Augustin Bizimungu et Augustin Ndindiliyimana ont été responsables d'assassinats commis à grande échelle sur la population civile du Rwanda, dans le cadre d'attaques généralisées ou systématiques, initiées en raison de l'appartenance ethnique, raciale ou politique des victimes ;

En vertu de l'article 6 (1) du Statut : en ce que l'accusé Augustin Bizimungu, par ses actes positifs, a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter les crimes rapportés dans le paragraphe 79 ci-dessus ; et

En vertu de l'article 6 (3) du Statut : du fait que les accusés Augustin Bizimungu et Augustin Ndindiliyimana savaient ou avaient des raisons de savoir que des militaires relevant de leur commandement ou des miliciens sur qui ils avaient autorité avaient commis ou s'apprêtaient à commettre les crimes rapportés dans les paragraphes 82, 84, 85, 89, 90, 73 et 102 ci-dessus et qu'ils n'ont pas pris les mesures raisonnables et nécessaires pour en empêcher la commission ou pour en punir les auteurs.

Sixième chef d'accusation : crime contre l'humanité (viol)

110. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu, François-Xavier Nzuwonemeye et Innocent Sagahutu de viol en tant que crime contre l'humanité, sous l'empire de l'article 3 (g) du Statut, en ce que courant 1994, au Rwanda, Augustin Bizimungu, François-Xavier Nzuwonemeye et Innocent Sagahutu ont été responsables de plusieurs viols commis sur des civiles Tutsi par des militaires placés sous leur commandement ou par des civils sur qui ils exerçaient une autorité, dans le cadre d'attaques généralisées ou systématiques dirigées contre une population civile, en raison de son appartenance nationale, raciale, ethnique ou politique, comme suit :

En vertu de l'article 6 (3) du Statut : du fait que les accusés savaient ou avaient des raisons de savoir que leurs subordonnés avaient commis ou s'apprêtaient à commettre les viols rapportés dans les paragraphes 111 à 117 pour Augustin Bizimungu, dans le paragraphe 112 pour Innocent Sagahutu et François-Xavier Nzuwonemeye, et

take reasonable and necessary measures to prevent such crimes or to punish the perpetrators thereof.

111. In April and May 1994, soldiers from the Rwandan Army went daily to the office of the *conseiller* of Kicukiro in Kigali, to abduct Tutsi women and young girls whom they raped in the vicinity of the office.

112. During the months of April, May and June 1994, soldiers from the A squad of the Reconnaissance battalion, led by Innocent Sagahutu and under the command of Major François-Xavier Nzuwonumeye, who guarded the *Centre hospitalier de KigaIi*, and their *Interahamwe* accomplices abducted several Tutsi women from the hospital who had come to seek treatment or simply to seek refuge; they raped them or mistreated them. Those rapes often took place inside the kiosks at the entrance to the hospital.

113. Between April and June 1994, several persons sought refuge at Kabgayi primary school in Gitarama *préfecture*. Throughout that period, soldiers from the Rwandan Army and *Interahamwe* militiamen selected and abducted Tutsi women and young girls that they took to the rooms reserved for injured soldiers or in nearby places and woods where they raped them.

114. In April and May 1994, at the Musambira *commune* office and dispensary, in Gitarama *préfecture*, soldiers from the Rwandan Army and militiamen frequently abducted Tutsi women and young girls to take them to nearby places and woods where they raped them. Those rapes were often accompanied by humiliating and degrading treatment.

115. In April and May 1994, at the Trafipro centre in Gitarama, soldiers from the Rwandan Army and militiamen abducted Tutsi women that they led to neighbouring places where they raped them. Those rapes were often accompanied by humiliating and degrading treatment.

116. In Butare, starting on 19 April 1994, soldiers from the Rwandan Army and *Interahamwe* militiamen went on a regular basis to the *préfecture* office, to the Episcopal church of Rwanda (EER), to Gishamvu church and Nyumba parish to abduct the female refugees and rape them. Those rapes were often accompanied by humiliating and degrading treatment.

117. In Cyangugu, during the months of April and May 1994, soldiers from the Rwandan Army and *Interahamwe* regularly abducted Tutsi refugee women at Kamarampaka stadium and raped them and assaulted them morally.

Count 7 : Violation of Article 3 common to the Geneva Conventions and Additional Protocol II (Murder)

118. The Prosecutor of the International Criminal Tribunal for Rwanda charges Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu with Murder, as a violation of Article 3 common to the Geneva conventions and Additional Protocol II, an offence punishable under Article (4) (a) of the Statute, in that, in course of 1994 in Rwanda, soldiers under their command or civilians over which they had authority committed, in the context of a non-inter-

qu'ils n'ont pas pris les mesures raisonnables et nécessaires pour en empêcher la commission ou pour en punir les auteurs.

111. En avril et mai 1994, des militaires de l'armée rwandaise se sont rendus quotidiennement au bureau du conseiller de Kikuciro, à Kigali, pour y enlever des femmes et des jeunes filles Tutsi qu'ils ont violées dans des endroits attenants au bureau.

112. Durant les mois d'avril, de mai et de juin 1994, des soldats de l'escadron A du bataillon de reconnaissance, dirigés par Innocent Sagahutu et placés sous le commandement du Major François-Xavier Nzuwonemeye, qui gardaient le centre hospitalier de Kigali et leurs acolytes *Interahamwe*, ont enlevé à l'hôpital plusieurs femmes Tutsi qui y étaient venues pour recevoir des soins ou simplement pour s'y réfugier, et les ont violées ou leur ont fait subir de mauvais traitements. Ces viols avaient souvent lieu à l'intérieur des kiosques disposés à l'entrée de l'hôpital.

113. Entre avril et juin 1994, plusieurs personnes ont trouvé refuge à l'école primaire de Kabgayi, dans la préfecture de Gitarama. Durant toute cette période, des militaires de l'armée rwandaise et des miliciens *Interahamwe* ont sélectionné et enlevé des femmes et des jeunes filles Tutsi qu'ils ont conduites dans les appartements réservés aux militaires blessés ou dans des endroits et forêts avoisinants, pour les y violer.

114. En avril et mai 1994, au bureau communal et au dispensaire de Musambira, dans la préfecture de Gitarama, des militaires de l'armée rwandaise et des miliciens ont fréquemment enlevé des femmes et des jeunes filles Tutsi pour les conduire dans des endroits et forêts avoisinants et les y violer. Ces viols ont été souvent accompagnés de traitements humiliants et dégradants.

115. En avril et mai 1994, au centre Trafipro de Gitarama, des militaires de l'armée rwandaise et des miliciens ont enlevé des femmes Tutsi qu'ils ont conduites dans les endroits avoisinants pour les y violer. Ces viols ont été souvent accompagnés de traitements humiliants et dégradants.

116. A Butare, à partir du 19 avril 1994, des militaires de l'armée rwandaise et des miliciens *Interahamwe* se sont rendus régulièrement au bureau préfectoral, à l'église épiscopale du Rwanda (E.E.R.), à l'église Gishamvu et à la paroisse de Nyumba, pour y enlever des femmes réfugiées et les violer. Ces viols ont été souvent accompagnés de traitements humiliants et dégradants.

117. A Cyangugu, durant les mois d'avril et de mai 1994, des militaires de l'armée rwandaise et des *Interahamwe* ont régulièrement enlevé des femmes Tutsi réfugiées dans le stade Kamparampaka et les ont violées et agressées moralement.

Septième chef d'accusation : violation de l'article 3 commun aux conventions de Genève et du Protocole additionnel II (meurtre)

118. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu de meurtre en tant que violation de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, sous l'empire de l'article 4 (a) du Statut, en ce que courant 1994, au Rwanda, des militaires placés sous leur commandement ou des civils sur qui ils exerçaient une autorité ont commis, dans le cadre d'un conflit

national armed conflict opposing the *Forces armées régulières du Rwanda* (FAR) to the *Front patriotique rwandais* (FPR), and in direct relation to that conflict, many murders of members of the Rwandan civilian population who were not participating in the hostilities; moreover, at the same place and time, soldiers under the command of François-Xavier Nzuwonemeye and Innocent Sagahutu killed ten Belgian UNAMIR peacekeepers, whose mandate did not include combat (see Chapter 6 of the United Nations Charter), whom moreover were disarmed, allegedly because there was collusion between the Kingdom of Belgium and the Rwandan Patriotic Front;

Pursuant to Article 6 (1) of the Stature : by virtue of their acts, the Accused planned, incited to commit, ordered, or otherwise aided and abetted the planning or execution of the crimes referred to in paragraphs 66, 92 and 103 to 107 above; and

Pursuant to Article 6 (3) of the Statute : in that the Accused knew or had reason to know that their subordinates had committed or were about to commit the crimes referred to in paragraphs 86 to 88 and 90, 76, 77 and 102, 103 to 108 above, and in that they did not take reasonable and necessary measures to prevent such crimes from being committed or to punish the perpetrators thereof.

Count 8 : Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II (Rape, humiliating and degrading treatment)

119. The Prosecutor of the International Crirninal Tribunal for Rwanda charges Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu with Rape, and other humiliating and degrading treatment, an offence punishable under Article 3 common to the Geneva Conventions and Additional Protocol II, under Article 4 (e) of the Statute, in that, 1994, in Rwanda, soldiers from the Rwandan Army, under their authority, in concert with militiamen, raped several Tutsi civilian women, in the context of a non-international armed conflict inasmuch as those Rwandan civilians were categorized by their tormentors as being virtual members of the RPF or accomplices of that movement;

Pursuant to Article 6 (3) of the Statute : in that the Accused knew or had reason to know that their subordinates had committed or were about to commit the rapes referred to in paragraphs 111 to 117, in respect of Augustin Bizimungu, and 112, in respect of François-Xavier Nzuwonemeye and Innicent Sagahutu, and did not take reasonable and necessary measures to prevent such crimes or to punish the perpetrators thereof.

Done at Arusha (Tanzania)

[Signed] : Hassan Bubacar Jallow, Prosecutor

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armé non international opposant les Forces armées régulières du Rwanda (FAR) au Front patriotique rwandais (FPR) et en relation directe avec ce conflit, plusieurs meurtres sur des membres de la population civile rwandaise qui ne prenaient pas part aux hostilités; en ce qu'également, dans les mêmes circonstances de temps et de lieu, des militaires placés sous le commandement de François-Xavier Nzuwonemeye et Innocent Sagahutu ont tué 10 casques bleus belges de la MINUAR, non investis d'une mission de combat (voir Chapitre 6 de la Charte des Nations Unies), désarmés de surcroît, au motif d'une collusion supposée entre le Royaume de Belgique et le Front patriotique rwandais;

En vertu de l'article 6 (1) du Statut : en ce que les accusés, par leurs actes positifs, ont planifié, incité à commettre, ordonné ou de toute autre manière aidé et encouragé à planifier ou exécuter les crimes mentionnés dans les paragraphes 66, 92 et 103 à 107 ci-dessus; et

En vertu de l'article 6 (3) du Statut : du fait que les accusés savaient ou avaient des raisons de savoir que leurs subordonnés avaient commis ou s'apprêtaient à commettre les crimes rapportés dans les paragraphes 86 à 88 et 90, 76, 77 et 102 et 103 à 108 ci-dessus, et qu'ils n'ont pas pris les mesures nécessaires et raisonnables pour en empêcher la commission ou pour en punir les auteurs.

Huitième chef d'accusation : violation de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II (viol, traitements humiliants et dégradants).

119. Le Procureur du Tribunal pénal international pour le Rwanda accuse Augustin Bizimungu, François-Xavier Nzuwonemeye et Innocent Sagahutu de viol et d'autres traitements humiliants et dégradants en tant que violations de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, sous l'empire de l'article 4 (e) Statut, en ce que courant 1994, au Rwanda, des militaires de l'armée rwandaise, placés sous leur autorité, de connivence avec des miliciens, ont commis plusieurs viols sur des civiles Tutsi, dans le cadre d'un conflit armé non international et avec cette circonstance que ces civiles rwandaises étaient assimilées par leurs bourreaux à des membres virtuels du FPR ou à des acolytes de ce mouvement;

En vertu de l'article 6 (3) du Statut : du fait que les accusés savaient ou avaient des raisons de savoir que leurs subordonnés avaient commis ou s'apprêtaient à commettre les viols rapportés dans les paragraphes 111 à 117 pour Augustin Bizimungu, 112 pour François-Xavier Nzuwonemeye et Innocent Sagahutu, et qu'ils n'ont pas pris les mesures raisonnables et nécessaires pour en empêcher la commission ou pour en punir les auteurs.

Fait à Arusha (Tanzanie), le 23 août 2004.

[Signé] : Hassan Bubacar Jallow, Procureur

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Decision on the Prosecutor's Motion for Transfer of Witnesses in Detention or Under Court Supervision : Rules 54 and 90 bis *of the Rules of Procedure and Evidence 9 September 2004 (ICTR-2000-56-I)*

(Original : French)

Trial Chamber II

Judges : Arlette Ramaroson

Transfer of witnesses in detention or under Court supervision – Rwanda – Tanzania – Registry – presence of the detained witness not required for any criminal proceedings in progress in the territory of the requested State – period of detention not extended – cooperation – motion granted

International instruments cited : Rules of procédure and évidence, Rules 54, 73 (A), 90 bis

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

SITTING as Trial Chamber II, composed of Judge Arlette Ramaroson, presiding (designated by the Chamber pursuant to Rule 73 (A) of the Rules) ("the Rules");

BEING SEIZED OF the "Prosecutor's Extremely Urgent *Ex Parte* Motion for Transfer of Witnesses in Detention or under Court Supervision : Rules 54 and 90 *bis* of the Rules of Procedure and Evidence", filed on 6 September 2004;

HEREBY DECIDES the motion.

1. Considering Rules 54 and 90 *bis* of the Rules of Procedure and Evidence ("the Rules"), the Prosecution requests the temporary transfer of protected Witnesses KJ, GAP, UB, GFU, AMW, GFR and ANI/KEI who are detained in various prisons in Rwanda or under the jurisdiction of the Rwandan judicial authorities. The transfer is sought in view of the first session of the trial scheduled to commence on 20 September 2004.

2. The Prosecution requests that the competent authorities of the Republic of Rwanda and of the Republic of Tanzania be notified of the transfer order and that the Registry of the Tribunal be responsible for the transfer and custody of the said witnesses.

3. The Prosecution submits that the presence of the said witnesses would not be required for any court proceedings in Rwanda between 20 September 2004 and 31 December 2004. The Prosecution also states that their transfer is not likely to prolong their period of detention. It further requests the Chamber to issue an order that the said witnesses be remanded to the authorities of the Republic of Rwanda no later than 31 December 2004.

Décision sur la requête du Procureur aux fins de transfert de témoins détenus ou placés sous contrôle judiciaire : articles 54 et 90 **bis** *du Règlement de procédure et de preuve 9 septembre 2004 (ICTR-2000-56-I)*

(Original : Français)

Chambre de première instance II

Juge : Arlette Ramaroson

Transfert de témoins détenus ou placés sous contrôle judiciaire – Rwanda – Tanzanie – Greffe – présence du témoin détenu pas nécessaire dans une procédure pénale en cours sur le territoire de l'État requis – non prolongation de la durée de détention – coopération – requête accordée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 54, 73 (A), 90 bis

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le "Tribunal"),

SIÉGEANT en la Chambre de première instance II composée de la juge Arlette Ramaroson, présidente, désignée par la Chambre conformément à l'article 73 (A) du Règlement de procédure et de preuves (le «Règlement»);

ÉTANT SAISI de la "requête non contentieuse du procureur, en extrême urgence, aux fins de transfert de témoins détenus ou placés sous contrôle judiciaire : articles 54 et 90 *bis* du Règlement de procédure et de preuve» déposée le 6 septembre 2004 ex-parte;

STATUE EN L'ESPÈCE

1. Vu les articles 54 et 90 *bis* du Règlement de procédure et de preuve (le «Règlement»), le Procureur requiert le transfert temporaire des témoins protégés KJ, GAP, UB, GFU, AMW, GFR et ANI/KEI détenus dans différentes prisons du Rwanda ou placés sous contrôle judiciaire par les autorités rwandaises. Le transfert est demandé pour la première session du procès dont l'ouverture est prévue pour le 20 septembre 2004.

2. Le Procureur demande à ce que l'ordre de transfert soit signifié aux autorités compétentes de la République du Rwanda et à celles de la République de Tanzanie et que le Greffe du Tribunal soit chargé de l'acheminement et de la garde de ces témoins.

3. Le Procureur expose que la présence desdits témoins ne sera pas nécessaire pour les besoins d'une procédure judiciaire au Rwanda dans la période comprise entre le 20 septembre 2004 et le 31 décembre 2004. Le Procureur indique que leur transfert ne sera pas de nature à prolonger leur détention. Le Procureur demande en outre à la Chambre d'ordonner que ces témoins soient remis aux autorités rwandaises après leur témoignage devant le Tribunal et au plus tard le 31 décembre 2004.

4. The Chamber recalls that Rule 90 *bis* (B) requires that an order for the transfer of witnesses in custody only be issued 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;

5. The Chamber takes due note of the letter dated 31 August 2004 from the Rwandan Minister of Justice, appended to the motion. The Chamber holds that the Rule 90 *bis* (B) conditions have been met, in respect of Witnesses KJ, GAP, UB, GFU, AMW, GFR and ANI/KEI.

FOR THESE REASONS,

THE CHAMBER

HEREBY ORDERS, pursuant to Rule 90 *bis* of the Rules, that Witnesses KJ, GAP, UB, GFU, AMW, GFR and ANI/KEI be transferred, at the earliest opportunity, to the United Nations Detention Facility in Arusha, for a period not exceeding three months from the date of their transfer;

DIRECTS the Registrar :

(a) To transmit the instant Decision to the Governments of Rwanda and of Tanzania;

(b) To ensure the proper conduct of the transfer, including the supervision of the witnesses at the United Nations Detention Facility in Arusha; and

(c) To remain abreast of any changes which might occur regarding the conditions of detention of the witnesses in Rwanda which may possibly affect the length of their detention, and to inform the Chamber as promptly as possible.

REQUESTS the Government of the Republic of Rwanda to comply with this Order, to cooperate with the Prosecutor and the Registrar and to take the necessary steps to effect the said transfer, in collaboration with the Republic of Tanzania, the Registrar and the ICTR Witness and Victims Support Section.

Arusha, 9 September 2004

[Signed] : Arlette Ramaroson

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4. La Chambre rappelle que l'article 90 *bis* (B) exige qu'un ordre de transfert de témoins détenus soit délivré seulement 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'État 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'État requis ;

5. La Chambre prend note de la lettre du ministre de la Justice rwandais en date du 31 août 2004 annexée à la requête. La Chambre considère que les conditions de l'article 90 *bis* (B) du Règlement sont réunies en ce qui concerne les témoins KJ, GAP, UB, GFU, AMW, GFR et ANI/KEI.

PAR CES MOTIFS,

LE TRIBUNAL

ORDONNE, sur la base de l'article 90 *bis* du Règlement que les témoins KJ, GAP,UB, GFU, AMW, GFR et ANI/KEI soient transférés dès que possible au Centre de détention des Nations Unies à Arusha pour une période ne dépassant pas trois mois après la date de leur transfert ;

ORDONNE au Greffier :

(a) de transmettre la présente décision aux gouvernements du Rwanda et de la Tanzanie ;

(b) d'assurer la bonne conduite du transfert, y compris la supervision des témoins au Centre de détention des Nations Unies à Arusha ; et

(c) de rester informé de tous changements qui pourraient survenir concernant les conditions de détention des témoins au Rwanda et qui pourraient affecter la durée de leurs détentions et d'informer la Chambre de ces changements dans les plus courts délais.

DEMANDE au gouvernement de la République du Rwanda de se conformer à la présente ordonnance, de coopérer avec le Procureur et le Greffier et de prendre, en collaboration avec le gouvernement de la République de Tanzanie, le Greffier et la Section de protection des victimes et des témoins du Tribunal, les mesures nécessaires à la réalisation de ce transfert.

Arusha, le 9 septembre 2004

[Signé] : Juge Arlette Ramaroson

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Décision sur la requête de François-Xavier Nzuwonemeye en application des articles 73 **bis** *(B) et 66 (B) relative au mémoire préalable au procès 16 septembre 2004 (ICTR-2000-56-I)*

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente ; William H. Sekule ; Solomy Balungi Bossa

Nzuwonemeye – mémoire préalable au procès – liste de témoins – omission des points de l'acte d'accusation sur lesquels chaque témoin sera entendu – communication de dépositions de témoins – conférence préalable au procès – requête accordée en partie

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73 (A), 73 bis*, 66 (B), 68, 92* bis *(D), 94 (B)*

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts*, Decision on Disclosure of Transcripts and Exhibits of Witness X, 3 juin 2004 (ICTR-99-52-T,* Recueil 2004*, p. X)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée des juges Arlette Ramaroson, présidente, William H. Sekule et Solomy Balungi Bossa ;

ÉTANT SAISI :

(i) d'une «Requête en application des articles 73 *bis* (B) et 66 (B) du Règlement relative au mémoire préalable au procès» déposée par M^e^ Antoine Beraud, conseil de la défense de François-Xavier Nzuwonemeye, le 24 août 2004 (la «Requête») ;

(ii) du «Mémoire en réponse du Procureur à la requête déposée pour le compte de l'accusé François-Xavier Nzuwonemeye sur le fondement des articles 73 *bis* (B) et 66 (B) du Règlement de procédure et de preuve», déposé le 30 août 2004 (la «réponse du Procureur») ;

(iii) du «*Corrigendum* à la requête de la défense», déposé le 8 septembre 2004 (le «*Corrigendum* de la défense») ;

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), notamment les articles 73 *bis* et 66 ;

STATUANT sur la base des mémoires déposés par les parties conformément aux articles 73 (A) du Règlement ;

ARGUMENTS DES PARTIES

La défense

1. La défense prétend que le Procureur a enfreint les prescriptions de l'article 73 *bis* (b) (iv) (c) du Règlement. Selon la défense, la liste des témoins que le Procureur entend citer pour soutenir son cas et qui est annexée au mémoire préalable du 17 juin 2004, ne comporte pas les points de l'acte d'accusation sur lesquels chaque témoin sera entendu.

2. La défense souligne qu'une telle omission de la part du Procureur nuit aux intérêts de la défense et lui cause un préjudice substantiel. En effet, l'absence de précisions relatives aux points de l'acte d'accusation sur lesquels chaque témoin sera entendu a pour effet immédiat de permettre au Procureur d'introduire, lors du procès au fond, de nouveaux chefs d'accusation auxquels la défense sera contrainte de répondre. La défense requiert ainsi le retrait du mémoire préalable au procès du Procureur et, le cas échéant sa mise en conformité avec les prescriptions du Règlement.

3. La défense sollicite également la communication des dépositions de certains témoins du Procureur à savoir : Alison Desforges, le Général Roméo Dallaire, XAF, DY, DN, AN, DO, DAK, HP, DA, GS, DBQ, DBN, XXO et enfin LN, conformément à l'article 66 (B) du Règlement.

Le Procureur

4. Le Procureur soumet, en réponse de la violation alléguée de l'article 73 *bis* (B) (iv) (c), que, lors de la conférence de mise en état du 30 avril 2004, le Juge Président n'a interpellé le Procureur que sur la communication des pièces à conviction et des déclarations de témoins; ledit Juge n'a jamais demandé au Procureur d'indiquer les points de l'acte d'accusation sur lesquels chaque témoin serait entendu. Le Procureur indique en outre que dans tous les cas, le mémoire préalable n'est pas un document obligatoire comme l'est l'acte d'accusation.

5. En ce qui concerne la demande de la défense aux fins de communication des dépositions de certains témoins ou des rapports d'expert, le Procureur affirme qu'il ignore si la défense souhaite procéder à une inspection ou simplement se faire communiquer ces déclarations de témoins.

6. Le Procureur souligne qu'il n'existe pas de déposition antérieure fournie par le Général Dallaire, mais 2417 documents provenant de la MINUAR qui était commandée par ledit Général entre septembre 1993 et septembre 1994 ainsi que les versions française et anglaise de son livre intitulé «J'ai serré la main du diable». Ces documents ont déjà été communiqués à la défense respectivement le 26 juillet 2004 et le 16 mars 2004. Le Procureur précise en outre que l'interrogatoire de ce témoin sera basé sur les documents mentionnés ci-dessus.

7. Le Procureur réaffirme qu'il n'entendait recourir au témoignage de l'expert Alison Des Forges qu'au titre des dispositions de l'article 94 (B) ou de l'article 92 *bis* (D) du Règlement.

8. Le Procureur soumet que les déclarations des témoins XA, FD, YD, ND, OD, AK, HP, DA, GS, DBN et LN ont été déjà communiquées à la défense, à une ou plusieurs reprises. Quant à la communication intégrale des déclarations de ces témoins, le Procureur prétend qu'il dispose d'une durée limite de 21 jours avant la comparution de chaque témoin pour y procéder[1].

9. Le Procureur allègue enfin que les témoins XXO, AN et DBQ ne sont pas sur la liste du Procureur; cependant, si la défense estime que leurs déclarations ont un quelconque effet disculpatoire, elle devrait en demander communication sur le fondement de l'article 68 du Règlement, et non de l'article 66 (B).

DÉLIBÉRATIONS

Sur l'absence de mention des points de l'acte d'accusation sur lesquels chaque témoin de l'accusation sera entendu et l'éventuel préjudice causé à la défense

10. La Chambre fait observer qu'il n'est pas contesté que la liste des témoins de l'accusation annexée au mémoire préalable au procès ne comporte effectivement pas les points de l'acte d'accusation sur lesquels chaque témoin sera entendu. La Chambre indique que ce point pourra être abordé dans le cadre de la conférence préalable au procès qui se tiendra conformément à l'article 73 *bis* du Règlement.

Sur le retrait du mémoire préalable au procès en date du 17 juin 2004

11. La Chambre rappelle qu'en vertu de l'article 73 *bis* du Règlement, la Chambre ou un juge désigné en son sein, peut, au cours de la conférence préalable au procès, inviter le Procureur à déposer un mémoire préalable au procès traitant des questions de fait et de droit. En l'espèce, le Procureur a jugé utile de déposer un mémoire avant la conférence préalable au procès. La Chambre considère que la question de la validité de ce mémoire et les objections soulevées par la défense devraient être abordées, conformément à l'article 73 *bis* du Règlement, lors de la conférence préalable au procès.

Sur la communication des déclarations des témoins XXN, AN et DBQ

12. La Chambre observe une contradiction entre la base légale à laquelle se réfère la requête et la teneur de la demande. En effet, la défense se fonde sur l'article 66 (B) du Règlement pour solliciter la communication des déclarations des témoins. Or, en

[1] Le Procureur se prévaut de la décision rendue le 19 mars 2004 par la Chambre de première instance II intitulée : «Décision sur la requête du Procureur en variation et en extension des mesures de protection de témoins».

vertu de l'article 66 (B) du Règlement, la défense ne peut que demander à examiner les documents que le Procureur a en sa possession. La requête aux fins de communication des déclarations des témoins susvisés, que le Procureur n'entend pas appeler à la barre, devait être fondée sur l'article 68 du Règlement. La Chambre souligne que les deux dispositions répondent à des critères différents et entraînent des effets différents.

13. Par conséquent, en l'état actuel des soumissions de la défense, la Chambre n'est pas en mesure de trancher cette contradiction et invite la défense à préciser, si elle le souhaite, la nature de sa demande.

Sur la communication des dépositions du Général Roméo Dallaire

14. La Chambre note la réponse du Procureur qui prétend qu'il n'existe pas de déposition antérieure, au sens classique, fournie par ce témoin et que tous les documents servant de base à son interrogatoire ont déjà été communiqués à la défense. La Chambre, au vu des copies des bordereaux d'envoi versées au dossier, conclut que la communication sollicitée par la Défense a déjà été effectuée et qu'il échet d'en donner acte.

15. Toutefois, la Chambre note que, conformément à la jurisprudence du Tribunal[2], les témoignages antérieurs des témoins factuels dans le cadre des autres affaires devant le Tribunal font partie des documents devant être communiqués par le Procureur en vertu de l'article 66 (A) (ii) du Règlement, sans même que la Chambre ait besoin d'intervenir. Dès lors, les témoignages du Général Roméo Dallaire dans les autres affaires où il a comparu devant le Tribunal doivent être communiqués en vertu de l'article 66 (A) (ii) du Règlement. La Chambre accueille donc partiellement la requête de la défense sur ce point, et ce en requalifiant la base légale.

Sur la communication des dépositions du témoin Alison Des Forges

16. La Chambre note la réponse du Procureur à cet effet et conclut que la demande de la défense aux fins de communication des dépositions du témoin Alison Des Forges est, à ce stade de la procédure, prématurée et qu'il échet par conséquent de rejeter la demande sur ce point.

Sur la communication des déclarations des témoins XAF, DY, DN, DO, DAK, HP, DA, GS, DBN et LN

17. A la lumière des pièces justificatives produites, la Chambre note qu'il a déjà été procédé à la communication desdites déclarations à la défense. La Chambre

[2] *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.

conclut qu'il échet d'en donner acte et considère par conséquent que la demande de la défense sur ce point n'est pas fondée.

PAR CES MOTIFS

LA CHAMBRE,

RENVOIE les questions relatives à l'omission des points sur lesquels chaque témoin à charge doit être entendu dans la liste des témoins du Procureur et à la validité du mémoire déposé par le Procureur, devant la conférence préalable au procès qui se tiendra en vertu de l'article 73 *bis* du Règlement.

ACCUEILLE PARTIELLEMENT la demande de la défense concernant les déclarations préalables du Général Roméo Dallaire et ORDONNE que soit communiquée à la défense la totalité des retranscriptions en langues française, et éventuellement anglaise, de ses précédents témoignages devant le Tribunal.

INVITE la défense à préciser, si elle le souhaite, la nature et le fondement légal de sa demande relative aux déclarations des témoins XXN, AN et DBQ.

REJETTE les autres demandes de la défense.

Arusha, le 16 septembre 2004

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy B. Bossa

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Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial including Reasons in Support of the Chamber's Oral Ruling delivered on Monday 20 September 2004
24 September 2004 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

Judges : Joseph Asoka de Silva; Taghreed Hikmat; Seon Ki Park

Ndindiliyimana, Bizimungu, Nzuwonemeye – stay of proceedings – adjournment of trial – disclosure obligation of the Prosecutor, witness statements – protection of witnesses, redacted documents – Prosecutorial discretion, discriminatory prosecutorial policy – inequality of arms between defence and Prosecution – fair trial– transfer of cases to national jurisdiction, Rwanda – absence of the accused – independance of the Tribunal – ICTY – burden of proof – motion denied

International instruments cited : Statute, art. 8, 15, 21 – Rules of procedure and evidence, Rule 11 bis*, 41 (B), 66, 69, 73, 75, 82* bis

International cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu*, Judgement, 1 June 2001 (ICTR-96-4,* Reports 2001*, p. 16) – Trial Chamber I,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana*, Judgement, 21 February 2003 (ICTR-96-10,* Reports 2003*, p. 2752) – Trial Chamber,* The Prosecutor v. Augustin Bizimungu et al.*, Décision sur la requête du Procureur aux fins de modification et d'extension des mesures des victimes et des témoins, 19 March 2004 (ICTR-2000-56-I,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Augustin Bizimungu et al.*, Decision on Urgent Oral Motion for a Stay of the lndictment, or in the Alternative a Reference to the Security Council, 26 March 2004 (ICTR-2000-56-I,* Reports 2004*, p. X)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Delacic et al.*, Judgement, 20 February 2001 (IT-96-21-A)*

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

SITTING as Trial Chamber II, composed of Judge Joseph Asoka de Silva, presiding, Judge, Taghreed Hikmat, and Judge Seon Ki Park;

NOTING Ndindiliyimana's "Motion for the transfer of Applicant's trial to the courts of a national jurisdiction on the basis that a fair trial cannot be obtained before the Tribunal", filed on 20 September 2004;

Décision relative aux requêtes de la défense tendant à la suspension de l'instance et au report de la date d'ouverture du procès, assortie de l'exposé des motifs de la décision orale rendue par la chambre le lundi 20 septembre 2004 24 septembre 2004 (ICTR-2000-56-T)

(Original : Anglais)

Chambre de première instance II

Juges : Joseph Asoka de Silva; Taghreed Hikmat; Seon Ki Park

Ndindiliyimana, Bizimungu, Nzuwonemeye – suspension d'instance – report de la date d'ouverture du procès – obligation de communication du Procureur, déclarations de témoins – protection des témoins, caviardage – pouvoir d'appréciation de poursuites du Procureur, poursuites discriminatoires – inégalité des armes entre la défense et le Procureur – procès équitable – renvoi devant une juridiction nationale, Rwanda – absence de l'accusé – indépendance du Tribunal – TPIY – preuve – requête rejetée

Instruments internationaux cités : Statut, art. 8, 15, 21 – Règlement de procédure et de preuve, art. 11 bis*, 41 (B), 66, 69, 73, 75, 82* bis

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Jean-Paul Akayesu*, arrêt, 1er juin 2001 (ICTR-96-4,* Recueil 2001*, p. 17) – Chambre de première instance I,* Le Procureur c. Gérard et Elizaphan Ntakirutimana*, jugement, 21 février 2003 (ICTR-96-10,* Recueil 2003*, p. 2752) – Chambre de première instance,* Le Procureur c. Augustin Bizimungu et consorts*, Décision sur la requête du Procureur aux fins de modification et d'extension des mesures de protection des victimes et des témoins, 19 mars 2004 (ICTR-2000-56-1,* Recueil 2004*, p. X) – Chambre de première instance,* Le Procureur c. Augustin Bizimungu et consorts*, Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 mars 2004 (ICTR-2000-56-1,* Recueil 2004*, p. X)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Delalic et consorts*, arrêt, 20 février 2001 (IT-96-21-A)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGANT en la Chambre de première instance II composée des juges Joseph Asoka de Silva, Président de Chambre, Taghreed Hikmat et Seon Ki Park,

VU la requête de Ndindiliyimana intitulée *Motion for the transfer of Applicant's trial to the courts of a national jurisdiction on the basis that a fair trial cannot be obtained before the Tribunal,* déposée le 20 septembre 2004,

NOTING the "Mémoire en réponse du Procureur à la requête aux fins de transfert déposée par le conseil d'Augustin Ndindiliyimana sur le fondement de l'article 11 *bis* du Règlement de procédure et de preuve", filed on 23 September 2004;

NOTING the "Requête en extrême urgence de la défense de Monsieur Augustin Bizimungu pour les manquements du procureur dans la communication de la preuve relativement à la déposition des premiers témoins", filed on 20 September 2004;

NOTING the "Mémoire en réponse du Procureur à la requête en extrême urgence du conseil d'Augustin Bizimungu sollicitant le rejet des 21 premiers témoins de l'accusation, pour absence de communication de pièces", filed on 23 September 2004;

NOTING Bizimungu's, "Requête urgente en arrêt des procédures pour procédure discriminatoire et dilatoire et remise en liberté immédiate", filed on 20 September 2004;

HAVING HEARD the oral submissions made to the Chamber on 20 September 2004 by Mr. Ferran, counsel for François-Xavier Nzuwonemeye for postponement of the trial, by Mr. Croisier, counsel for Augustin Bizimungu for a stay of proceedings and for the unconditional release of the accused Bizimungu, and Mr. Black, counsel for Augustin Ndindiliyimana for a transfer of his client's case to a national jurisdiction where he can receive a fair trial;

HAVING HEARD the submissions in reply of the Prosecutor and Mr. Bâ for the prosecution;

HAVING fully considered that both the oral and written arguments of the Parties relate to the same issues;

CONSIDERING THAT THE CHAMBER delivered an oral ruling on 20 September 2004 dismissing the application for postponement of trial, and for a stay of proceedings and indicated that it would deliver written reasons on Friday 24 September 2004;

HEREBY RENDERS its decision in respect of the above motions and the reasons in support of its oral ruling :

SUBMISSIONS

The Defence

Michel Croisier, Counsel for Bijmungu

1. Mr. Croisier argues that the prosecution has failed to fulfil its disclosure obligations under Rule 66 of the Rules in that the 26,000 pages of documents handed to the Defence in August and the further 3000-4000 handed to them on 17 September 2004, have not been made available to their clients. He submits that as a result of this non-compliance, the Defence has not had adequate time to prepare their case.

2. The Defence argues that the manner in which the Chamber has been seised of this case shows a selective and discriminatory exercise of Prosecutorial discretion. They argue that other persons similarly situated with the four accused persons, and

VU le Mémoire en réponse du Procureur à la requête aux fins de transfert déposée par le conseil d'Augustin Ndindiliyimana sur le fondement de l'article 11 *bis* du Règlement de procédure et de preuve, déposé le 23 septembre 2004,

VU la Requête en extrême urgence de la défense de Monsieur Augustin Bizimungu pour les manquements du Procureur dans la communication de la preuve relativement à la déposition les premiers témoins, déposée le 20 septembre 2004,

VU le Mémoire en réponse du Procureur à la requête en extrême urgence du conseil d'Augustin Bizimungu sollicitant le rejet des 21 premiers témoins de l'accusation, pour absence de communication de pièces, déposé le 23 septembre 2004,

VU la Requête urgente en arrêt des procédures pour procédure discriminatoire et dilatoire et remise en liberté immédiate, déposée par Bizimungu le 20 septembre 2004,

AYANT ENTENDU les arguments présentés oralement devant la Chambre le 20 septembre 2004 par Me Ferran, conseil de François-Xavier Nzuwonemeye, aux fins d'obtenir l'ajournement du procès, par Me Croisier, conseil d'Augustin Bizimungu, aux fins d'obtenir la suspension de l'instance et la mise en liberté sans conditions de l'accusé Bizimungu et par Me Black, conseil d'Augustin Ndindiliyimana, aux fins d'obtenir le renvoi de l'affaire de son client devant une juridiction nationale où il pourra bénéficier d'un procès équitable,

AYANT ENTENDU les conclusions en réponse du Procureur et M. Bâ pour le Bureau du Procureur,

AYANT vérifié en profondeur que les arguments oraux et écrits des parties se rapportent aux mêmes questions,

ATTENDU QUE LA CHAMBRE a rendu le 20 septembre 2004 une décision orale rejetant les demandes d'ajournement du procès et de suspension de l'instance et indiqué qu'elle en fournirait les motifs par écrit le vendredi 24 septembre 2004,

STATUE sur les requêtes susmentionnées et expose les motifs de sa décision orale.

ARGUMENTS DES PARTIES

Arguments de la défense

Me Michel Croisier, conseil de Bizimungu

1) Me Croisier fait valoir que le Procureur ne s'est pas acquitté de l'obligation de communication mise à sa charge par l'article 66 du Règlement, les 26 000 pages de documents remises aux conseils de la défense en août et les autres 3 000 à 4 000 pages que ceux-ci ont reçues le 17 septembre 2004 n'ayant pas été communiquées à leurs clients. Il souligne qu'à cause de ce manquement, la défense n'a pas eu assez de temps pour se préparer.

2) Selon la défense, les circonstances de la saisine de la Chambre en l'espèce démontrent que le Procureur exerce son pouvoir d'appréciation de l'opportunité des poursuites d'une manière sélective et discriminatoire, puisque des personnes se trou-

who might have committed crimes in Rwanda in 1994, have not been brought for trial.

3. For the foregoing reasons, Mr. Croisier prayed that the Chamber order the Prosecutor to properly exercise his discretion and bring to trial other persons who might have participated in the crimes in Rwanda in 1994; secondly, that the Chamber stay all proceedings against accused Bizimungu pending the commencement of proceedings by the Prosecutor against other alleged perpetrators; and thirdly, to promptly and unconditionally release Augustin Bizimungu on the basis of the presumption of innocence and to safeguard the accused's right to be tried without undue delay.

Mr. Ferran, Counsel for Nzuwonemeve

4. Mr. Ferran similarly argues that the prosecution has not met its disclosure obligations. He submits that the CD-roms containing 26,000 pages were delivered to his Defence team in August. They were on vacation at the rime, and did not have sufficient rime to study the documents. Counsel further argues that a box containing 3000-4000 pages of documents was handed to the Defence on 17 September 2004 and that his team would need rime to effectively study these documents and prepare their Defence.

5. Mr. Ferran further submits that the Prosecutor has failed to properly exercise his Prosecutorial discretion and that his selection of persons to be brought for trial was both bias and discriminatory.

6. Counsel Ferran finally submits that there is an inequality of arms between the prosecution and Defence teams and that he is constrained in the preparation of his client's Defence by the circumstances under which he is compelled to work at the Tribunal.

7. Counsel therefore urged the Chamber to adjourn the commencement of trial for 45 days so as to allow him sufficient rime to study the documents and prepare his Defence.

Mr. Christopher Black for Ndindilivimana

8. Mr. Black informed the court that he had instructions from his client to file a written motion explaining the reasons for his absence from the trial. He further argued that it was his client's instruction to read the body of the motion in open court before filing it.

9. Mr. Black argued that his motion was brought pursuant to Rules 11 *bis* (B) and 73 of the Rules. He argued that the structure of the Tribunal, its Rules of evidence and procedure, as well as its lack of independence, make it impossible for his client to receive a fair trial.

10. Counsel also argued that the prosecutor has been selective and discriminatory bringing accused persons for trial before the tribunal and that there is inequality of arms between the prosecution and defence teams.

11. Counsel Black therefore prayed that the Chamber exercise the discretion conferred on it under Rule 11 *bis* (B) and transfer, *proprio motu*, the case of

vant dans une situation semblable à celle des quatre accusés qui auraient commis des crimes au Rwanda en 1994 n'ont pas été traduites en justice.

3) Cela étant, Me Croisier prie la Chambre d'ordonner que le Procureur exerce correctement son pouvoir d'appréciation en poursuivant les autres personnes qui auraient participé aux crimes commis au Rwanda en 1994, de suspendre toute la procédure engagée contre l'accusé Bizimungu en attendant que le Procureur intente une action à d'autres auteurs présumés et de remettre immédiatement en liberté et sans conditions Augustin Bizimungu pour respecter le principe de la présomption d'innocence et protéger le droit d'être jugé sans retard excessif dont jouit l'accusé.

Me Ferran, conseil de Nzuwonemeye

4) Me Ferran fait valoir aussi que le Procureur n'a pas respecté l'obligation de communication qui lui incombait. Selon ses dires, les CD-ROM contenant 26 000 pages de documents ont été communiqués à son équipe de défense en août. Étant en vacances à ce moment-là, les membres de l'équipe n'ont pas eu assez de temps pour étudier ces documents. Le conseil ajoute qu'une boîte contenant 3 000 à 4 000 pages de documents a été remise à la défense le 17 septembre 2004 et que son équipe aurait besoin de temps pour examiner utilement ces documents et préparer la défense de l'accusé.

5) Me Ferran fait valoir en outre que le Procureur n'exerce pas correctement son pouvoir d'appréciation de l'opportunité des poursuites et choisit d'une manière partiale et discriminatoire les personnes à poursuivre.

6) Il fait valoir enfin qu'il existe une inégalité des armes entre le Procureur et les équipes de défense et qu'il n'arrive pas à bien préparer la défense de son client à cause des conditions dans lesquelles il est obligé de travailler au Tribunal.

7) Par conséquent, il prie la Chambre de reporter de 45 jours la date d'ouverture du procès afin de lui donner le temps nécessaire pour compulser les documents et préparer ses moyens de défense.

Me Christopher Black, conseil de Ndindiliyimana

8) Me Black informe la Chambre que son client l'a chargé de former une requête par écrit pour exposer les raisons de son absence aux audiences. Il dit également que son client lui a demandé de donner lecture du corps de la requête en audience publique avant de la déposer.

9) Précisant que sa requête est fondée sur les articles 11 *bis* (B) et 73 du Règlement, il soutient que la structure du Tribunal, son Règlement de procédure et de preuve et le manque d'indépendance qui caractérise le Tribunal ne permettent pas à son client d'avoir un procès équitable.

10) Il déclare aussi que le Procureur exerce les poursuites devant le Tribunal d'une manière sélective et qu'il existe une inégalité des armes entre le Procureur et les équipes de défense.

11) En conséquence, Me Black prie la Chambre d'user du pouvoir souverain d'appréciation que lui confère l'article 11 *bis* (B) du Règlement pour renvoyer

Augustin Ndindiliyimana to a national jurisdiction where he can receive a fair trial.

The Prosecution

12. In his reply, the Prosecutor submitted that the arguments of the Defence are without merit and urged the Chamber to dismiss them. On the issue of lack of independence of the tribunal and the alleged interference by some states in the work of the tribunal and the prosecutor's office, Mr. Jallow reiterated his absolute faith in the independence and impartiality of the tribunal and stated his full confidence that the chamber has the ability to decide all the issues before it in accordance with the law and the evidence given before it.

13. On the issue of alleged selective and discriminatory prosecutorial policy, Mr. Jallow argued that the very nature of the exercise of the prosecutorial discretion implies that there must be a selective process. In light of the finite resources at the disposal of the Tribunal and its limited life span, a choice must be made between the thousands of potential cases that could be brought for prosecution. He however denied that the prosecutor has been bias or discriminatory in the exercise of this selective discretion.

14. Mr. Jallow further argued that the defence had on previous occasions canvassed the selective prosecution argument before various chambers of the tribunal, and that on each of those occasions, the argument was dismissed. He argued that the common denominator in these cases is that in order for the judicial branch to interfere with the exercise of prosecutorial discretion on the basis of discrimination or bias, the applicant must satisfy two requirements : first, they must show that those being prosecuted were being prosecuted for improper or impermissible motives; secondly, the applicants must show that there are other persons who are similarly situated and are not being prosecuted. Mr. Jallow argued that the mere assertion of bias or discrimination, without proof of the above two elements, is insufficient for the Chamber to intervene in the exercise of the Prosecutor's discretion.

15. With respect to the absence of the accused persons before the Tribunal, the Prosecutor recalled that Article 20 (4) (c) of the Statute guarantees to every accused person the right to be tried in his or her presence. He however argued that that right is not infringed where the accused is available in detention and chooses to stay away from the proceedings. He submitted that under those circumstances, the Court has a duty to proceed with the case so that justice could be done.

16. On the issue of the Prosecutor's alleged failure to meet his disclosure obligations under Rule 66, C.A. Bâ, Senior Trial Attorney, argued on behalf of the Prosecution that they are in full compliance with the Rules. He argued that in March 2004, the Prosecution made full disclosure of all the material it intends to rely upon at the trial. He conceded that while parts of these documents were redacted, this was necessary to protect the identity of witnesses under Article 21 of the Statute and Rule 75 of the Rules. Counsel also argued that the prosecution's disclosure obligation under

d'office l'affaire d'Augustin Ndindiliyimana devant une juridiction nationale où il peut bénéficier d'un procès équitable.

Arguments du Procureur

12) Dans sa réponse, le Procureur fait valoir que les arguments de la défense ne sont pas valables au fond et exhorte la Chambre à les rejeter. Sur la question du manque d'indépendance qui caractériserait le Tribunal et de l'ingérence de certains États dans les activités du Tribunal et du Bureau du Procureur, M. Jallow réaffirme sa foi absolue en l'indépendance et l'impartialité du Tribunal et se déclare pleinement convaincu que la Chambre est en mesure de trancher toutes les questions dont elle est saisie dans le sens imposé par le droit et les éléments de preuve produits devant elle.

13) S'agissant de la politique sélective et discriminatoire d'exercice des poursuites, M. Jallow soutient que la nature même de la mise en oeuvre du pouvoir d'appréciation de l'pportunité des poursuites impose une sélection. Compte tenu de la modicité des ressources du Tribunal et de la limitation de sa durée de vie, il faut faire un choix entre les milliers d'instances qui pourraient être engagées. Il nie toutefois avoir fait preuve de partialité ou de discrimination dans l'exercice de ce pouvoir discrétionnaire de sélection.

14) M. Jallow avance en outre que la défense a déjà invoqué l'argument pris de l'exercice sélectif des poursuites devant diverses Chambres du Tribunal et que dans chaque cas, cet argument a été rejeté. Selon lui, le dénominateur commun à ces cas réside dans le principe que les juges ne peuvent s'ingérer dans l'application de la règle de l'opportunité des poursuites pour cause de discrimination ou de partialité que si le requérant remplit deux conditions : premièrement, prouver que les personnes en cause sont poursuivies pour des motifs illégitimes ou inadmissibles; deuxièmement, prouver qu'il y a des personnes placées dans une situation semblable à la leur qui ne sont pas poursuivies. M. Jallow estime que le simple fait de crier à la partialité ou à la discrimination, sans établir l'existence de ces deux éléments, ne suffit pas pour que la Chambre s'ingère dans l'exercice du pouvoir discrétionnaire du Procureur.

15) S'agissant de l'absence des accusés au prétoire, le Procureur rappelle que l'article 20 (4) (c) du Statut garantit à toute personne accusée le droit d'être jugée en sa présence. Il précise cependant qu'il n'y a pas violation de ce droit lorsque l'accusé se trouve en détention et choisit de manquer les débats. Dans ces circonstances, dit-il, la Chambre est tenue de continuer à juger l'affaire afin que justice soit faite.

16) En ce qui concerne le manquement du Procureur aux obligations de communication mises à sa charge par l'article 66 du Règlement, M. C. A. Bâ, avocat général principal, fait valoir au nom du Bureau du Procureur que celui-ci s'est totalement conformé au Règlement. Il signale qu'en mars 2004, le Bureau du Procureur a communiqué dans leur intégralité toutes les pièces sur lesquelles il a l'intention de s'appuyer au procès. Il reconnaît que certaines parties de ces documents étaient caviardées, mais explique que le caviardage était nécessaire pour protéger l'identité des témoins comme le prévoient les articles 21 du Statut et 75 du Règlement. Le représentant du Procureur ajoute que l'obligation de communication imposée au Pro-

Rule 66 is subject to the overriding need to protect the identity of witnesses under Rule 69[1].

17. Mr. Bâ argued that the 26,000 pages on CD-rom given to the Defence in August, were given pursuant to the Defence's request and that the Prosecutor did not wish to rely on any of this material at trial. He therefore submitted that the Defence cannot be heard to argue that this amounted to a failure to meet the Prosecutor's disclosure obligation under Rule 66.

18. With respect to the 3000-4000 pages handed to the Defence on 17 September 2004, prosecution counsel argued that these documents were tendered pursuant to Rule 41 (B) rather than Rule 66. In addition, the documents were meant solely for restitution to accused Ndindiliyimana, and were submitted to the other Defence teams based on an error on the part of the registry.

DELIBERATIONS

Postponement of Trial due to Inadequate Disclosure by the Prosecution

19. The Chamber notes that under Rule 66 (A) (ii), the Prosecutor must disclose the Defence copies of the statements of all witnesses it intends to call to testify at trial not less than 60 days before the date set for trial. This disclosure obligation is however not unlimited. It is subject *inter alia*, to the provisions of Rule 69 which relates to the protection of victims and witnesses[2]. Under that Rule, the Chamber can order non-disclosure of the identity of witnesses and victims until such rime that such non-disclosure may affect the ability of the prosecution or Defence to prepare their cases. The Chamber further notes that in an earlier Decision, the Chamber ruled that the Prosecutor is under an obligation to disclose witness statements to the Defence within 21 days prior to the date the witness is scheduled to testify[3].

[1] The learned authors, May and Wierda in their book, International Criminal Evidence (2002) p. 2821'2' wrote the following commentary on the equivalent provision under the ICTY statute : "The statute ... provide[s] that the right to a public trial is subject to the Tribunal's duty to provide protective measures for victims and witnesses, including protecting the identity of witnesses."

[2] Sub-rule (A) provides that : "In exceptional circumstances, either of the parties may apply to a Trial Chamber to order non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise." Sub-rule (C) provides : "Subject to Rule 75, the identity of the victim or witness shall disclosed within such time as determined by [the] Trial Chamber to allow adequate time for the preparation of the prosecution and the Defence."

[3] See *Décision sur la requête du Procureur aux fins de modification et d'extension des mesures des victimes et des témoins, Affaire N° ICTR-2000-56-I*, 19 March 2004.

cureur par l'article 66 du Règlement tombe devant l'impérieuse nécessité de protéger l'identité des témoins qui est prévue par l'article 69[1].

17) M. Bâ relève que les 26 000 pages reproduites sur des CD-ROM que la défense a reçues en août lui avaient été communiquées à sa demande et que le Procureur ne veut utiliser aucun de ces éléments d'information au procès. Il en conclut qu'on ne saurait prêter l'oreille à la défense lorsqu'elle interprète la situation comme un manquement à l'obligation de communication mise à la charge du Procureur par l'article 66.

18) S'agissant des 3 000 à 4 000 pages remises à la défense le 17 septembre 2004, le représentant du Procureur a affirmé que ces documents lui ont été communiqués en application de l'article 41 (B) du Règlement et non pas de l'article 66. De plus, il était uniquement prévu de les restituer à l'accusé Ndindiliyimana et c'est à cause d'une erreur du Greffe qu'ils ont été communiqués aux autres équipes de défense.

DÉLIBÉRATION

Du report de la date d'ouverture du procès pour cause d'irrégularité dans la communication des pièces effectuée par le Procureur

19) La Chambre relève qu'aux termes de l'article 66 (A) (ii) du Règlement, le Procureur doit communiquer à la défense copie des déclarations de tous les témoins qu'il entend appeler à la barre au plus tard 60 jours avant la date fixée pour le début du procès. Toutefois, cette obligation de communication n'est pas sans limite. Son exécution est soumise à certaines conditions, notamment aux dispositions de l'article 69 qui porte sur la protection des victimes et des témoins[2]. Selon cet article, la Chambre peut ordonner la non-divulgation de l'identité des témoins et des victimes jusqu'au moment où elle risque d'entraver la préparation du Procureur ou de la défense. La Chambre relève en outre que dans une décision précédente, elle a déclaré que le Procureur était tenu de communiquer les déclarations de témoin à la défense au plus tard 21 jours avant la date fixée pour la déposition du témoin[3].

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[1] Dans leur livre intitulé *International Criminal Evidence*, (2002), p. 2821 «2», May et Wierda commentent en ces termes la disposition équivalente du Statut du TPIY : «Le Statut . . . dispose que le droit à un procès public s'exerce sous réserve de l'obligation faite au Tribunal de prendre des mesures de protection des victimes et des témoins, notamment de protéger l'identité des témoins» [traduction].

[2] Le paragraphe A dispose que «[d]ans 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.» Le paragraphe C se lit comme suit : «Sous réserve de l'article 75, l'identité des victimes ou des témoins doit être divulguée dans des délais prescrits par la Chambre de première instance, pour accorder au Procureur et à la défense le temps nécessaire à leur préparation».

[3] Voir la Décision sur la requête du Procureur aux fins de modification et d'extension des mesures de protection des victimes et des témoins, affaire n° ICTR-2000-56-1, 19 mars 2004.

20. Based on the submissions of Counsel, the Chamber is convinced that the Prosecutor has disclosed the unredacted statements of the first 21 witnesses it intends to call during this trial session within the required timeframe. The Chamber is satisfied that this disclosure meets the requirements of the 19 March 2004 Decision.

21. With respect to the 26,000 pages of documents on CD-Rom referred to in the Defence submissions, the Chamber recalls that Mr. Ferran has himself conceded that the CD-rom has been available to him since August, but that his team could not study the documents because they were on vacation at the time. It is the Chamber's considered view that the failure by the Defence team to study the documents in a timely manner cannot be interpreted as a lack of adequate disclosure by the Prosecutor.

22.The Chamber is equally convinced that the 3000-4000 pages of documents contained in a box that was handed to the Defence teams on 17 September 2004 were tendered pursuant to Rule 41 of the Rules as a matter of restitution to the Accused Ndindiliyimana. The fact that the Defence received these documents 3 days before the commencement of trial has no bearing on the Prosecutor's obligation to disclose under Rule 66.

23.The Chamber finds that the Prosecutor has fulfilled his disclosure obligation under the Rules and therefore it is for the above reasons that on 20 September 2004 the Chamber refused the Defence's application for postponement.

Stay of Proceedings Against Accused Bizimungu

24. he Chamber recalls its finding that the Prosecutor has fulfilled his disclosure obligation and therefore this cannot provide the basis for a stay of proceedings against Bizimungu or any other accused.

25.On the issue of selective and discriminatory exercise of prosecutorial discretion, the Chamber notes that under article 15 of the Statute, the prosecutor is the sole authority entrusted by the Security Council with responsibility to investigate and prosecute persons responsible for serious violations of international criminal law in the territory of Rwanda and Rwandan citizens responsible for such violation committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. In carrying out this responsibility, the prosecutor acts as an independent organ of the tribunal and does not receive instructions from any government or other source.

26. The Chamber notes that the issue of the proper exercise of prosecutorial discretion raised by Counsel for Bizimungu and Ndindiliyimana has been the subject of several decisions in this Tribunal and the International Criminal Tribunal for the Former Yugoslavia[4]. 4 In the view of the Chamber, the golden thread that runs

[4] See Decision on Urgent Oral Motion for a Stay of the lndictment, or in the Alternative a Reference to the Security Council, Case N° ICTR-2000-56-I, 26 March 2004; *Prosecutor v.*

20) Compte tenu des arguments de l'avocat général principal, la Chambre est convaincue que le Procureur a communiqué dans le délai requis les déclarations non caviardées des 21 premiers témoins qu'il entend appeler à la barre au cours de la présente session. Elle est également convaincue que cette communication répond aux prescriptions de la décision du 19 mars 2004.

21) S'agissant des 26 000 pages de documents sur CD-ROM dont il est question dans les conclusions de la défense, la Chambre rappelle que Me Ferran a lui-même reconnu que le CD-ROM lui avait été remis depuis août et que les membres de équipe n'avaient pu étudier les documents parce qu'ils étaient en vacances à ce moment-là. Après analyse, la Chambre estime que si l'équipe de défense n'a pas étudié ces documents en temps voulu, cette situation ne saurait être interprétée comme la conséquence d'une irrégularité dans la communication des pièces effectuée par le Procureur.

22) La Chambre est également convaincue que les 3 000 à 4 000 pages de documents figurant dans une boîte qui a été remise aux équipes de défense le 17 septembre 2004 ont été communiquées en application de l'article 41 du Règlement pour les restituer à l'accusé Ndindiliyimana. Le fait que la défense ait reçu ces documents trois jours avant le début du procès n'a aucun rapport avec l'obligation de communication imposée au Procureur par l'article 66 du Règlement.

23) La Chambre conclut que le Procureur s'est acquitté de l'obligation de communication mise à sa charge par le Règlement et c'est pour les raisons susmentionnées que le 20 septembre 2004, elle a rejeté la requête en ajournement du procès déposée par la défense.

De la suspension de l'instance engagée contre l'accusé Bizimungu

24) La Chambre rappelle qu'elle a conclu que le Procureur s'était acquitté de l'obligation de communication qui lui incombait. Celle-ci ne saurait donc servir de base à la suspension de l'instance engagée contre Bizimungu ou tout autre accusé.

25) S'agissant de l'exercice sélectif et discriminatoire du pouvoir d'appréciation de l'opportunité des poursuites, la Chambre relève que selon l'article 15 du Statut, le Procureur est la seule autorité chargée par le Conseil de sécurité de la responsabilité d'instruire les dossiers et d'exercer les poursuites 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 dans l'exercice de ces fonctions, le Procureur agit en toute indépendance au sein du Tribunal et ne reçoit d'instructions d'aucun gouvernement ni d'aucune autre source.

26) La Chambre relève que la question de la bonne application de la règle de l'opportunité des poursuites soulevée par les conseils de Bizimungu et de Ndindiliyimana a été l'objet de plusieurs décisions au Tribunal de céans et au Tribunal pénal international pour l'ex-Yougoslavie[4]. Selon la Chambre, le fil conducteur reliant ces

[4] Décision relative à la requête orale déposée en procédure d'urgence et intitulée «Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council», affaire

through these decisions is that in order for judges of this Tribunal to interfere with the exercise of prosecutorial discretion, the defence must prove that the Prosecutor exercised his discretion improperly or for impermissible motives[5]. Secondly, the defence must show that in prosecuting the persons that he did, the prosecutor left out persons similarly situated[6]. In the Chamber's considered opinion, the mere assertion, without proof, that the prosecutor was bias in his selection of persons to bring to trial, is insufficient to ground judicial interference with the power conferred on the prosecutor by the Security Council in all its wisdom. The Chamber notes that the examples provided by Mr. Croisier and the arguments of Black to back up their assertions of selective prosecution are insufficient to substantiate any charge so grave against the Prosecutor. In light of this failure by the defence to discharge the burden cast on them by law, and in observance of the maxim that 'he who asserts must prove', the Chamber rejects the allegation of improper exercise of prosecutorial discretion. Accordingly, the Chamber also denies the application for stay of proceedings based on the unproved allegation of prosecutorial bias.

The Chamber's Decision to Proceed in the Absence of the Accused

27. The Chamber notes that three of the accused namely Ndindiliyimana, Bizimungu, and Sagahutu chose to stay away from the proceedings in protest against the possibility of transfer of cases to Rwanda.

28. The Chamber wishes to note that under article 8 of the Statute, the Tribunal and the national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in Rwanda in 1994. The statute further provides that the Tribunal shall have primary jurisdiction over such crimes. The Chamber is convinced that under the Rules, it is the Prosecutor who has responsibility for determining which cases will be prosecuted at this Tribunal and which ones will be prosecuted by national jurisdictions[7].

29. It is the Chamber's considered view that there are provisions under the Statute and the Rules allowing transfer of cases to national jurisdiction, including Rwanda. If the accused persons decide to absent themselves from court based on the potential transfer of other detainees and suspects to Rwanda for trial, the Cham-

Ntakirutimana, Case N° ICTR-96-10, "Judgement", 21 February 2003, para. 870-871; *Prosecutor v. Akayesu*, Case N° ICTR-96-4, "Appeals Chamber Judgement", 1 June 2001, para 94; *Prosecutor v. Delacic et al*., Case N° IT-96-21-A, "Appeals Chamber Judgement", 20 February 2001, para. 602 (the "*Celebici* Appeals Judgment").

[5] *Celebici* Appeals Judgement, para. 611.

[6] *Ibid*.

[7] V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda* (1998) at p. 319 : "It is for the Prosecutor to determine in the first instance whether the Rwanda Tribunal should investigate or prosecute a case rather than the national authorities of the State concerned."

décisions est le principe que pour amener les juges du Tribunal de céans a s'ingérer dans l'exercice du pouvoir discrétionnaire conféré au Procureur en la matière, la défense doit prouver que le Procureur a mal utilisé sa liberté d'appréciation ou qu'il l'a utilisée pour des motifs inadmissibles[5]. Qui plus est, la défense doit établir qu'en poursuivant les personnes mises en cause, le Procureur a exclu des gens placés dans une situation semblable à la leur[6]. La Chambre estime que le simple fait d'affirmer, sans en apporter la preuve, que le Procureur a choisi avec partialité les personnes à traduire en justice ne suffit pas à justifier une ingérence des juges dans l'exercice du pouvoir conféré en toute connaissance de cause au Procureur par le Conseil de sécurité. Elle relève que les exemples donnés par Me Croisier et les arguments présentés par Me Black pour soutenir que les poursuites sont engagées d'une manière sélective ne permettent pas de retenir des accusations aussi graves contre le Procureur. La défense n'ayant dès lors pas assumé la charge de la preuve que lui assigne le droit, la Chambre rejette l'allégation d'abus du pouvoir d'appréciation de l'opportunité des poursuites en application de la maxime qui veut que «la preuve incombe à celui qui affirme». En conséquence, elle rejette également la requête en suspension de l'instance fondée sur l'allégation non établie de partialité dans l'exercice des poursuites.

De la décision de la Chambre ordonnant la continuation de l'instance en l'absence des accusés

27) La Chambre relève que trois des accusés, à savoir Ndindiliyimana, Bizimungu et Sagahutu ont choisi de boycotter les audiences pour protester contre la possibilité qu'il y a de renvoyer des affaires au Rwanda.

28) Elle tient à souligner qu'aux termes de l'article 8 du Statut, le Tribunal et les juridictions nationales sont concurremment compétents pour juger les personnes présumées responsables de violations graves du droit international humanitaire commises au Rwanda en 1994. Le Statut dispose en outre que le Tribunal a la primauté sur les juridictions nationales à l'égard de ces crimes. La Chambre est convaincue que selon le Règlement, c'est le Procureur qui est chargé de déterminer les affaires à engager devant le Tribunal de céans et celles qui seront portées devant les juridictions nationales[7].

29) La Chambre juge que des dispositions du Statut et du Règlement autorisent le renvoi de certaines affaires devant les juridictions nationales, y compris celles du Rwanda. Si les accusés décident de ne pas participer aux audiences parce que d'autres

n° ICTR-2000-56-1, 26 mars 2004; *Le Procureur c. Ntakirutimana*, affaire n° ICTR-96-10, jugement, 21 février 2003, paras. 870 et 871; *Le Procureur c. Akayesu*, affaire n° ICTR-96-4, arrêt, 1er juin 2001, para. 94; *Le Procureur c. Delalic et consorts*, affaire n° IT-96-21-A, arrêt, 20 février 2001, para. 602 (ci-après dénommé l'«arrêt *Celebici*»).

[5] Arrêt *Celebici*, para. 611.

[6] *Ibid*.

[7] V. Morris et M. P. Scharf, *The International Criminal for Rwanda* (1998), p. 319 : «Il revient au Procureur de déterminer au premier chef si le Tribunal pour le Rwanda doit enquêter ou engager des poursuites dans une affaire en lieu et place des autorités nationales de l'État concerné» [traduction].

ber finds that this does not provide grounds upon which the Chamber could grant an adjournment or a stay of proceedings. On the contrary, the Chamber has concluded, after careful consideration of the submissions of the parties and the law, that there is sufficient basis to proceed in the absence of the accused under Rule 82 *bis* of the Rules[8].

Ndindiliyimana's Application to be Transferred for Trial to a National Jurisdiction

30. The Chamber has carefully considered the submissions of Mr. Black on this issue, and the response of the Prosecutor. The Chamber recalls that the Security Council has conferred this tribunal with competence to prosecute persons for serious violations of international humanitarian law committed in Rwanda in 1994[9]. The Judges of the Tribunal are elected by Members States of the United Nations and are required to be persons of high moral character, impartiality and integrity. They must be Persons qualified to hold the highest judicial office in their respective countries.

31. It is the Chamber's considered view that the defence has not put forward any cogent argument or evidence to prove that the integrity or independence of this Chamber, or the Tribunal or any of its judges has been compromised. In addition, the defence has not given any convincing reason to support its assertion that Ndindiliyimana will not receive a fair trial before this tribunal.

32. For all these reasons, the Chamber denies the application for transfer Ndindiliyimana to national jurisdiction. This Chamber is properly seised of his matter and will try him based solely on the evidence that will be tendered before this Chamber.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motions for :

(i) A Stay of Proceedings against any of the accused persons;

(ii) Postponement of the trial;

(iii) Transfer of any of the accused persons for trial at national jurisdiction.

Arusha, this 24th day of September, 2004.

[Signed] : Joseph Asoka de Silva; Taghreed Hikmat; Seon Ki Park

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[8] Rule 82 *bis* : 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 at trial;

(iii) the interests of the accused are represented by counsel.

[9] Statute of the ICTR, Article 1.

détenus et des suspects pourraient être transférés au Rwanda pour y être jugés, la Chambre estime que cette décision ne constitue pas un motif pour reporter la date d'ouverture du procès ou suspendre l'instance. Au contraire, elle conclut, après avoir attentivement examiné les arguments des parties et le droit applicable, qu'il y a des raisons suffisantes pour poursuivre la procédure en l'absence des accusés comme le prévoit d'ailleurs l'article 82 *bis* du Règlement[8].

De la requête de Ndindiliyimana tendant à son renvoi devant une juridiction nationale

30) La Chambre a attentivement examiné les arguments de Me Black sur ce point et la réponse du Procureur. Elle rappelle que le Conseil de sécurité a conféré au Tribunal de céans le pouvoir de juger les personnes présumées responsables de violations graves du droit international humanitaire commises au Rwanda en 1994[9]. Qui plus est, les juges du Tribunal sont élus par les États membres de l'Organisation des Nations Unies et doivent être des personnes de haute moralité, impartialité et intégrité. Ils doivent également posséder les qualifications requises pour être nommés aux plus hautes fonctions judiciaires dans leurs pays respectifs[10].

31) Selon la Chambre, la défense n'a présenté aucun argument ou élément de preuve convaincant pour établir que l'intégrité ou l'indépendance de la Chambre, du Tribunal ou de l'un de ses juges a été compromise. En outre, la défense n'a donné aucune raison convaincante pour laquelle elle estime que Ndindiliyimana n'aura pas un procès équitable devant le Tribunal de céans.

32) Dans ces circonstances, la Chambre rejette la requête tendant au renvoi de Ndindiliyimana devant une juridiction nationale. Elle est régulièrement saisie de son affaire et le jugera sur la seule base des éléments de preuve qui seront présentés devant elle.

PAR CES MOTIFS, LA CHAMBRE

REJETTE les requêtes de la défense tendant :

i) A la suspension de l'instance engagée contre tel ou tel accusé;

ii) Au report de la date d'ouverture du procès;

iii) Au renvoi de tel ou tel accusé devant une juridiction nationale.

Arusha, le 24 septembre 2004

[Signé] : Joseph Asoka de Silva; Taghreed Hikmat; Seon Ki Park

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[8] Article 82 *bis* : 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.

[9] Article premier du Statut du TPIR.

[10] Article 12 du Statut du TPIR.

Decision on Defence Oral Motion for Adjournement of the Proceedings 8 October 2004 ICTR-2000-56-T

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding; Taghrid Hikmet; Seon Ki Park

Nzuwonemeye – adjournment of the proceedings – withdrawal of co-counsel, health reasons – assignment of a new co-counsel – counsel represents the accused – counsel shall deal with all stages of the procedure – help of legal assistant – motion denied

International instruments cited : Statute, art. 20 (4) (b) – Rules of procedure and evidence, Rule 45 (i) – Directive on the assignment of Defence Counsel, Art. 15 (A), (C) and (E)

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

SITTING as Trial Chamber II composed of Judges Asoka de Silva, presiding, Taghrid Hikmet and Seon Ki Park (the "Chamber");

BEING SEIZED of a Defence oral motion for adjournment of the proceedings argued on Thursday 7 October 2004;

HAVING HEARD the Prosecution's reply during the same proceedings;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion on the basis of the oral submissions by the Parties.

WHEREAS Mr Ferran, Lead Counsel for the Defence for Nzuwonemeye argues that since Co-Counsel Mr. Béraud has filed a request for withdrawal based on health reasons which he will accept, and awaiting the assignment of a new Co-Counsel to the interest of the Accused, a one month trial adjournment should be ordered by the Tribunal;

WHEREAS Mr. Ferran argued that it would not be feasible for him to continue the proceedings without the help of co-counsel at a sustained rhythm and also in view of his age;

WHEREAS the Prosecution rejects Counsel's arguments based on the fact that a Lead-Counsel and a Co-Counsel are designed to operate as substitute to one another and added that this situation is only temporary and provisional as a Co-Counsel will be appointed and that Lead Counsel benefits from the assistance of a Legal Assistant.

HAVING DELIBERATED

1. The Trial Chamber recalls Article 20 (4) (b) of the Statute :

> 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 :[…] to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his own choosing.

2. The Chamber also recalls that pursuant to Rule 45 (i), "It is understood that Counsel will represent the accused and conduct the case to finality.[…]".

3. The Chamber also notes Article 15 (A) of the Directive on the assignment of Defence Counsel (the "Directive") which states that :

> A suspect or accused shall only be entitled to have *one Counsel* assigned to him and that Counsel shall deal with *all stages of procedure* and all matters arising out of the representation of the suspect or accused or for the conduct of his Defence.[…]" (Our emphasis)

4. The Chamber further notes Article 15 (C) of the Directive which states that :

> Whenever appropriate and at the request of the assigned Counsel, the Registrar *may*, pursuant to Article 13 above, appoint a co-counsel to assist the assigned Counsel.[…] (Our emphasis),

5. Article 15 (E) recalls that Lead Counsel "has primarily responsibility for the Defence" and stipulates that under the authority of Lead Counsel, Co-Counsel may deal with all stages of the procedure.

6. Accordingly, the Chamber is of the view that an indigent Accused is entitled to the assignment of *one Counsel* who has the responsibility to deal with all stages of the procedure whereas the Registrar *may* appoint a Co-Counsel, which is a discretionary power.

7. The Chamber recalls that Counsel for Nzuwonemeye shall deal with all stages of the procedure and all matters arising out of the representation of the accused or of the conduct of the Accused's Defence. Based on the fact that the Accused Nzuwonemeye is represented by Counsel, the Chamber is satisfied that the right of the Accused to have an adequate Defence is respected. The Chamber adds for the record that Mr. Ferran is an experienced Counsel before this Tribunal and benefits from the assistance of a Legal Assistant. Therefore, the Chamber denies the Defence request for adjournment of the proceedings based on the fact that Co-Counsel has asked to withdraw.

FOR THE FOREGOING REASONS, THE TRIBUNAL :

DENIES the Defence motion in all respect.

Arusha, 8 October 2004

[Signed] : Asoka de Silva, Presiding Judge; Taghrid Hilmet; Seon Ki Park

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Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials 3 November 2004 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

Judges : Asoka De Silva, Presiding; Taghrid Hikmet; Seon Ki Park

Bizimungu – disclosure of prosecution materials – reconsideration, change of circumstances – disclosure of unredacted witness testimonies before the start of trial – cross-examination – balance between Defense rights and protective measures for witnesses – motion granted in part

International instruments cited : Statute, art. 19, 20, 21 – Rules of procedure and evidence, Rules 53, 66, 67, 69, 73, 75, and 90

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Samuel Musabyimana*, Decision on the Prosecutor's Motion for protective measures for victims and witnesses, 19 February 2002 (ICTR-01-62,* Reports 2002*, p. X) – Trial Chamber I,* 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,* Reports 2003*, p. 97) – Trial Chamber,* The Prosecutor v. Augustin Ndindiliyimana et al.*, Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses Orders, 19 March 2004 (ICTR-00-56,* Reports 2004*, p. X) – Trial Chamber,* The Prosecutor v. Augustin Ndindiliyimana et al.*, 19 March 2004 (ICTR-00-56,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber II composed of Judges Asoka De Silva, Presiding, Taghrid Hikmet, and Seon Ki Park (the "Chamber"),

BEING SEIZED of the "*Requête présentée par le conseil d'Augustin Bizimungu aux fins de révision de la décision du 19 mars 2004 relative aux mesures de protections des témoins de l'accusation",* "the Motion" filed on 23 September 2004[1];

HAVING RECEIVED AND CONSIDERED THE

i. "Mémoire du Procureur en réponse à la requête présentée par le conseil d'Augustin Bizimungu aux fins de révision de la décision du 19 mars 2004 rel-

[1] Unofficial Translation : "Bizimungu Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Victims and Witnesses"

ative aux mesures de protection des témoins de l'accusation" filed on 28 September 2004[2];

ii. "Réplique au 'Mémoire du Procureur en réponse à la requête présentée par le conseil d'Augustin Bizimungu aux fins de révisions de la décision du 19 Mars 2004 relative aux mesures de protection des témoins de l'accusation'" filed on 8 October 2004[3];

NOTING the 19 March 2004 Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, requiring that the Prosecution disclose unredacted statements to the Defence not later than twenty one (21) days before each witness is due to testify at trial (the "19 March 2004 Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 53, 66, 67, 69, 73, 75, and 90 of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence requests the Disclosure of unredacted witness testimonies before the start of trial

2. The Defence argues that circumstances have changed since the 19 March 2004 Decision on witness protection and that unless the disclosure deadlines in that Decision are extended, the court calendar which was decided on 17 September 2004 provides inadequate time for the Defence to prepare its cross-examinations.

3. Referring to Rule 66, the Defence argues that the Defence cannot conduct a competent cross-examination with only 21 days disclosure for several reasons including : the obligation of counsel to attend trial sessions five days a week; administrative delays; and the extensive nature of redactions of witness statements.

4. The Defence notes that the statements disclosed by the Prosecution in 2000 and 2001 were almost entirely redacted meaning that the documents are often useless.

5. The Defence recognizes the changes to Rule 69 (C) allowing for rolling disclosure, but interprets Article 19 – which requires "full respect for the rights of the accused and due regard for the protection of victims and witnesses" – to mean that the rights of the Accused prevail.

6. The Defence argues that Rule 75 (A) also states that witness protection must be "consistent with the rights of the accused."

[2] Unofficial Translation : "Prosecutors response to the Bizimungu Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Witnesses"

[3] Unofficial Translation : "Reply to the 'Prosecutor's response to the Bizimungu Motion to Reconsider the 19 March 2004 Decision on Measures for the Protection of Witnesses'"

7. The Defence refers to Rule 66 (A) as the governing rule on such issues, and argues that the derogation foreseen in Rule 69 (A) is reserved for 'exceptional circumstances'.

8. The Defence believes that no such circumstances have been shown to justify the blanket protection of all witnesses in this case.

Response of the Prosecution

9. On the disclosure of all witness statements in unredacted form before the start of the Trial, the Prosecution notes that Rules 66 (A) and 67 (A) are specifically subject to Rules 53 and 69.

10. The Prosecution also cites Rule 69 (A) (B) (C), and adds that in this case, the Trial Chamber has rendered two decisions related to witness protection. The Decision dated 19 March 2004 states that :

> "The Prosecution may initially disclose materials to the Defence in a redacted form in order to protect names…"
>
> "The identities and all previously redacted information pertaining to these protected witnesses be disclosed to the Defence no later than 21 days prior to the date each witness is due to testify."[4]

11. The Prosecution adds that as long as it has not been shown that the threat to witnesses has disappeared, the measures taken by the Court are incumbent on all.

12. The Prosecution argues that the Defence has neither proved, nor offered to prove, that there has been a change in the security situation of victims and witnesses such that the protective measures are no longer necessary.

13. The Prosecution adds that the Defence has the same right as the Prosecution to make requests to the appropriate Chambers. It adds that the Defence has also requested protection for its witnesses.

14. The Prosecution states that the Defence has had redacted statements of all 115 witnesses for several years.

15. The Prosecution notes that on 21 September 2004, when the first witness testified in this case, the Defence had had identifying material for at least 35 days.

16. The Prosecution affirms that for those witnesses who will appear in November or December 2004, the Defence will have had the identifying materials at least three or four months in advance of the dates on which they are due to testify. The same will hold for any future sessions.

[4] *Prosecutor v. Augustin Ndindiliyimana et al*., Decision on the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses Orders, 19 March 2004, Paragraphs (i) and (j).

The Defence Reply to the Prosecutor's Response

17. The Defence points out that the accused Bizimungu has not requested any protective measures for its witnesses. Protective measures have only been accorded to witnesses for the defence of the Accused Nzuwonomeye.

18. On 17 June 2004, the Defence received for the first time redacted testimonies of all 115 Prosecution witnesses. Therefore, the Prosecution's claim that the Defence has had these documents for several years is wrong.

19. The Defence claims that the practice of the Tribunal is to make unredacted statements available to the Defence before the start of the trial, as in *Prosecutor v Nahimana et al*., and *Prosecutor v. Ntagerura et al.*

20. The Defence also notes that several Chambers have reconsidered their own protective measures and cites *Prosecutor v. Nyiramasuhuko et al.* and *Prosecutor v. Bagosora et al.*

HAVING DELIBERATED

21. The Chamber agrees with the Defence that a Trial Chamber may reconsider its own decisions if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.

22. The Chamber notes the argument of the Defence that Article 19 (1) should be interpreted to mean that the Rights of the Accused prevail over those of witnesses, the Chamber believes it has an obligation to "strike a balance between the Right of the Defence and the demonstrated need for protective measures for witnesses."[5]

23. It is clear that Rule 69 (C) may displace the disclosure requirements under Rule 66 (A) (ii) when the protection of victims and witnesses is at stake. In such a case, the disclosure deadline must allow for 'adequate time for preparation of the prosecution and defence'. Balancing the interests engaged in Articles 20 and 21 must be the basis for determining what is 'adequate'. This point is reiterated in Rule 75 (A). What is "adequate" will depend on the facts of each case.

24. Having considered the Defence submission, this Trial Chamber believes that it has not established a basis on which to consider the 19 March 2004 Decision erroneous.

25. The Chamber recalls the *Bagosora* decision on the issue of disclosure of the identities of protected witnesses stating that "measuring the dangers to prospective witnesses is a difficult task, and the consequences of miscalculation are profound, both for the rights of the Accused and the availability of witnesses…The Chamber is anxious to ensure the highest level of protection for witnesses, and is mindful of

[5] *Musabyimana*, Decision on the Prosecutor's Motion for protective measures for victims and witnesses, 19 February 2002, as quoted in Military II 19 March 2004 Decision (para. 42).

the need to inspire confidence that those who come before the Tribunal will not be subject to intimidation."[6].

26. The Chamber must also consider whether there has been a change in circumstances. It recognizes the validity of the Defence arguments regarding the Court calendar. At the Status Conference on 30 April 2004, the Trial Chamber estimated that trial sessions would last two to three months. The actual three month session was not fixed until the 17 September 2004 Pre-Trial Conference. It follows therefore that the Trial calendar could not have been taken into account at the time the 19 March 2004 Decision was made by the Chamber.

27. In those circumstances, the Chamber agrees that it may be difficult to prepare an adequate cross-examination with only 21 days of full disclosure when Defence counsel is expected to attend trial hearings full time in Arusha; when many previously disclosed statements are redacted; and with the potential for a range of administrative delays.

28. The Chamber therefore believes that the balance between the Rights of the Accused and the need to Protect Witnesses must be reviewed in light of the establishment of the actual Court calendar.

29. Moreover, the Chamber is persuaded by the reasoning in the *Bagosora* Decision to the effect that "speedy, focused, and predictable trial proceedings, which fully respect the rights of the Accused, while providing the maximum protection to witnesses and victims, will be served by modifying the existing witness protection."[7]

30. The Chamber recalls the Prosecution's assertion that the Defence had had identifying material for the first 21 witnesses approximately 35 days before the first witness testified in this case, and that the same would be true for trial sessions to come. This is a further ground to consider it reasonable to vary the deadline for disclosure of unredacted witness statements, in order to bring the legal regime into conformity with what the Prosecution indicated they have been doing in practice and what they intend to continue doing in the future.

31. The Chamber therefore decides to amend Measure C of the 19 March 2004 Decision to read that "The Prosecution must disclose to the Defence any identifying information relating to protected witnesses no later than 35 days before the start of each trial session."[8]

32. Finally, the Chamber does not exclude the possibility that among the remaining witnesses, there are cases that would constitute exceptional circumstances pursuant to article 69 (A). In such cases, the Prosecution may apply to the Chamber for special protective measures derogating from this Decision.

FOR THE FOREGOING REASONS, THE TRIBUNAL

GRANTS IN PART the Defence motion and amends Measure C of its 19 March 2004 Decision to read that "The Prosecution must disclose to the Defence any iden-

[6] *Prosecutor v. 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.

[7] *Ibid*, para. 24.

[8] Paragraph 50 of 19 March 2004 Decision in *Prosecutor v. Ndindliliyimana et. a*l on protective measures for witnesses.

tifying information relating to protected witnesses no later than 35 days before the start of each trial session"; and

DENIES the Defence Motion in all other respects.

Arusha, 3 November 2004

[Signed] : Asoka De Silva; Taghrid Hikmet; Seon Ki Park

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Decision on Sagahutu's Motion for Reconsideration of 19 march 2004 Decision on Disclosure of Prosecution Materials, for Leave to contact a Prosecution Witness, and for Access to Testimony of Protected Witnesses in the Military I Case 3 November 2004 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

Judges : Asoka De Silva, Presiding; Taghrid Hikmet; Seon Ki Park

Sagahutu – disclosure of unredacted statements before the start of trial – disclosure of statements made before other jurisdictions, judicial files, Rwanda – identities – leave to contact a prosecution witness, agreement of the witness, interest of justice – access to testimony of protected witnesses – reconsideration – motion granted in part

International instruments cited : Rules of procedure and evidence, Rules 53, 66 (A), 67 (A), 68, 69, 73 (A), 73 bis*, 75 and 90*

International cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v Augustin Ndindiliyimana et al.*, Decision of the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, 19 March 2004 (ICTR-00-56,* Reports 2004*, p. X) – Trial Chamber,* The Prosecurion v. Augustin Bizimungu et al.*, Decision on Bizimungu Defence Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, 3 November 2004 (ICTR-00-56,* Reports 2004*, p. X)*

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

SITTING as Trial Chamber II composed of Judges Asoka De Silva, Presiding, Taghrid Hikmet, and Seon Ki Park (the "Chamber"),

BEING SEIZED of the "Requête en extrême urgence présentée par le conseil d'Innocent *Sagahutu* aux fins de communication de pièces et pour être autorisé à entrer en contact avec un témoin de l'accusation" filed on 15 September 2004[1].

HAVING RECEIVED AND CONSIDERED THE

i. "*Mémoire du Procureur en réponse à la requête en extrême urgence présentée par le conseil d'Innocent Sagahutu aux fins de communication de pièces et pour être autorisé à entrer en contact avec un témoin de l'accusation"* filed on 20 September 2004[2],

ii. "*Additif au mémoire en réponse du procureur en date du 20 Septembre 2004, faisant suite à la requête du conseil d'Innocent Sagahutu aux fins de communication de pièces du 15 septembre 2004*", filed 23 September 2004[3],

iii. "*Duplique à la réplique du Procureur à la requête en extrême urgence aux fins de communication des pièces du procureur et de demande d'autorisation d'entrer en contact avec un témoin du Procureur*", filed on 23 September 2004[4].

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") and in particular Rules 73 *bis*, 75 and 90;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence for Sagahutu stresses Rule 66 (A) which requires that the Prosecution disclose all witness statements and identities prior to the start of the trial. It also notes the decision of the Chamber granting the Prosecutor rolling disclosure up to 21 days before the date the witness is due to testify at trial. The Defence, however, asks that the Tribunal order the Prosecutor to disclose all prosecution witness statements at least 21 days before the start of the trial.

2. The Defence notes Rule 67 (A) (i) on the disclosure of the names of Prosecution witnesses. The Defence argues that the statements disclosed by the Prosecutor in 2000 and 2001 were almost entirely redacted meaning that the documents are, for all intents and purposes, useless. The Defence thus requests the disclosure of the unredacted statements of all Prosecution witnesses.

3. The Defence requests that the Prosecution disclose all witness identities subject to Rule 69.

[1] Unofficial Translation : "Extremely Urgent Motion for disclosure of Prosecution materials, and for leave to contact a prosecution witness"

[2] Unofficial Translation : "Prosecution's Response to Sagahutu's Motion"

[3] Unofficial Translation : "Addition to the Prosecutor's response dated 20 September 2004 to the request from the Defence for Innocent Sagahutu for disclosure dated 15 September 2004"

[4] Unofficial Translation : "The response of Counsel for Sagahutu to the Prosecutor's Response to the 'Extremely Urgent Motion for disclosure of Prosecution materials, and for leave to contact a prosecution witness'"

4. The Defence requests access to judicial files related to Prosecution Witnesses from all other jurisdictions.

5. The Defence for Sagahutu also submits that certain witnesses in the Military I Case referred to the Accused Sagahutu in their testimony. The Defence requests that all testimonies by these witnesses be disclosed to it. The Defence adds that even if the Prosecution does not use these testimonies, the Defence is entitled to use them pursuant to Rule 90 (g), and that they should therefore be disclosed prior to the start of the trial.

6. Finally, the Defence for Sagahutu requests permission to meet with Prosecution Witness DA in the presence of the Prosecutor and anyone else of the Chamber's choosing. The Defence refers to paragraph (f) of the Order of the Tribunal in its Decision dated 19 March 2004 requiring that the Defence ask for such permission in writing when "he wishes to enter into contact with one of the witnesses whose identity is known by the Defence."[5]

7. The Defence submits that the Accused knows Witness DA well, and that the witness was contacted by the Defence before the Defence learned that he would be a Prosecution witness. The Defence would like to use some of the statements made by the witness during this meeting to address the credibility of Witness DA.

Response of the Prosecution

8. On the disclosure of all witness statements in unredacted form before the start of the Trial, the Prosecution notes that Rules 66 (A) and 67 (A) are specifically subject to Rules 53 and 69.

9. The Prosecution also cites Rule 69 (A), (B), and (C), and adds that in this case, the Trial Chamber has rendered two decisions related to the protection of witnesses. The Prosecution adds that as long as it has not been shown that the threat to witnesses has disappeared, the measures taken by the Court are incumbent on all.

10. With respect to the Disclosure of witness testimony mentioning Innocent Sagahutu in other trials, the Prosecution alleges that it cannot disclose trial proceedings which may contain information allowing for the identification of protected witnesses without the approval of the Chamber.

11. The Prosecutor argues that protective measures remain in force after the end of proceedings, and the new Rule 75 does not allow derogation from this Rule, as long as the conditions in paragraphs (C) and (E) have not been met.

12. The Prosecution adds that the Defence has the same right as the Prosecution to make requests to the appropriate Chambers.

13. On the Defence's request to meet with Witness DA, the Prosecution states that it asked witness DA whether he would be willing to meet with the Defence on 18 September 2004. Witness DA refused, both orally and in writing.

[5] *Prosecutor v A. Ndindiliyimana et al*., Decision of the Prosecutor's Motion for Review, Variation and Extension of Protective Measures for Victims and Witnesses, 19 March 2004. Order (f).

Addition to the Prosecution Response

14. The Prosecution states that in accordance with the Chambers' 17 September 2004 Order, it has sent to the Defence 14 transcripts as well as unredacted statements of the 21 witnesses to be heard in the first trial session.

15. The Prosecution notes that the first five witnesses have never given testimony before the Tribunal, and that their testimony is expected to last at least until 15 October 2004.

16. The Prosecutor undertook, on 23 September 2004, to send a letter that same day to the Rwandan authorities asking for judicial files related to all Prosecution witnesses[6].

Sagahutu's Reply

17. The Defence submits that Rule 75 on measures for the Protection of Victims and Witnesses must be 'consistent with the rights of the accused'. This is why the Defence believes it is entitled to all Prosecution evidence before the start of the trial.

18. The Defence again seeks access to previous statements made by witnesses in Rwanda or before the Tribunal.

HAVING DELIBERATED

On Disclosure of Unredacted Statements Before the Start of Trial

19. The Chamber notes that this issue has been addressed in the Chamber's Decision dated 3 November 2004[7]. In that Decision, the Chamber amended its 19 March 2004 Decision, based on changed circumstances, and ordered the Prosecution to disclose unredacted statements of its witnesses no later than 35 days before the start of the trial session in which they are scheduled to testify. This similarly disposes of the same prayer in this motion.

On the Request for Statements Made by the Accused in Other Jurisdictions

20. The Chamber recalls the Prosecution's undertaking, made on 23 September 2004, to ask the Rwandan authorities for the judicial files of Prosecution witnesses. The Chamber orders the Prosecution to inform the Chamber of developments on this issue by 12 November 2004.

[6] The Chamber has not received a copy of this letter.

[7] Decision on Bizimungu Defence Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, 2 November 2004.

On the Request to Meet with a Prosecution Witness

21. The Chamber decides that in the interests of justice it will grant the Defence permission to meet with Witness DA subject to the agreement of the witness to such a meeting

22. However, the Chamber notes the Prosecution's response in which it states that it has asked Witness DA whether he would be willing to speak to the Defence team and that he has indicated both orally, and in writing, that he is unwilling to do so.

23. In this connection, the Chamber directs the WVSS to do the following : (a) explore, as a preliminary matter, the willingness of the witness to meet with the Defence Counsel; (b) supervise the resulting meeting, where the witness is agreeable to the meeting, subject to other applicable witness protection measures; and (c) permit the attendance of a representative of the Office of the Prosecutor.

On the Request for Access to Testimony from the Military I Case

24. The Chamber notes that the Defence has not indicated in its Motion whether the witnesses in the *Bagosora* case will also be witnesses in this case, or whether that testimony might be exculpatory.

25. The Chamber observes that if the said witnesses were potential witnesses in this case, any testimony which they gave in closed session in the *Bagosora* case would be subject to disclosure obligations pursuant to Rules 66, 67, and 75(f) (ii). The same is true for any testimony that might be exculpatory, pursuant to Rule 68.

26. The present Defence Motion, however, is not founded on any of the legal considerations discussed in the preceding paragraphs. The Chamber concludes, therefore, that there is no legal basis for the Defence request as it is currently formulated, and the request is therefore denied.

FOR THE FOREGOING REASONS, THE TRIBUNAL :

GRANTS in part the Defence request relating to the disclosure of unredacted witness statements in accordance with the Chamber's Decision of 3 November 2004 on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision.

ORDERS the Prosecution to inform the Chamber by 12 November 2004 of any developments regarding its undertaking to request the judicial files of Prosecution witnesses from the Rwandan authorities.

GRANTS the Motion with regards to the Defence request to meet with Witness DA, in the terms indicated in paragraph 23 above.

DENIES the Motion in all other respects.

Arusha, 3 November 2004

[Signed] : Asoka De Silva; Taghrid Hikmet; Seon Ki Park

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Decision on Defence Motion to Lift the Chamber's 19 September 2004 Order Assigning Defence Counsel to Accused Augustin Bizimungu 3 November 2004 (ICTR-2000-56-T)

(Original : English)

Trial Chamber II

Judges : Asoka De Silva, Presiding; Taghrid Hikmet; Seon Ki Park

Bizimungu – withdrawal of counsel, other counsel appointed – frivolous motion, no fees – motion denied

International instruments cited : Rules of procedure and evidence, Rule 45 quater*, 73 (A)*

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

SITTING as Trial Chamber II composed of Judges Asoka De Silva, Presiding, Taghrid Hikmet and Seon Ki Park, (the "Chamber");

BEING SEIZED of "*Requête à fin de main levée de la commission d'office du 21 septembre 2004"* dated 27 September 2004[1];

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules.

SUBMISSION OF THE PARTY

1. On 21 September 2004, Augustin Bizimungu asked that his Defence Counsel, Michel Croisier, no longer represent him in his absence.

2. On 21 September 2004, the Chamber instructed the Registrar under Rule 45 *quarter* to assign Mr. Croisier to represent the interests of the Accused Bizimungu.

3. On 27 September 2004, Mr. Croisier informed the Chamber of Accused Bizimungu's decision to take part in the proceedings again and to voluntarily retain Mr. Croisier to represent him. Therefore, Mr. Croisier asked the Chamber to lift the Order of assignment pursuant to Rule 45 *quarter.*

[1] Unofficial Translation : "Decision on the Defence Motion to Lift the Chamber's 21 September 2004 Order on Assignment of Counsel to Augustin Bizimungu."

AFTER HAVING DELIBERATED

4. Considering that Mr. Croisier has formally withdrawn his representation in this case due to health reasons and that another Lead Counsel has been appointed by the Registrar to replace him, the Chamber considers Mr Croisier's Motion of 27 September 2004 to have been overtaken by events and therefore moot.

5. Notwithstanding that the motion has become moot due to the withdrawal of counsel, the Chamber finds this motion frivolous pursuant to Rule 73 (f) and instructs the Registrar not to pay any fees associated with the filing of this Motion.

FOR THE FOREGOING REASONS, THE TRIBUNAL :

Declares the Motion Moot.

Arusha, 3 November 2004.

[Signed] : Asoka De Silva; Taghrid Hikmet; Seon Ki Park

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Decision on Prosecutor's Extremely Urgent Motion for the Transfer of Detained Witnesses (Rule 90 bis*) 7 December 2004 (ICTR-2000-56-T)*

(Original : English)

Trial Chamber II

Judge : Asoka de Silva

Transfer of detained witnesses – Rwanda, Tanzania – presence of the witnesses not required for any criminal proceedings in the requested State - transfer will not extend the period of the detention – letters from the Minister for Justice – United Nations Detention Facility – cooperation – Registrar – motion granted

International instruments cited : Rules of procedure and evidence, Rules 54, 73 (A), 90 bis

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, designated by the Trial Chamber pursuant to Rule 73 (A) and pursuant to Rule 90 *bis* (B) of the Rules of Procedure and Evidence (the "Rules");

BEING SEISED of the "*Requête non contentieuse du Procureur, en extrême urgence, aux fins de transfert de témoins détenus ou placés sous contrôle judiciaire :*