## *Judgement*
## *19 September 2005 (ICTR-99-54A-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Florence Ndepele Mwachande Mumba; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

*Jean de Dieu Kamuhanda – Error of law, Identification of the Accused, In-court identification – Error of fact, Error invalidating the judgement, Necessary factual findings, Miscarriage of justice – Errors in the Indictment, Right of the accused to be informed about the nature and cause of the charges against him/her, Imprecise charges, Lack of precision regarding the allegations, Prejudicial effects of a defective indictment – Burden of proof, Alibi, Reasonable doubt about the presence of the accused at the crime site, Alibi not credible because appeared designed for a purpose, Rebuttal evidence, Standard of proof, Different standards for the assessment of Defence and Prosecution witnesses – Criminal Responsibility, Simultaneous convictions, Unique conviction for multiple modes of liability, Cumulative modes of responsibility , Instigating others to commit the crime, Authority and influence of the accused, Aiding and abetting the commission of the crimes, Nexus requirement, Causality, Ordering crimes, Superior responsibility, Effective control, Authority over the perpetrator of the crime, Direct and substantial effect on the commission of the illegal act – Genocide, Specific intent to destroy the Tutsi ethnic group – Extermination, Widespread or systematic attack against the population, Specific objective of extermination of the Tutsi, Explicit manifestations of criminal intent – Evidence, Assessment of the evidence, Mischaracterization of the evidence, Reasonable trier of fact, Distortion of the Defence Position, Hearsay evidence, Corroborative evidence,* Affidavit*, Corroborative and Circumstantial Evidence – Testimonies, Content of the testimony, Cross-examination limited to the subject-matter of the evidence-in-chief, Reliance of the testimonies, Internal Inconsistencies, Eyewitness testimony, Effects of trauma on testimony – Credibility of the witnesses, Sufficient doubt about a witness's credibility, Impeachment of Witness's Credibility, Contradictory Testimony, Third person influence, Direct evidence – Right to a fair trial, Right to a fair hearing – Statement, Individual and Proportional Sentencing, Individual circumstances, Aggravating circumstances, Duty and authority to protect the population, Superior responsibility, Abuse of the Accused's personal position in the community, Superior/subordinate relationship, Mitigating circumstances, Guilty plea, Age of the accused, Poor health, Statute of father of four young children, Good character, General sentencing practices, Sentencing practices of the Rwandan courts, Goals of sentencing, National Reconciliation and Restoration of Peace, Fundamental principles of sentencing, Principle of proportionality, Principle of individualisation of the punishment, Gravity of the crime, Degree of responsibility – Separate opinion, Separate and dissenting opinion, Dissenting opinion, Confirmation of the Trial judgement*

*International Instruments cited :*

*Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4 (b) ; Rules of Procedure and Evidence, rules 67 (A) (ii), 85 (A) (vi), 90 (G) (i), 101 (B) (ii), 101 (D), 103 (B), 107, 118, 118 (C) and 119; Security Council Resolution 955 of 8 November 1994; Statute, art. 2 (3) (a) , 6 (1), 6 (3), 23 (2) and 24; Statute of the ICTY, art. 7 (1) and 7 (3)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Jean Kambanda, *Judgement and Sentence, 4 September 1998 (ICTR-97-23); Trial Chamber,* The Prosecutor v. Georges Ruggiu, *Judgement and Sentence, 1st June 2000 (ICTR-97-32); Appeals Chamber,* The Prosecutor v. Jean Kambanda, *Judgement, 19 October 2000 (ICTR-97-23); Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4); Appeals Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Judgement (Reasons), 1 June 2001 (ICTR-95-1); Appeals Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 16 November 2001 (ICTR-96-13); Trial Chamber,* The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, *Judgement and Sentence, 21 February 2003 (ICTR-96-10 and ICTR-96-17); Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89 (C) and 92* bis *of the Rules of Procedure and Evidence, 20 May 2003 (ICTR-99-54A); Trial Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, Corrigendum *to the Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89 (C) and 92* bis *of the Rules of Procedure and Evidence, 22 May 2003 (ICTR-99-54A); Appeals Chamber,* The Prosecutor v. Georges Rutaganda, *Judgement, 26 May 2003 (ICTR-96-3); Appeals Chamber,* The Prosecutor v. Eliezer Niyitegeka, *Judgement, 9 July 2004 (ICTR-96-14); Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and 96-17);* ***Unspecified*** *Chamber,* The Prosecutor v. Jean de Dieu Kamuhanda, *Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005 (ICTR-99-54A); Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20); Appeals Chamber,* The Prosecutor v. Juvénal Kajelijeli*, Judgement, 23 May 2005 (ICTR-98-44A)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Zlatko Aleksovski, *Judgement, 24 March 2000 (IT-95-14/1); Appeals Chamber,* The Prosecutor v. Anto Furundzija, *Judgement, 21 July 2000 (IT-95-17/1); Appeals Chamber,* The Prosecutor v. Zdravko Mucic et al., *Judgment, 20 February 2001 (IT-96-21); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić, *Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Dragoljub Kunarac, *Judgement, 12 June 2002 (IT-96-23 and 23/1); Trial Chamber,* The Prosecutor v. Vidoje Blagojević et al., *Decision on Dragan Obrenovic's Application for Provisional Release, 9 November 2002 (IT-02-60); Appeals Chamber,* The Prosecutor v. Mitar Vasiljević, *Judgement, 25 February 2004 (IT-98-32); Appeals Chamber,* The Prosecutor v. Radislav Krstić*, Judgement, 19 April 2004 (IT-98-33); Appeals Chamber,* The Prosecutor v. Tihomir Blaškić, *Judgement, 29 July 2004 (IT-95-14); Appeals Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Judgement, 17 December 2004 (IT-95-14/2); Appeals Chamber,* The Prosecutor v. Dragan Nikolić, *Judgement, 4 February 2005 (IT-94-2); Appeals Chamber,* The Prosecutor v. Miroslav Kvočka, *Judgement, 28 February 2005 (IT-98-30/1)*

**Contents**

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 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal by Jean de Dieu Kamuhanda against the Judgement and Sentence rendered by Trial Chamber II on 22 January 2004 in the case of *The Prosecutor v. Jean de Dieu Kamuhanda* ("Trial Judgement")[1].

## I. INTRODUCTION

### A. *The Appellant*

2. The Appellant, Jean de Dieu Kamuhanda, was born on 3 March 1953 in Gikomero *Commune*, Kigali-Rural Prefecture, Rwanda[2].The Appellant was Minister of Higher Education and Scientific Research in the interim government, from 25 May 1994 until mid-July 1994[3]. TheAppellant held a prominent position in Rwanda which gave him certain influence in Gikomero[4]. The Trial Chamber found that the Appellant distributed weapons to members of the *Interahamwe* and others engaged in attacks in Gikomero and that he participated in crimes against the Tutsi population in Gikomero on 12 April 1994[5].

### B. *The Judgement and Sentence*

3. The Trial Chamber found the Appellant individually criminally responsible for instigating, ordering, and aiding and abetting the killing and extermination of members of the Tutsi ethnic group in Gikomero Parish Compound, pursuant to Article 6 (1) of the Statute[6]. Accordingly, the Trial Chamber found the Appellant guilty of the following crimes : genocide (Count 2) and extermination as a crime against humanity (Count 5)[7]. For each conviction under Counts 2 and 5 the Trial Chamber, by a majority, sentenced the Appellant to imprisonment for the remainder of his life, with the sentences to run concurrently[8].

### C. *The Appeal*

4. As indicated in the Appellant's Notice of Appeal ("Notice of Appeal") and Appeal Brief ("Appeal Brief"), the Appellant is appealing against the convictions and the sentences, and requests the Appeals Chamber to quash the Trial Judgement, enter a verdict of not guilty on each of the charges, and order his immediate release, or, in the alternative, to return the case to a differently composed Trial Chamber, or, as

[1] For ease of reference, two annexes are appended to this Judgement : Annex A – Procedural Background and Annex B – Cited Materials/Defined Terms.
[2] Trial Judgement, paras. 5, 6.
[3] Trial Judgement, paras. 6, 24
[4] Trial Judgement, para. 73.
[5] Trial Judgement, para. 740.
[6] Trial Judgement, paras. 651, 700.
[7] Trial Judgement, para. 750.
[8] Trial Judgement, paras. 770, 771.

a further alternative, to overturn the sentences imposed and sentence him to a fixed term of imprisonment[9]. The Appellant has divided his grounds of appeal into three categories : errors of law, errors of fact, and appeal against the sentence. Within these categories the Appeals Chamber has identified fifteen grounds of appeal.

### D. *Standards for Appellate Review*

5. The Appeals Chamber now recalls some of the requisite standards for appellate review pursuant to Article 24 of the Statute. Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice.

6. As regards errors of law, the Appeals Chamber has recently stated that :

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law[10].

7. As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice[11].

8. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber[12]. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits[13].

9. In order for the Appeals Chamber to assess the appealing party's arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenge is being made[14]. Further,

---

[9] Notice of Appeal, p. 9; Appeal Brief, p. 108.

[10] *Ntakirutimana* Appeal Judgement, para. 11 (citations omitted). See also, *e.g., Blaškic* Appeal Judgement, para. 14; *Niyitegeka* Appeal Judgement, para. 7; *Vasiljevic* Appeal Judgement, para. 6; *Rutaganda* Appeal Judgement, para. 20; *Musema* Appeal Judgement, para. 16.

[11] *Krstic* Appeal Judgement, para. 40 (citations omitted). See also, *e.g., Kajelijeli* Appeal Judgement, para. 5; *Blaškic* Appeal Judgement, paras. 16-19; *Ntakirutimana* Appeal Judgement, para. 12; *Niyitegeka* Appeal Judgement, para. 8.

[12] *Kajelijeli* Appeal Judgement, para. 6. See also *Ntakirutimana* Appeal Judgement, para. 13.

[13] *Kajelijeli* Appeal Judgement, para. 6. See also, *e.g., Blaškic* Appeal Judgement, para. 13; *Ntakirutimana* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.

[14] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4 (b). See also *Kajelijeli* Appeal Judgement, para. 7; *Blaškic* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Ntakirutimana* Appeal Judgement, para. 14; *Vasiljevic* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

"the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies"[15].

10. Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing[16]. The Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning[17].

## II. Alleged Errors concerning the Indictment (Ground of Appeal 1)

11. Under the first ground of appeal, the Appellant submits that the Indictment did not properly inform him about the nature and cause of the charges against him. The Appellant alleges that : (1) the charge relating to the massacres in the Gishaka Catholic Parish was imprecise[18], and (2) the Indictment lacked of precision regarding the allegations that he distributed weapons in Gikomero[19].

### A. *The Events at the Gishaka Catholic Parish*

12. In respect of the alleged error of law relating to the charge concerning the events at the Gishaka Catholic Parish, the Appellant acknowledges that this error does not invalidate the Judgement since he was not found guilty on that charge[20]. Further, in this sub-ground, the Appellant does not raise any legal issue of a broader interest; he merely argues that the trial Chamber did not meet the standard established by the Tribunal's jurisprudence[21].This argument does not justify an intervention of the Appeals Chamber when there are no other interests of the Appellant at stake. Accordingly, the Appeals Chamber declines to address this sub-ground of appeal further.

### B. *The Distribution of Weapons in Gikomero*

#### 1. *The Arguments of the Parties*

13. Next, the Appellant submits that the Indictment does not provide details as to the alleged distribution of weapons. Consequently, the Appellant contends, the evi-

[15] *Vasiljevic* Appeal Judgement, para. 12. See also, *e.g., Kajelijeli* Appeal Judgement, para. 7; *Blaškic* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, paras. 43, 48.

[16] *Kajelijeli* Appeal Judgement, para. 8. See also, *e.g., Niyitegeka* Appeal Judgement, para. 11; *Ntakirutimana* Appeal Judgement, para. 15; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.,* Appeal Judgement, para. 47.

[17] *Kajelijeli* Appeal Judgement, para. 8. See also, *e.g., Niyitegeka* Appeal Judgement, para. 11; *Blaškic* Appeal Judgement, para. 13; *Ntakirutimana* Appeal Judgement, para. 15; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 48.

[18] Appeal Brief, paras. 8-18.

[19] Appeal Brief, paras. 19-32.

[20] Appeal Brief, para. 11.

[21] Appeal Brief, para. 13.

dence relating to the distribution of weapons should be dismissed[22]. He argues that he did not know where the alleged distribution of weapons took place, as the Indictment mentioned only the *préfecture* of Kigali-Rural, but did not specify in which of its 16 *communes* the alleged distribution took place[23]. Only after the Prosecution presented its evidence, the Appellant submits, did he realize against which allegations he had to defend himself[24].

14. The Prosecution responds that the distribution of weapons was not a material fact that should have been pleaded; rather, it was part of the evidence that supported the allegations against the Appellant[25]. As such, it was only a matter for disclosure, and this disclosure was effectuated in a timely manner[26]. The Prosecution points to its Pre-Trial Brief, in which it alleged that the Appellant had distributed weapons to the inhabitants of Gikomero *Commune* prior to the massacre[27]. The Prosecution argues that the Appellant's ability to prepare his defence was not impaired : the Appellant had already himself mentioned the alleged distribution of weapons in his Pre-Trial Brief, and he had indicated that he would call witnesses to contradict the Prosecution's evidence relating to the distributions of weapons in Gikomero *commune*[28]. When the evidence concerning the arms distribution at the house of the Appellant's cousin in Gikomero was adduced at the trial, the Prosecution adds, the Appellant did not object[29]. Finally, the Prosecution argues that the Trial Chamber did rely on the distribution of weapons as one of several circumstances only to support its finding that the Appellant had the requisite intent for genocide. Of far more significance for the Appellant's conviction, in the Prosecution's view, was his initiation of the attack at the Gikomero Parish Compound[30].

15. In reply, the Appellant argues that the distribution of weapons was one of the facts supporting the Trial Chamber's finding that he acted with genocidal intent, and thus was material to the charges brought against him[31].

*2. The Trial Chamber's Findings*

16. The Trial Chamber found that the Appellant distributed weapons in Gikomero and relied on this finding to support its conclusions that the Appellant (1) intended to commit genocide[32], and (2) aided and abetted genocide[33]. As to the first point, the Trial Chamber relied additionally on the facts that the Appellant led the armed attackers to the Gikomero Parish Compound, gave them the order to start the attack, and

[22] Appeal Brief, para. 20.
[23] Appeal Brief, para. 22.
[24] Appeal Brief, para. 23.
[25] Respondent's Brief, paras. 22, 23.
[26] Respondent's Brief, para. 24.
[27] Respondent's Brief, para. 25.
[28] Respondent's Brief, paras. 28, 29.
[29] Respondent's Brief, para. 27.
[30] Respondent's Brief, para. 23.
[31] Reply Brief, paras. 4, 5.
[32] Trial Judgement, para. 637.
[33] Trial Judgement, para. 648.

was still present when a Tutsi preacher named Augustin Bucundura was shot by one of the persons who had arrived with the Appellant[34].

3. *The Alleged Defect of the Indictment*

17. An indictment is defective if it does not state the material facts underpinning the charges[35]. Whether a fact is material depends upon the nature of the Prosecution's case[36]. In *Kupreškic*, the ICTY Appeals Chamber held as follows :

> A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail[37].

18. In the present case, the relevant section of the Indictment reads :

> Interim Government Minister Jean de Dieu Kamuhanda had family ties to Gikomero *commune*, Kigali-Rural préfecture. During the month of April 1994 he supervised the killings in the area. On several occasions [*sic*] he personally distributed firearms, grenades and machetes to civilian militia in Kigali-Rural for the purpose of "killing all the Tutsi and fighting the FPR"[38].
>
> The Trial Chamber found that the Appellant distributed weapons to a number of persons during a meeting at the home of his cousin between 6 and 10 April 1994[39], but rejected the Prosecution's evidence about other alleged distributions of weapons[40]. The Trial Chamber concluded that the Appellant participated in the massacre at the Gikomero Parish Compound, "by aiding and abetting in the commission of the crime through the distribution of weapons"[41]. Therefore, the Appeals Chamber finds, the distribution of weapons was a material fact relating to the Appellant's criminal responsibility and had to be pleaded in the Indictment in detail.

19. The Indictment alleged that the Appellant distributed weapons in Kigali-Rural *préfecture* in April 1994 "on several occasions", without further specifying the dates or locations of the alleged distributions. In the context of this case, the distribution of weapons was a criminal act which the Appellant, according to the Indictment, committed personally. At a minimum, the Prosecution was therefore required to provide the Appellant with information "in detail" about "the time and place of the events and the means" by which the alleged distributions were committed[42].

---

[34] Trial Judgement, paras. 638-641.

[35] *Kupreškic et al.,* Appeal Judgement, para. 88. See also *Ntakirutimana* Appeal Judgement, para. 25.

[36] *Kupreškic et al.,* Appeal Judgement, para. 89.

[37] *Kupreškic et al.,* Appeal Judgement, para. 89.

[38] Indictment, para. 6.44.

[39] Trial Judgement, para. 273.

[40] Trial Judgement, paras. 283 (Kayanga football field), para. 288 (Ntaruka *secteur*).

[41] Trial Judgement, para. 648.

[42] See *Kupreškic et al.,* Appeal Judgement, para. 89.

20. The Prosecution possessed a statement of Witness GEK dated 12 February 1998, which contains a detailed description of the Appellant's visit to the homes of his cousins, including the exact date, and of his distribution of weapons to those present[43]. Therefore, the Prosecution was in a position to plead specific details regarding this matter, given that Witness GEK's statement was the sole evidentiary basis for the Prosecution's allegation of the distribution of weapons at the homes of the Appellant's cousins. The Prosecution's failure to include a detailed pleading of this fact therefore rendered the Indictment defective.

4. *Failure to Object*

21. In *Niyitegeka*, the Appeals Chamber ruled that, in order to succeed in challenging the exclusion of a material fact from an indictment, an accused must make a timely objection to the admission of evidence of the material fact in question before the Trial Chamber :

> In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the un-pleaded allegation[44].

Failure to object before the Trial Chamber will usually result in the Appeals Chamber disregarding the argument. Here, the Defence did not object to the introduction of Witness GEK's testimony at trial ; rather, it challenged her credibility during cross-examination. However, even in such a case, the Appeals Chamber may choose to intervene *proprio motu*, considering the importance of the accused's right to be informed of the charges against him and the possibility of serious prejudice to the accused if the Prosecution informs him about crucial facts for the first time at trial. In such circumstances the accused has the burden of proving on appeal that his ability to prepare his case was materially impaired[45].

22. In *Ntakirutimana*, the Appeals Chamber treated a challenge to the Indictment as properly raised, although the Appellant did not object to the error at the time of the introduction of the evidence at trial, because the Trial Chamber had concluded that the challenges to the vagueness of the Indictment had subsequently been properly presented before it[46].

23. In the present case, the Trial Chamber noted that :

> The Defence submitted that in the above paragraphs of the Indictment, the Prosecution vaguely refers to weapons that the Accused allegedly distributed in his *commune* of Gikomero and to massacres which he allegedly led. Nowhere in the Indictment did the Prosecution provide the particulars of the circumstances in which these crimes were allegedly committed[47].

---

[43] Statement of Witness GEK, 12 February 1998 (Defence Exhibit 2).

[44] *Niyitegeka* Appeal Judgement, para. 199. See also *Kayishema and Ruzindana,* Appeal Judgement, para. 91.

[45] *Niyitegeka,* Appeal Judgement, paras. 199, 200.

[46] *Ntakirutimana,* Appeal Judgement, para. 52.

[47] Trial Judgement, para. 48.

Subsequently, the Trial Chamber did not indicate that it had any doubts about the admissibility of the Defence's argument, but found that the Indictment was not vague as to the massacre at the Gishaka Catholic Parish[48]. In light of these circumstances, the Appeals Chamber will consider whether the Appellant was sufficiently prejudiced so as to merit a remedy at the appellate stage, notwithstanding his failure to timely object at trial.

5. *Prejudicial Effects of the Defective Indictment*

24. The prejudicial effects of a defective indictment can be remedied if the Prosecution

> "provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him or her, which compensates for the failure of the indictment to give proper notice of the charges"[49].

25. The Appeals Chamber recalls that, in the present case, the Trial Chamber based its finding that the Appellant distributed weapons at his cousins' homes exclusively on the evidence given by Witness GEK. Witness GEK's statement of 12 February 1998, which contained details about this distribution of weapons, including the exact date, was disclosed to the Appellant in a redacted version on 22 November 2000. The unredacted statement was disclosed on 26 March 2001. In the Pre-Trial Brief filed on 30 March 2001, the Prosecution explicitly alleged that

> "[p]rior to the Gikomero massacre, the accused distributed weapons to certain indigenes of the Gikomero *commune*"[50].

The same brief contained a summary of the statement of Witness GEK :

> According to this witness the accused came to her house to meet with her husband and brotherin-law, on the 8th April 1994. Kamuhanda gave them grenades and a pruning knife each. Further she would testify on the conversation [that] took place between those three men. The accused had told them that they were the only ones who had not started killing and urged them to start[51].

26. The Appeals Chamber concludes that the Prosecution provided the Appellant with timely, clear and consistent information about the alleged distribution of weapons in the homes of his cousins in Gikomero.

27. The Appeals Chamber observes that the Defence was not prejudiced by the aforementioned imprecision in the Indictment. It is clear from the Appellant's Pre-Trial Brief, filed on 25 July 2002, that he understood that the charges against him included

> "crimes he is alleged to have committed on or about 12 and 13 April 1994 at the catholic and protestant churches in Gikomero when he is alleged to have distributed weapons and supervised the massacres"[52].

---

[48] The Trial Chamber did not specifically address the argument that the Indictment was vague as to the distribution of weapons.

[49] *Kvocka et al.,* Appeal Judgement, para. 34, referring to *Kupreskic et al*., Appeal Judgement, para. 114. See also *Niyitegeka* Appeal Judgement, para. 195; *Ntakirutimana* Appeal Judgement, para. 27.

[50] Prosecution Pre-Trial Brief, para. 1.

[51] Prosecution Pre-Trial Brief, pp. 15, 16.

[52] Defence Pre-Trial Brief, p. 4.

More specifically, the Appellant asserted that "[h]e did not travel to Gikomero after 6 April 1994; he did not distribute weapons there"[53]. Moreover, the Appellant indicated that he would call witnesses to contradict Witness GEK's evidence, among them Witness GPK :

> This witness contradicts GEK's testimony. He states that she was no longer at his home on the 12th; that the accused had not come and distributed weapons in Gikomero because he certainly would have seen him; that the accused was not there during the events[54].

Likewise, Witness EM was called by the Appellant to testify :

> [T]hat GEK had left her house upon hearing of the plane accident and contrary to what she says, could not have witnessed any distribution of weapons, nor massacres. She contradicts GEK's testimony in every respect[55].

The Defence called Witnesses GPB and TMF for a similar purpose[56].

28. In sum, the Appeals Chamber holds that the Prosecution provided the Appellant with timely, clear, and consistent information about this distribution of weapons. Moreover, the Appellant did not object to the only evidence adduced to prove this fact, the testimony of Witness GEK, and had ample opportunity to prepare his defence. Accordingly, this sub-ground of appeal is dismissed and the first ground of appeal is rejected in its entirety.

## III. Assessment of Evidence : Exhibits (Ground of Appeal 2, in part)

29. The Appellant submits that the Trial Chamber erred in law by failing to consider the exhibits introduced by the parties[57]. The Appellant specifies three instances in which, in his view, the Trial Chamber did not meet its obligation to determine the probative value of all the exhibits :

(1) The Defence filed excerpts of earlier statements of Witness GEK and highlighted the inconsistencies it had found within these statements, submitting that the Trial Chamber never ruled on these inconsistencies[58].

(2) The Defence filed a sketch of the Gikomero Parish Compound drawn by Witness GEE. The Appellant submits that the sketch did not correspond to the local situation, but that the Trial Chamber failed to take this into account[59].

(3) Finally, the Appellant argues that the Defence submitted all the prior statements of Prosecution and alibi witnesses as exhibits, but that the Trial Chamber did not consider the inconsistencies in the case of the Prosecution witnesses and the corroboration in the case of the alibi witnesses[60].

---

[53] Defence Pre-Trial Brief, p. 5.
[54] Defence Pre-Trial Brief, p. 25.
[55] Defence Pre-Trial Brief, p. 28.
[56] Defence Pre-Trial Brief, pp. 26 (Witness GPB), 46 (Witness TMF).
[57] Appeal Brief, paras. 60, 70.
[58] Appeal Brief, para. 62.
[59] Appeal Brief, para. 63.
[60] Appeal Brief, paras. 64, 65.

30. In response, the Prosecution argues that the Trial Chamber was not required to articulate in its Judgement every step of its reasoning in reaching a particular finding, nor to refer to every piece of evidence[61]. With regard to Witness GEK, the Prosecution submits that the Trial Chamber had the discretion to find the alleged inconsistencies inadequate to cast any substantial doubt on Witness GEK's testimony[62]. Regarding Witness GEE, the Prosecution submits that the Appellant merely repeats the position he took at trial, and that the Trial Chamber at least considered a similar argument[63]. The Prosecution submits that the appeal on these grounds should be dismissed[64].

31. In reply, the Appellant relies on the Appeal Judgement in *Musema*, which, in his view, found that when a Trial Chamber did not refer to a particular piece of evidence, it could be presumed that the Trial Chamber did not take this piece of evidence into account[65].

32. Contrary to the Appellant's view, Musema does not stand for such a proposition. In that case, the Appeals Chamber did not suggest that a Trial Chamber could be presumed to have ignored a piece of evidence just because it did not mention it in the Judgement. Rather, the Appeals Chamber held, in the paragraph cited by the Appellant, that it could be presumed (absent particular circumstances suggesting otherwise) that the Trial Chamber chose not to "rely on" an unmentioned piece of evidence - that is, that it considered the evidence but decided that it was either not reliable or otherwise not worth citing in the Judgement[66]. The Appeals Chamber then proceeded to assess the reasonableness of the Trial Chamber's decision not to rely on the evidence, ultimately identifying several reasons why the Trial Chamber could reasonably have concluded the evidence was not reliable and thus rejecting the challenge to its Judgement. The Appeals Chamber in Musema furthermore expressly acknowledged that

> … a Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching a particular finding. Although no particular evidence may have been referred to by a Chamber, it may nevertheless be reasonable to assume in the light of the particular circumstances of the case, that the Trial Chamber had taken it into account. Hence, where a Trial Chamber did not refer to any particular evidence in its reasoning, it is for the appellant to demonstrate that both the finding made by the Trial Chamber and its failure to refer to the evidence had been disregarded[67].

Moreover, the reading of *Musema* proffered by the Appellant is inconsistent with the subsequent case law of the Appeals Chamber, which clearly establishes that a Trial Chamber is not obligated to identify and discuss in the Judgement each and every piece of evidence that it has considered[68].

---

[61] Respondent's Brief, para. 161.
[62] Respondent's Brief, para. 163.
[63] Respondent's Brief, para. 164.
[64] Respondent's Brief, para. 167.
[65] Reply Brief, para. 86. See also Appeal Brief, para. 66, quoting *Musema* Appeal Judgement, para. 118.
[66] *Musema* Appeal Judgement, para. 118.
[67] *Musema* Appeal Judgement, para. 277 (citations omitted).
[68] See*, e.g., Semanza* Appeal Judgement, paras. 130, 139; *Rutaganda* Appeal Judgement para. 536; *Celebici Case* Appeal Judgement, para. 481.

33. The alleged inconsistencies in Witness GEK's testimony are discussed as such under Ground of Appeal 12[69]. With regard to Exhibit D 9, the Appeals Chamber notes that this exhibit is a sketch drawn by the witness, which consists of a few uneven lines without any explanation. The Trial Chamber indeed did not refer to this exhibit; however, with regard to Witness GEE, the Trial Chamber stated it did not find

> "the fact that the Witness did not recognise the photograph in Prosecution Exhibit 2 to be unusual, insofar as the Witness testified that he had never been at Gikomero Parish Compound before"[70].

In light of this reasoning, with which the Appeals Chamber agrees, it was not unreasonable for the Trial Chamber to disregard the fact that the witness was apparently also unable to draw a sketch representing the same compound.

34. The Appeals Chamber now turns to the argument that the Appellant tendered the prior statements of "all the Prosecution witnesses"[71] and of all his alibi witnesses, and that the Trial Chamber should have examined them. The Appeals Chamber considers that this submission is unsubstantiated. Even if the Trial Chamber did not refer to these statements, the Appellant has not shown that the Trial Chamber in fact disregarded them, and he has not demonstrated that they would have prevented a reasonable trier of fact from entering a conviction[72]. Accordingly, the Appeals Chamber dismisses the submissions considered under this ground of appeal.

## IV. Burden of Proof (Ground of Appeal 4)

35. The Appellant submits that the Trial Chamber erred in law by requiring the Defence to prove its argument beyond reasonable doubt, in effect requiring him to prove his innocence[73]. To support this submission, the Appellant refers to a number of passages from the Trial Judgement which show, in his view, that the Trial Chamber reversed the burden of proof[74].

36. The Prosecution argues that these passages, correctly understood, meant that the Trial Chamber observed that the Defence evidence in question failed to raise a reasonable doubt because it was not incompatible with the Prosecution evidence[75]. In addition, the Prosecution points out, it should be remembered that the Trial Chamber rejected much of the Prosecution's case[76].

37. The examples which the Appellant quotes will be discussed in greater detail in their proper context[77]. At the present stage, the Appeals Chamber will only consider

[69] See Chapter X.A.
[70] Trial Judgement, para. 453.
[71] Appeal Brief, para. 64.
[72] See *supra* para. 10 ("The Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning").
[73] Appeal Brief, para. 82.
[74] Appeal Brief, para. 83.
[75] Respondent's Brief, para. 46.
[76] Respondent's Brief, para. 47.
[77] See Chapters IX, XI.

whether, as the Appellant contends, they reveal a fundamental misapplication of the burden of proof on the part of the Trial Chamber.

38. The Appeals Chamber notes that with regard to alibi, the Trial Chamber stated that :

> when an alibi is submitted by the Accused the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects. Indeed, the Prosecution must prove "that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence". If the alibi is reasonably possibly true, it will be successful[78].

This definition is legally beyond reproach and shows that the Trial Chamber was aware of the applicable burden of proof.

39. As is explained below in Chapter XI, the Appeals Chamber notes that in some instances the Trial Chamber applied language which *prima facie* supports the Appellant's arguments, for example in paragraph 174 of the Trial Judgement :

> "The Trial Chamber finds that the evidence of Witness ALB does not exonerate the Accused from being present at Gikomero"[79].

However, as the Prosecution correctly pointed out, these passages have to be read in context. The fact that the Trial Chamber in some instances used language which may be misunderstood, does not necessarily mean that it fundamentally misplaced the burden of proof. For example, the Trial Chamber found that the Appellant "may have been in the Kacyiru area at some time during the period of 7 April 1994 to 18 April 1994" and continued that, however, "this did not preclude him from travelling to the Gikomero commune at times during the same period"[80]. This latter statement, interpreted in context, simply means that the Appellant's occasional presence at Kacyiru did not raise a reasonable doubt about his presence in Gikomero, which was supported by other parts of the evidence.

40. The same applies to the Appellant's argument that the Trial Chamber required him to prove the impossibility of travel between Kigali and Gikomero[81]. The material fact to be proven was not the possibility of travel between the two points, but whether the Appellant was present at Gikomero in the early afternoon of 12 April 1994. The Trial Chamber had found that there was evidence supporting the Appellant's presence there. One way for the Appellant to raise reasonable doubt about this evidence was to show that it was impossible to travel to Gikomero at the time in question. The fact that it was possible, albeit difficult, to travel was in the Trial Chamber's view consistent with the evidence showing that the Appellant was at Gikomero, and, therefore, the evidence introduced by the Appellant on this point was not sufficient to raise reasonable doubt about his presence there. The "rebuttal" evidence which, the Appellant claims, was not adduced[82], is precisely the evidence that showed that he was present at Gikomero, notwithstanding any difficulties in travelling there. Therefore, the fact that the Trial Chamber was not satisfied that it was impossible to travel from

[78] Trial Judgement, para. 84, referring to *Musema* Appeal Judgement, para. 205 (citations omitted).
[79] Trial Judgement, para. 174 (emphasis added). See Appeal Brief, para. 85.
[80] Trial Judgement, para. 167.
[81] Appeal Brief, para. 86.
[82] Appeal Brief, para. 86.

Kigali to Gikomero does not show that the Trial Chamber misplaced the burden of proof.

41. Likewise, the fact that the Trial Chamber disregarded Witness GPK's and Xavièra Mukaminani's testimony that no weapons had been distributed at their neighbour's house does not show that the Trial Chamber misplaced the burden of proof. The Trial Chamber had heard Witness GEK's evidence about the distribution of weapons and found the witness to be credible. When it disregarded the evidence of two neighbours who claimed that they had not witnessed the distribution, which had taken place inside the house[83], it did not misplace the burden of proof, but simply found that the neighbour's testimony did not raise a reasonable doubt about the Prosecution's case.

42. The Trial Chamber reasoned that, even if the testimonies of the Defence witnesses about the events at the Gikomero Parish Compound were to be believed, this would not demonstrate that the Appellant was not on the scene[84]. The Trial Chamber had determined that a number of Prosecution witnesses supported the finding that the Appellant had been present at the beginning of the attack, but had left soon afterwards. The testimony of other witnesses, who had testified that they arrived later at the scene of the attack and had not seen the Appellant there, was not inconsistent with the testimony of the Prosecution witnesses and, therefore, not suited to cast any reasonable doubt on their evidence. The Trial Chamber's statements reconciling the competing sets of testimony again do not reflect a misunderstanding of the burden of proof.

43. With regard to Witness GPT, the Trial Chamber noted in paragraph 472 of the Trial Judgement that, following the inquiries [Witness GPT] made there was no mention of a leader of the attack of 12 April 1994 at the Gikomero Parish Compound. The Chamber notes that while indeed GPT may have made inquiries, he testified that he did not question Prosecution Witness GEK. The Chamber thus finds that even if GPT did make such inquiries, it does not rule out the possibility that a man identified as Kamuhanda had been at the Gikomero Parish Compound for a brief period on 12 April 1994, bringing with him attackers who attacked the refugees sheltering there[85].

The Appellant argues that the Trial Chamber thus said "that statements by a Prosecution witness have more weight than those by a Defence witness"[86]. This contention is unfounded. The Trial Chamber heard a number of witnesses who had been present when the Appellant arrived with the assailants at the Gikomero Parish Compound[87]. The fact that it attached more weight to these witnesses than to Witness GPT who had not been present, but testified about later inquiries, does not reveal any error of law on the part of the Trial Chamber.

[83] Trial Judgement, para. 273.
[84] Trial Judgement, para. 470.
[85] Trial Judgement, para. 472.
[86] Appeal Brief, para. 90.
[87] For a more detailed discussion, see Chapter XI.K.

44. Accordingly, the Appeals Chamber, Judge Weinberg de Roca dissenting[88], finds that the Appellant has not established that the Trial Chamber misapplied the burden of proof and rejects this ground of appeal.

## V. Standard of Proof (Ground of Appeal 5)

45. Under this ground of appeal the Appellant submits that the Trial Chamber erred in law by misapprehending the standard and tests for assessing evidence. He advances three sub-grounds to support this submission. First, that the Trial Chamber committed errors concerning the identification evidence[89]. This sub-ground is addressed below in Chapter XI. Second, that the Trial Chamber did not assess the evidence as a whole, in particular regarding the alibi and the alleged impossibility of travel between Kigali and Gikomero[90]. The Appeals Chamber addresses these submissions in Chapters XI and IX, respectively. Third, the Appellant submits that the Trial Chamber applied different standards for the assessment of Defence and Prosecution witnesses, a point the Appeals Chamber addresses here[91].

46. The Appellant submits that the Trial Chamber found Defence witnesses not to be credible upon realizing the slightest discrepancy in their testimony, whereas it accepted the testimony of Prosecution witnesses even if it showed irreparable discrepancies[92]. The Appellant argues that the Trial Chamber recalled the principle that "[t]he presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable"[93], but applied this principle only to the testimony of Prosecution witnesses, and systematically disregarded it in the case of Defence witnesses, thus breaching the principle of equality of arms and the right of the Appellant to a fair trial[94]. To support his argument, the Appellant enumerates a number of instances in which the Trial Chamber, in his view, disregarded evident inconsistencies in the testimony of Prosecution witnesses[95]. On the other hand, the Appellant argues, the Trial Chamber disregarded the alibi evidence solely because it had found contradictions in the evidence of Witnesses ALS, ALF, ALR, and ALB[96].

47. At this point the Appeals Chamber examines only the alleged error of law. The Appeals Chamber understands that the Appellant contends that the Trial Chamber applied different standards for the assessment of Defence and Prosecution witnesses, thus breaching his right to a fair trial[97].

48. The Appeals Chamber observes that the Trial Chamber rejected in a number of instances the evidence given by Prosecution witnesses :

---

[88] See Chapter XVIII.
[89] Appeal Brief, paras. 93-107.
[90] Appeal Brief, paras. 108-114; Reply Brief, para. 29.
[91] Appeal Brief, paras. 115-133.
[92] Appeal Brief, para. 115.
[93] Trial Judgement, para. 36, quoting *Kupreškic et al.* Appeal Judgement, para. 31.
[94] Appeal Brief, para. 117.
[95] Appeal Brief, paras. 119-127.
[96] Appeal Brief, paras. 130, 131.
[97] Appeal Brief, para. 117.

- Prosecution Witness GAB testified that the Appellant spoke at an MRND political rally in the Kayanga *secteur*, telling his audience that a "solution has been found to the problems that [the Tutsi] are raising and this will be conveyed, that solution will be conveyed to you in the not too distant future"[98].

Between 9 and 11 April 1994, Witness GAB testified further, the Appellant distributed weapons in the Kayanga *secteur*[99]. The Trial Chamber found the evidence of Witness GAB not credible, and thus concluded that it was not established that the Appellant distributed weapons in the Kayanga *secteur*[100].

- Prosecution Witness GAC testified that, between 8 and 12 April 1994, the Appellant distributed weapons at a bar in Ntaruka *secteur*, Gikomero *commune*[101]. The Trial Chamber found Witness GAC's account improbable and did not rely on his evidence, and declined to find that the Appellant distributed weapons in Ntaruka *secteur*[102].
- Regarding the massacre at the Gikomero Parish Compound, the Trial Chamber indicated that it did not rely on the uncorroborated evidence of Witness GEI[103], and that it found Witness GEM's estimates of times and numbers unreliable[104].
- With regard to the events at the Gishaka Catholic Parish, the Trial Chamber noted "the many inconsistencies between the Witness testimonies"[105] and found "that the Prosecution has not proven the charges against the Accused in relation to his alleged involvement in the massacres which occurred there between these dates"[106].

49. With regard to the alleged application of a stricter standard to Defence witnesses, the Appeals Chamber notes that the Appellant relies only on the assessment of the evidence of four of his alibi witnesses, whose evidence had been in fact rejected because of inconsistencies in their testimonies. Given the fact that the Trial Chamber, on the other hand, disregarded the evidence of a number of Prosecution witnesses, partly because of inconsistencies, the Appeals Chamber is not satisfied that the Appellant has established an inconsistent approach on the part of the Trial Chamber. Whether the Trial Chamber's treatment of the alleged inconsistencies in the individual testimonies amounts to errors of fact will be discussed later in its proper context[107].

50. This ground of appeal is, accordingly, rejected.

[98] Trial Judgement, para. 275.
[99] Trial Judgement, para. 276.
[100] Trial Judgement, paras. 282, 283.
[101] Trial Judgement, para. 285.
[102] Trial Judgement, paras. 287, 288.
[103] Trial Judgement, para. 457.
[104] Trial Judgement, para. 459.
[105] Trial Judgement, para. 565.
[106] Trial Judgement, para. 567.
[107] See, *e.g.*, Chapter X (Witness GEK); Chapter XI (Defence's alibi witnesses; Prosecution's witnesses of the Gikomero Parish Compound massacre).

## VI. Distortion of the Defence Position : The Origin of the Attackers (Ground of Appeal 7, in part)

51. The Appellant submits that the Trial Chamber distorted several arguments of the Defence as well as the testimony of Defence witnesses, thus denying him the right to a fair trial[108]. Most of his arguments in support of this submission relate closely to alleged errors of fact and will be addressed in subsequent chapters of this Judgement[109]; at this point, the Appeals Chamber will only address the allegation that the Trial Chamber distorted the Defence's argument about the origin of the attackers.

52. The Appellant contends that he had established that the people who attacked the refugees at the Gikomero Parish Compound came from Rubungo and argues that the Defence had always used the term "attackers" to designate the people who arrived in vehicles, but never to designate local people who joined in the attack[110]. The Appellant points out, however, that the Trial Chamber noted evidence that local Hutus joined the attackers[111]. In the view of the Appellant, this amounted to a "distortion" of his arguments[112]. This "distortion", he asserts, impacted upon the factual findings of the Trial Chamber, which found that the issue of the origin of the attackers was immaterial to the Appellant's criminal responsibility, whereas it was actually an important matter showing that the Appellant had no influence over the attackers[113].

53. The Prosecution responds that the Trial Chamber was merely unprepared to accept the conclusion drawn by the Appellant, and that its factual findings about the Appellant's presence during the attack at the Gikomero Parish Compound were reasonable[114].

54. The Appeals Chamber notes that the Appellant does not challenge the Trial Chamber's summary of his arguments on the issue of the origin of the attackers, but rather the Trial Chamber's conclusion on this point, which reads as follows :

> The Chamber finds that there is no conclusive evidence that the attackers came from Rubungo. The Chamber also notes the evidence of Witness GEC that local Hutus joined those who had arrived in vehicles. The Chamber has considered all the evidence tendered and finds that as far as the criminal responsibility of the Accused is concerned the issue raised by the Defence is not material[115].

55. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber distorted the Defence position that the attackers came from Rubungo. Rather, the Trial Chamber simply made a finding of fact based on the evidence, and furthermore deemed the issue immaterial to the Appellant's criminal responsibility. In both respects, the Trial Chamber did not distort the Appellant's arguments but simply

[108] Appeal Brief, para. 150.
[109] See Chapter X.B.4 on the identity of Witness GEK; Chapter IX.D on the alleged impossibility to travel from Kigali to Gikomero; Chapter XI.C and XI.E on the alleged distortion of the testimony of the alibi witnesses.
[110] Appeal Brief, paras. 161, 162.
[111] Appeal Brief, para. 161.
[112] Appeal Brief, para. 164.
[113] Appeal Brief, paras. 163, 164.
[114] Respondent's Brief, paras. 207, 208.
[115] Trial Judgement, para. 67 (citations omitted).

disagreed with them. Accordingly, the Appeals Chamber dismisses the submissions considered in this chapter.

## VII. VERDICT (GROUND OF APPEAL 8)

56. Under this ground of Appeal, the Appellant alleges first that the Trial Chamber erred in law in holding him responsible on the basis of Article 6 (1) of the Statute, whereas, in the Appellant's view, none of the modes of participation enumerated in this provision could be imputed to him. He further alleges that the Trial Chamber erred in holding him guilty of genocide and extermination, without sufficient proof of the required intent for either crime[116].

### A. *Criminal Responsibility of the Appellant Under Article 6 (1) of the Statute*

57. On the basis of the Appellant's involvement in the massacre at Gikomero Parish Compound, the Trial Chamber found the Appellant criminally responsible for the crimes of genocide and extermination in several senses : (1) he instigated others to commit the crimes; (2) he aided and abetted the crimes by distributing weapons and leading the attackers to the compound; and (3) he ordered the attackers to kill those who had taken refuge in the compound. The Appellant asserts that these findings are not supported by the evidence[117].

#### 1. *Instigating Others to Commit the Crime*

58. The Appellant submits that the Trial Chamber's finding that he instigated others to commit the crimes covers the mode of participation by "inciting to commit". He argues that the Prosecution did not adduce evidence proving the existence of a causal link between the incitement and the commission of the crime, because the persons to whom the Appellant allegedly gave weapons were not present during the massacre, and because it was never established that the weapons which the Appellant had distributed were used for the crimes[118].

59. The Prosecution responds that to establish culpability for instigation pursuant to Article 6 (1) of the Statute, the accused's actions must substantially contribute to the commission of the crime, but they need not be a condition *sine qua non* of the crime[119]. The Prosecution argues that at least one man present at the meeting when the weapons were distributed was a member of the *Interahamwe*, and that the Appellant knew that the *Interahamwe* would be able to incite others to attack the Tutsi in Gikomero *commune*. Moreover, the Prosecution adds that, even if some of the perpetrators of the crimes did not communicate with the Appellant, it was only reasonable to conclude that they were encouraged to participate in the killings by those whose participation was directly instigated by the Appellant[120].

---

[116] Appeal Brief, para. 177.
[117] Appeal Brief, paras. 181, 182.
[118] Appeal Brief, paras. 183, 184.
[119] Respondent's Brief, para. 248.
[120] Respondent's Brief, paras. 250, 251.

60. In order to assess the merits of the Appellant's factual challenge, the Appeals Chamber must first consider whether, indeed, the Trial Chamber's findings concerning incitement were premised on the Appellant's alleged conduct during the weapons distribution incident, or, instead, on some other conduct. The Appeals Chamber recalls that the Trial Chamber summarized its conclusions regarding the Appellant's participation in the killing in Gikomero Parish Compound as follows :

> On the basis of its factual findings and legal findings above, the Chamber finds that the Accused participated in the killings in Gikomero Parish Compound in Gikomero *commune* by ordering *Interahamwe*, soldiers, and policemen to kill members of the Tutsi ethnic group, instigating other assailants to kill members of the Tutsi ethnic group and by aiding and abetting in the commission of the crime through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound[121].

61. In the view of the Appeals Chamber, the Trial Judgement is unclear as to which "other assailants" the Trial Chamber refers when it concludes that the Appellant ordered *Interahamwe*, soldiers, and policemen to kill members of the Tutsi ethnic group" and instigated "other assailants to kill members of the Tutsi ethnic group"[122]. It might be argued that the Trial Chamber thought of members of the local population who joined the attackers when it mentioned "other assailants". This interpretation of the Trial Judgement could be supported by the argument that the Appellant had authority over *Interahamwe*, soldiers, and policemen, but not over civilian bystanders who spontaneously joined the attack. However, considering the entire Trial Judgement, the Appeals Chamber finds that there is not enough material to support this interpretation. Paragraph 648, quoted above, contains only the conclusions of the Trial Chamber. The factual basis for these conclusions is to be found in paragraph 505 of the Trial Judgement. Analyzing the evidence about the attack at the Gikomero Parish Compound, the Trial Chamber found that the Appellant arrived with a group of *Interahamwe*, soldiers, policemen and local population at the compound, that he initiated the attack and that he ordered the attackers to start the killing[123]. In these factual findings, the Trial Chamber did not distinguish between the people accompanying the Appellant and the local population; rather, it found that he ordered "the attack". In addition, the Trial Chamber did not find that there was a formal superior-subordinate relationship between the Appellant and the attackers[124], but that he enjoyed "a certain influence in the Gikomero community"[125]; the Trial Chamber thus did not distinguish on this basis between attackers under the Appellant's formal authority and other attackers. In conclusion, the Appeals Chamber finds that the factual findings of the Trial Chamber are not premised on a distinction between the Appellant "ordering" *Interahamwe*, soldiers, and policemen, and "instigating" other assailants to start the attack.

62. The Prosecution argues that the Appellant's conviction for instigation relates to his actions prior to the events of 12 April 1994[126]. The Appeals Chamber notes that

[121] Trial Judgement, para. 648.
[122] Trial Judgement, para. 648.
[123] Trial Judgement, para. 505.
[124] Trial Judgement, para. 641.
[125] Trial Judgement, para. 73.
[126] Respondent's Brief, paras. 249-253.

the Trial Chamber found at paragraph 273 of the Judgement that "a meeting occurred sometime between 6 April 1994 and 10 April 1994 at the home of one of his cousins in Gikomero" involving "the Accused, two of his two cousins, an *Interahamwe*, and a neighbour". It further found as follows :

> [A]t this meeting, the Accused addressed those present and told them that the killings in Gikomero *commune* had not yet started and that "those [who] were to assist him to start had married Tutsi women". The Accused told those present that he would bring "equipment" for them to start, and that if their women were in the way, they should first eliminate them. Whilst in his house, Kamanzi received four grenades and a gun from the Accused. Following the meeting which took place in the house, the group went a few steps next door to the home of Karakezi, who is also a cousin of the Accused. Whilst there, the Accused gave the others grenades and machetes, for themselves, and also additional weapons which they were to distribute to others. The Accused told them that they should distribute those weapons and that he would return to assist them. He also said that he would return to see if they had begun the killings, or so that the killings could start. The Accused then left, and did not return that day[127].

63. The Trial Chamber did not indicate whether it was of the opinion that the "other assailants" were the participants of the meeting in the home of the Appellant's cousin, and it did not refer to any evidence as to the identity of the other assailants. The Appeals Chamber considers that evidence as to who the other assailants may have been was not adduced at trial.

64. The Prosecution argues that it was only reasonable to conclude that the persons who had been present during the meeting at the home of the Appellant's cousin, even if they were not present at the attack themselves, encouraged the perpetrators of the killings. This is speculation without foundation in the evidence. To support its argument, the Prosecution relies on the Trial Chamber's finding that the Appellant was a person of "authority and influence in Gikomero *Commune*"[128].

65. First, the Appeals Chamber observes that the Trial Chamber in the cited paragraph found that the Appellant enjoyed a "certain influence in the Gikomero community"[129]. This fact alone is not sufficient to establish the Appellant's responsibility for "instigating" the crimes. Second, this reasoning would be inconsistent with the fact that the Trial Chamber did not exclude the possibility that the attackers did not come from Gikomero, but from Rubungo[130]. Therefore, the Appeals Chamber finds the fact that the Appellant enjoyed a certain influence in the Gikomero community to be immaterial to the alleged relation between the meeting in the Appellant's cousin's home and the attack on the Gikomero Parish Compound.

66. In summary, the Appeals Chamber finds that the Trial Chamber's conclusion that the Appellant instigated assailants to kill members of the Tutsi ethnic group is not supported by the evidence.

---

[127] Trial Judgement, para. 273.
[128] Respondent's Brief, para. 251, referring to Trial Judgement, para. 73.
[129] Trial Judgement, para. 73.
[130] Trial Judgement, para. 67.

2. *Aiding and Abetting*

67. The Trial Chamber concluded that the Appellant aided and abetted the commission of the crimes through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound. The Appellant challenges the Trial Chamber's finding that he distributed weapons prior to the attack, and argues that there was no evidence that he directed the attackers[131].

68. The Appeals Chamber agrees, Judge Schomburg dissenting, with the Appellant that the evidence does not support any connection between the distribution of weapons and the subsequent attack on the Gikomero Parish Compound. It was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack, nor that the weapons he distributed were used at all. The Appeals Chamber recalls again that the Trial Chamber did not rule out the possibility that the attackers did not come from Gikomero, but from another location[132].

69. In paragraph 648 of the Trial Judgement, the Trial Chamber found that the Appellant aided and abetted the commission of the crimes "by leading the attackers to the Gikomero Parish Compound"[133]. This could be understood in the sense that the Trial Chamber held the Appellant responsible for aiding and abetting the attackers by guiding them to the Gikomero Parish Compound. However, the Trial Chamber cited no evidence showing that the Appellant served in such a capacity; the closest thing to this that it cited was testimony stating only that the Appellant arrived at the Gikomero Parish Compound and that he was travelling in the passenger section of the front cabin of one of the vehicles[134]. This evidence does not show that the Appellant "led" the attackers to the massacre site. Indeed, another Prosecution witness testified that the Appellant emerged from the second vehicle in the convoy that arrived at the Compound, not the leading vehicle[135].

70. It appears therefore that the Trial Chamber used the expression "leading" in a broader sense, as it employed the term in paragraph 505 of the Trial Judgement : "he led the attackers in the Gikomero Parish Compound … to initiate the attack"[136]. This is supported by the Trial Chamber's reasoning that the Appellant "was in a position of authority over the armed attackers because he led them to the Gikomero Parish Compound and because he ordered the attack"[137]. The Appeals Chamber understands that the Trial Chamber considered its finding that the Appellant led the attackers to the site only as one element supporting its conclusion that he led the attackers in the attack, thus aiding and abetting the commission of the crimes.

71. The Trial Chamber enumerated a number of factual findings on which it based its conclusion that the Appellant aided and abetted the commission of the crimes by leading the attackers :

[131] Appeal Brief, para. 185.
[132] Trial Judgement, para. 67.
[133] Emphasis added.
[134] See Trial Judgement paras. 300, 501.
[135] See Trial Judgement para. 320.
[136] Emphasis added.
[137] Trial Judgement, para. 504.

- The Appellant, at a meeting at the home of his cousin in Gikomero prior to the massacre, addressed those present, told them to start killing Tutsis, and distributed weapons to them[138].
- The Appellant arrived at the Gikomero Parish Compound, accompanied by armed persons[139].
- The Appellant ordered the armed persons to "work", which was understood as an order to start the killings[140].
- Augustin Bucundura was shot by an armed person who had come with the Appellant, while the Appellant was still present at the Parish[141].
- The Appellant was in a position of authority over the attackers[142].
- The Appellant led the attackers in the Gikomero Parish Compound and initiated the attack[143].

72. It has been already noted that a link between the participants of the meeting in the home of the Appellant's cousin and the attackers has not been established, so the first of these findings has to be disregarded. However, considering only the remaining five findings, the Appeals Chamber finds that a reasonable trier of fact could arrive at the conclusion that the Appellant aided and abetted the commission of the crimes by his actions at the Gikomero Parish Compound on 12 April 1994. The erroneous finding of the Trial Chamber that the Appellant aided and abetted the commission of crimes also by distributing weapons therefore does not amount to a miscarriage of justice.

3. *Ordering*

73. The Appellant submits that it has not been demonstrated that he held a position of authority in relation to the assailants[144]. He points to the Trial Chamber's finding that there was no specific evidence concerning the relationship between the attackers and him, and that the Trial Chamber did not find him responsible under Article 6 (3) of the Statute. The Appellant argues that this finding should have prevented the Trial Chamber from finding him responsible for ordering under Article 6 (1) of the Statute[145]. He adds that the simple fact that he arrived in the company of the attackers did not constitute circumstantial evidence of the necessary authority over the attackers. Concerning the order he allegedly gave, the Appellant submits that he has already demonstrated that most witnesses never mentioned an order, and that those witnesses who did were not credible[146]. He adds that he had established at trial that the attackers came from Rubungo, whereas the Trial Chamber had found that he had influence only

[138] Trial Judgement, para. 637.
[139] Trial Judgement, para. 638.
[140] Trial Judgement, para. 639.
[141] Trial Judgement, para. 640.
[142] Trial Judgement, para. 641.
[143] Trial Judgement, para. 643.
[144] Appeal Brief, para. 186
[145] Appeal Brief, paras. 188, 189.
[146] Appeal Brief, para. 192.

in the Gikomero *commune*. This, the Appellant contends, shows that he could not have had any authority over the attackers[147].

74. The Prosecution responds that there was sufficient evidence supporting the Trial Chamber's finding that the Appellant gave the order to "work", and that, in the absence of any clear evidence of authority, the existence of such authority may be inferred from the fact that an order is obeyed[148]. The Prosecution adds that the Appellant held a prominent and influential position in the Gikomero community and was a well-known civil servant, and that his mere presence at the Parish would have been an encouragement to the attackers[149].

75. The Appeals Chamber notes that superior responsibility under Article 6 (3) of the Statute is a distinct mode of responsibility from individual responsibility for ordering a crime under Article 6 (1) of the Statute. Superior responsibility under Article 6 (3) of the Statute requires that the accused exercise "effective control" over his subordinates to the extent that he can prevent them from committing crimes or punish them after they committed the crimes[150]. To be held responsible under Article 6 (1) of the Statute for ordering a crime, on the contrary, it is sufficient that the accused have authority over the perpetrator of the crime[151], and that his order have a direct and substantial effect on the commission of the illegal act[152]. In the *Semanza* Appeal Judgement, the Appeals Chamber made clear that no formal superior-subordinate relationship is required[153].

76. There is no requirement that an order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence[154]. As will be shown below, the factual finding that the Appellant gave the order to start the massacre, and that this order was obeyed, was not unreasonable[155]. The Appeals Chamber finds that a reasonable trier of fact could conclude from the fact that the order to start the massacre was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had authority over the attackers, regardless of their origin. This sub-ground of appeal is therefore without merit and the Appeals Chamber dismisses it.

*4. The Appellant's Convictions for Ordering and Aiding and Abetting*

77. The factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes. Both modes of participation form distinct categories of responsibility. In this case, however, both modes of responsibility are based on essentially the same set of facts : the Appellant "led" the attackers in the attack and he ordered the attackers to start the killings. On the facts of

[147] Appeal Brief, paras. 204-210.
[148] Respondent's Brief, paras. 259, 260.
[149] Respondent's Brief, para. 261.
[150] *Bagilishema* Appeal Judgement, para. 50.
[151] *Semanza* Appeal Judgement, para. 361. See also *Kordic and Cerkez* Appeal Judgement, para. 28 (for the identical provision in Article 7 (1) of the ICTY Statute).
[152] *Kayishema and Ruzindana* Appeal Judgement, para. 186.
[153] *Semanza* Appeal Judgement, para. 361.
[154] *Kordic and Cerkez* Trial Judgement, para. 388.
[155] See Chapter XI.K.4.c.

this case, with the Appeals Chamber disregarding the finding that the Appellant distributed weapons for the purposes of determining whether the Appellant aided and abetted the commission of the crimes, the Appeals Chamber does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting. In this case the mode of responsibility of ordering fully encapsulates the Appellant's criminal conduct at the Gikomero Parish Compound[156].

B. *Genocide*

78. The Appellant submits that his intent to destroy the Tutsi ethnic group in whole or in part has not been proven[157]. He argues that the Trial Chamber based its finding on circumstantial evidence which was unreliable[158]. He challenges, in particular, the Trial Chamber's holding that the origin of the attackers was immaterial to his criminal responsibility[159]. The Appellant maintains that the attackers did not come from Gikomero, but from the neighbouring *commune* of Rubungo, whereas, the Appellant argues, the Trial Chamber found that he had influence only in the Gikomero *Commune*[160].

79. Under the heading "Intent to Destroy in Whole or in Part the Tutsi Ethnic Group", the Trial Chamber referred to a number of its earlier findings :

- The Appellant, at a meeting at the home of his cousin in Gikomero prior to the massacre, addressed those present, told them to start killing Tutsi, and distributed weapons to them[161].
- The Appellant arrived with armed people at the Gikomero Parish Compound[162].
- The Appellant ordered the armed persons whom he brought to the Parish to "work",which was understood as an order to start the killings[163].
- Augustin Bucundura was shot by an armed person who had come with the Appellant, while the Appellant was still present at the Parish[164].
- The Appellant was in a position of authority over the attackers[165].
- The Appellant led the attackers in the Gikomero Parish Compound and initiated the attack[166].
- A large number of Tutsi refugees was killed by those attackers[167].

[156] *Cf. Semanza* Appeal Judgement, paras. 353, 364, Disposition (where the Trial Chamber's convictions for aiding and abetting extermination and complicity in genocide were reversed on appeal and the Appeals Chamber entered convictions for ordering extermination and genocide (ordering) with respect to the same events).

[157] Appeal Brief, para. 194.

[158] Appeal Brief, paras. 196-201.

[159] Appeal Brief, para. 204.

[160] Appeal Brief, paras. 205-210.

[161] Trial Judgement, para. 637.

[162] Trial Judgement, para. 638.

[163] Trial Judgement, para. 639.

[164] Trial Judgement, para. 640.

[165] Trial Judgement, para. 641.

[166] Trial Judgement, para. 643.

[167] Trial Judgement, para. 644.

80. The Appeals Chamber finds that the fact that the Appellant gave the order to attack the refugees at the Gikomero Parish Compound, thus starting a massacre which resulted in the death of a large number of Tutsi refugees, would already as such allow a reasonable trier of fact to find that the Appellant had a genocidal intent.

81. In addition, the Appeals Chamber notes that Witness GEK, who had been found "highly credible" by the Trial Chamber[168], testified about the meeting that occurred sometime between 6 and 10 April 1994 at the home of the Appellant's cousin in Gikomero :

> [A]t this meeting, the Accused addressed those present and told them that the killings in Gikomero *commune* had not yet started and that "those [who] were to assist him to start had married Tutsi women". The Accused told those present that he would bring "equipment" for them to start, and that if their women were in the way, they should first eliminate them[169].

82. The Appeals Chamber finds that these statements of the Appellant are direct evidence of his genocidal intent. It is immaterial that it was not established whether those who were present at the meeting were also among the perpetrators of the attack : once it was established that the Appellant had the intent to destroy the Tutsi ethnic group in whole or in part a few days prior to the massacre, it was reasonable for the Trial Chamber to conclude that the Appellant also acted with this intent when he gave the order to attack on 12 April 1994. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in holding that the Appellant had the specific intent to destroy the Tutsi ethnic group when he gave the order which resulted in the death of a large number of Tutsi refugees.

### C. *Extermination*

83. The Appellant submits that the constituent elements of extermination as a crime against humanity have not been established[170]. He challenges the Trial Chamber's finding that the attack at the Gikomero Parish Compound formed part of a widespread or systematic attack against the Tutsi population, and contends that not every crime committed against a Tutsi between April and July 1994 in Rwanda constituted a crime against humanity[171]. In addition, the Appellant argues that the Trial Chamber did not establish that he was aware of the general context of the attack[172].

84. The Prosecution responds that the magnitude of the Gikomero Parish Compound attack alone would be sufficient to satisfy the requirement of a widespread attack, and that the link between the attacks throughout the *préfecture* and the country on the one hand, and the attack at the Gikomero Parish Compound was "patently obvious"[173]. Regarding the Appellant's criminal intent, the Prosecution argues that it is clear from Witness GEK's testimony that the Appellant was aware of and encouraged the general campaign against the Tutsis[174].

---

[168] Trial Judgement, para. 272.
[169] Trial Judgement, para. 273. *Cf.* Trial Judgement, para. 253, quoting T. 3 September 2001 pp. 170, 171.
[170] Appeal Brief, para. 214.
[171] Appeal Brief, paras. 216-219.
[172] Appeal Brief, paras. 224-227.
[173] Respondent's Brief, para. 273.
[174] Respondent's Brief, para. 274.

85. The Appeals Chamber observes that the Appellant does not challenge the Trial Chamber's definition of the crime, but rather submits that the Trial Chamber's factual findings are erroneous and do not support his conviction for extermination as a crime against humanity.

86. The Appellant admitted at trial "that between 1 January 1994 and 17 July 1994 there were throughout Rwanda widespread or systematic attack [*sic*] against a population with the specific objective of extermination of the Tutsi"[175]. The Trial Chamber found that the Appellant, accompanied by soldiers, policemen, and armed *Interahamwe*, came to the Gikomero Parish Compound and gave the order to attack, which was followed by the killing of a large number of Tutsi refugees[176]. Given these circumstances, the Appeals Chamber finds that the Appellant's argument that the relationship between the attacks against Tutsis in Rwanda, in general, and, specifically, the attack on the Tutsi refugees at the Gikomero Parish Compound has not been established is without merit.

87. Regarding the Appellant's criminal intent, the Appeals Chamber considers that his statements which were recounted by Witness GEK[177] demonstrate that he was aware of the general attack on the Tutsi population; the Appellant admonished the participants in the meeting "that the killings in Gikomero *commune* had not yet started"[178]. In addition, the Appeals Chamber recalls that explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials. In order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances[179]. Given the circumstances of the attack, which was carried out by armed soldiers, policemen, and *Interahamwe*[180], it was reasonable for the Trial Chamber to conclude that the Appellant knew that this was not an isolated occurrence, but part of a widespread and systematic attack on the Tutsi population.

### D. *Conclusion*

88. The Appeals Chamber concludes that the Trial Chamber erred when it found the Appellant individually criminally responsible under Article 6 (1) of the Statute for instigating others to commit crimes, but did not err in finding that he was individually criminally responsible for ordering those crimes. Although, as explained above, the finding of his individual criminal responsibility for aiding and abetting the crimes is supported by the Trial Chamber's factual findings, the Appeals Chamber, Judge Shahabuddeen dissenting, deems it appropriate to confirm only the finding of the Appellant's individual criminal responsibility for ordering the crimes. The Appellant's argu-

[175] See Trial Judgement, para. 498, referring to Defence Response to the Prosecutor's Request to Admit Facts, 24 April 2001, fact number 89.
[176] Trial Judgement, para. 505.
[177] See Chapter X.
[178] Trial Judgement, para. 273.
[179] *Kayishema and Ruzindana* Appeal Judgement, para. 159.
[180] Trial Judgement, para. 505.

ments with regard to his convictions for genocide and extermination are unfounded and the related sub-grounds of appeal are therefore dismissed.

## VIII. Alleged Errors in the Assessment of the Appellant's Testimony (Grounds of Appeal 9 and 6, in part)

89. Under the ninth ground of appeal, the Appellant submits that the Trial Chamber erred in fact by making an erroneous assessment of his testimony[181]. Specifically, the Appellant contends that the Trial Chamber did not take into account his explanations rebutting the testimony of Witness GES and his explanations concerning his name and the events at the Gikomero Parish Compound[182]. The Appellant has also raised the first two arguments in his sixth ground of appeal, submitting that the Trial Chamber erred in law when it gave insufficient or no reasons for rejecting Witness PC's explanation concerning the meaning of "Kamuhanda" in Kinyarwanda as well as in respect of the Appellant's testimony concerning his name and that which, in his view, rebuts parts of Witness GES's testimony[183].

90. The Prosecution responds that the Trial Chamber neither failed to consider the Appellant's testimony nor erred in assessing it[184]. The Prosecution notes that a Trial Chamber is not obliged to refer to every piece of evidence in its judgement[185].

91. The Appeals Chamber recalls its holding from the *Musema* case that :

> Although no particular evidence may have been referred to by a Trial Chamber, it may nevertheless be reasonable to assume in the light of the particular circumstances of the case, that the Trial Chamber had taken it into account. Hence, where a Trial Chamber did not refer to any particular evidence in its reasoning, it is for the appellant to demonstrate that both the finding made by the Trial Chamber and its failure to refer to the evidence show that the evidence had been disregarded[186].

92. The Appellant argues that the Trial Chamber did not take into account his explanation that Witness GES could not see him go to work because the department where the witness claimed to be working was not within sight of the Ministry of Higher Education where the Appellant worked[187]. The Appeals Chamber notes that contrary to the Appellant's submission, the Trial Chamber considered this proposition in its Judgement, although it did so without referring to the Appellant's testimony. The Trial Chamber wrote :

> The Defence suggested that the Department of Bridges and Roads, where the Witness testified to have been employed at the time, was located more than four kilometres away from the Ministry of Higher Education and Scientific Research, where the Accused worked, and not across the street, as the Witness testified. How-

[181] Appeal Brief, para. 230.
[182] Appeal Brief, para. 231.
[183] See Appeal Brief, paras. 137-142, referring to Trial Judgement para. 464.
[184] Respondent's Brief, para. 209.
[185] Respondent's Brief, para. 194, citing *Kupreškic et al.* Appeal Judgement, para. 39.
[186] *Musema* Appeal Judgement, para. 277 (citations omitted).
[187] Appeal Brief, para. 232. See also Reply Brief, paras. 93, 94; T. 19 May 2005, p. 96.

> ever, the Chamber notes the Witness's explanation that his office was in a building located across the street from the Accused's office in the Kacyiru Complex[188].

The Appeals Chamber considers that this passage shows that the Trial Chamber did consider the Appellant's evidence on this point. Accordingly, the Appeals Chamber finds that the Appellant did not demonstrate that his evidence on this point was disregarded and dismisses this sub-ground of appeal.

93. The Appellant similarly argues that the Trial Chamber ignored his testimony that certain gatherings held by his ministry, known as "*Umugandas*" and "*animations*", were not carried out in concert with members of other ministries[189]. While this argument is not developed further, the Appellant presumably seeks to posit that his testimony countered Witness GES's testimony on this point and that the Trial Chamber did not acknowledge it. Although the Trial Chamber did not expressly recall this aspect of the Appellant's testimony in the Judgement, it was clearly alert to its substance since it noted the following :

> The Witness [GES] had the opportunity to see Kamuhanda at several *Umugandas* and *animations* that included personnel from several civil service divisions. When the Defence suggested that the different divisions of the civil service conducted separate *Umugandas* and *animations*, the Witness responded that sometimes different divisions conducted joint gatherings[190].

Indeed, the Appellant conceded in his testimony that joint gatherings sometimes were held, although he stated that he never took part in such gatherings, an argument which he does not raise under this ground of appeal[191]. Thus, in the view of the Appeals Chamber, the Appellant has not shown that the Trial Chamber ignored his testimony on this point. Moreover, even if it had done so, it has not been shown how this would render the Trial Chamber's finding that Witness GES had prior knowledge of the Appellant unreasonable. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

94. The Appellant submits that he testified to having been posted to Butare from 1990 to 1992[192]. He argues that the Trial Chamber did not take this evidence into account when it held, in paragraphs 448 and 466 of the Trial Judgement, that Witness GES knew the Appellant "because he regularly met him on the dates he indicated…."[193] In presenting this argument, the Appellant does not cite the record, contrary to the applicable Practice Direction[194]. Moreover, neither paragraph 448 nor 466 of the Trial Judgement to which the Appellant refers addresses Witness GES's prior knowledge of the Appellant[195]. However, the Appeals Chamber notes that when sum-

---

[188] Trial Judgement, para. 447 (citations omitted).
[189] Appeal Brief, para. 232.
[190] Trial Judgement, para. 325 (citations omitted).
[191] T. 20 August 2002, p. 35.
[192] Appeal Brief, para. 233.
[193] Appeal Brief, para. 233.
[194] Practice Direction on Formal Requirements for Appeals from Judgement, 16 September 2002, para. 4 (b).
[195] Paragraph 448 is concerned with Witness GAA's prior knowledge of the Appellant, not with Witness GES. Whereas in paragraph 466, the Trial Chamber addressed evidence of the Appellant's arrival at Gikomero Parish on 12 April 1994, not Witness GES's prior knowledge of the Appellant.

marizing the testimony of Witness GES, the Trial Chamber recalled the Defence argument that the Appellant was at the Institut de Recherche Scientifique et Technologique (IRST) in Butare for two years from 1990 to 1992 as well as the witness's clarification that "it was possible that Kamuhanda went on a mission between 1990 and 1994"[196]. When the Trial Chamber found Witness GES's account of prior knowledge of the Appellant to be credible, it expressly did so "[o]n the basis of all the evidence presented"[197]. Considering the foregoing, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber disregarded his evidence on this point. Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

95. The Appellant next submits that he testified that his name in Kinyarwanda means "on the road" which, according to him, the Trial Chamber failed to take into account when it rejected Witness PC's explanation on this point[198]. He asserts that the Trial Chamber's rejection of this explanation "'given the context' without specifying the 'context' in question and the impact of the 'context' on Witness PC's testimony does not suffice to reject the explanation given by the Accused and Witness PC"[199].

The Appellant contends that his testimony and that of Witness PC "enlightened the Chamber on the shouting that witnesses allegedly heard when the person who was pointed out to them as Kamuhanda arrived on the scene"[200]. He argues that when the refugees shouted "*Regardez 'Kamuhanda'*" this had to be understood as "*Regardez sur la route*"[201], or, "Look at the road."

96. Immediately before noting Witness PC's testimony that "Kamuhanda" can mean "on the road" in Kinyarwanda, the Trial Chamber summarized testimonies of several witnesses who testified that when the Appellant arrived at the Gikomero Parish on 12 April 1994 the refugees shouted that Kamuhanda had arrived and their fate was sealed[202]. In addition, the Appeals Chamber notes that Witness GEE testified that the refugees were shouting "We're going to be killed. Kamuhanda is coming" ("*Nous allons être tués, Kamuhanda arrive*")[203]; according to Witness GEG, "That is Kamuhanda. Now that Kamuhanda is here, we are finished" ("*C'est Kamuhanda, et maintenant que Kamuhanda arrive, c'en* [*sic*] *est fini pour nous*")[204]; and, according to Witness GEV, he was told "Kamuhanda has just arrived, our fate is sealed" ("*Kamuhanda vient d'arriver, et c'est fini pour nous*")[205]. It is therefore clear that when the Trial Chamber rejected Witness PC's explanation that "Kamuhanda" can mean "on the road", it did so because that meaning, even if correct, would not fit the context of the events at the parish at the given time or the meaning of the word as actually used by several refugees. The Appeals Chamber finds that the Trial Chamber's conclusion on this point has not been shown to be unreasonable. In view of this con-

[196] Trial Judgement, para. 325.
[197] Trial Judgement, para. 447.
[198] Appeal Brief, paras. 137, 139, 234. See also Reply Brief, para. 100.
[199] Appeal Brief, paras. 138, 235. See also Reply Brief, paras. 97, 98.
[200] Appeal Brief, para. 236.
[201] Reply Brief, para. 100. See also T. 19 May 2005, p. 68.
[202] See Trial Judgement, paras. 453-464.
[203] T. 18 September 2001, p. 5 (English)/p. 6 (French).
[204] T. 25 September 2001, p. 19 (English)/p. 23 (French).
[205] T. 6 February 2002, p. 54 (English)/p. 67 (French).

clusion, the Appeals Chamber need not determine whether the Trial Chamber failed to take into account the Appellant's testimony on the meaning of his name, because such an alleged failure, even if established, could not have occasioned a miscarriage of justice and, therefore, could not constitute an error of fact which may be corrected on appeal. Moreover, the Trial Chamber's reasoning on this point is not insufficient as a matter of law.

97. Lastly under this ground of appeal, the Appellant submits that "[i]t was equally incumbent on the Chamber to take into account his explanations of the events at the Gikomero Parish Compound"[206].

The Appellant did not substantiate or develop this submission in any way. Consequently, the Appeals Chamber will not consider this submission further.

98. For the foregoing reasons, the Appeals Chamber dismisses the appeal in respect of all issues considered in this Chapter.

## IX. Impossibility of Travel from Kigali to Gikomero in April 1994 (Grounds of Appeal 11, in its Entirety, and 2, 5, 6, and 7, in part)

### A. *The Trial Chamber's Findings*

99. Under this ground of appeal, the Appellant submits that the Trial Chamber erred when it dismissed the evidence tending to show that it was impossible to travel from Kigali to Gikomero around 12 April 1994, because the roads leading there were impassable due to fierce fighting[207].

100. The Trial Chamber found that there were three main routes which led at that time from Kacyiru, Kigali to Gikomero :

– the Kacyiru—Kimihurura—Remera—Gikomero route;

– the Kacyiru—Kimihurura—Remera—Kanombe—Gikomero route; and

– the Kacyiru—Muhima—Gatsata route in the direction of Byumba[208].

101. The Appeals Chamber recalls that after summarizing the evidence, the Trial Chamber noted that it was not satisfied that Witness RGM, one of the Defence witnesses, could have had access to the information about the positions which were the subject of his testimony[209]. With regard to Witness RKF, the Trial Chamber noted that he did not have first-hand information about the travel conditions, and admitted that there were small, secondary roads that could have been used to travel between Kigali and Gikomero[210]. On the other hand, the Trial Chamber noted that Defence witness Laurent Hitimana was able to move between Remera, Rubungo and Gasogi between 7 and 11 April 1994[211], and that various witnesses had testified it was possible to pass through areas "way out" from the Remera area of Kigali in the direction of

[206] Appeal Brief, para. 231.
[207] Appeal Brief, paras. 288, 289.
[208] Trial Judgement, para. 178.
[209] Trial Judgement, para. 216.
[210] Trial Judgement, paras. 217, 218.
[211] Trial Judgement, para. 215.

Gikomero[212]. The Trial Chamber arrived thus at the conclusion "that, although it might have been difficult, it was possible to move from Kigali to Gikomero within the period between 7 and 17 April 1994"[213].

102. During the appeal hearing the Appellant's Counsel argued that, even if it were possible to travel to Gikomero, it would have taken more than three hours to go there and back, whereas his alibi evidence showed that he never left his home for more than two hours[214]. Given the fact that the Trial Chamber did not accept the alibi evidence[215], and that the Appellant himself does not even try to present any evidence showing how long the trip to Gikomero took at that time, the Appeals Chamber declines to address this argument further.

### B. *Failure to Rule on the Testimonies of Witnesses VPG, RGG, RGB, and RGS*

103. The Appellant submits that his Defence called seven witnesses to show that it was impossible to move from Kigali to Gikomero on or around 12 April 1994 : Witnesses VPG and Laurent Hitimana (protected Witness RKA, who subsequently renounced his protected status[216]) testified about travel from Kigali to Remera, Witnesses RGB and RGS about travel from Kigali to Byumba, and Witnesses RGM, RGG, and RKF testified to the positions of the warring armies in April 1994, corroborating the evidence of the first four witnesses[217]. The Appellant argues that the Trial Chamber addressed only the testimony of Witnesses RGM, RKF, and Laurent Hitimana (RKA)[218]. By its failure to rule on the testimony of Witnesses VPG, RGB, RGS, and RGG, the Appellant argues, the Trial Chamber committed an error of law invalidating the Judgement[219].

104. The Prosecution responds that the Trial Chamber was not obliged to refer to every piece of evidence, and that it took note of all the Defence witnesses' and the Appellant's testimony[220].

105. The Appellant acknowledges that the Trial Chamber was "not required to set out in detail why it accepted or rejected a particular testimony"[221], but argues that, in the present case, the Trial Chamber failed to explain its position on the main issues raised[222]. However, the Appeals Chamber recalls that it is not sufficient for an appellant to show that the Trial Chamber did not refer to a particular piece of evidence :

> It is for an appellant to show that the finding made by the Trial Chamber is erroneous and that the Trial Chamber indeed disregarded some item of evidence, as it did not refer to it. In Celebici, the Appeals Chamber found that the Appel-

[212] Trial Judgement, para. 219.
[213] Trial Judgement, para. 220.
[214] T. 19 May 2005, pp. 59, 60.
[215] See Trial Judgement, para. 176. For a discussion of the alibi evidence, see Chapter XI.
[216] Trial Judgement, para. 181.
[217] Appeal Brief, para. 290.
[218] Appeal Brief, para. 143.
[219] Appeal Brief, para. 145.
[220] Respondent's Brief, paras. 193, 56.
[221] Appeal Brief, para. 146, quoting *Musema* Appeal Judgement, para. 20.
[222] Appeal Brief, para. 148.

lant had "failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond reasonable doubt on these grounds"[223].

An appellant who alleges that the Trial Chamber failed to provide a reasoned opinion in writing therefore not only has to show the lacuna in the Trial Chamber's reasoning, but also has to demonstrate that the evidence allegedly disregarded by the Trial Chamber would have affected the Trial Judgement.

106. The Trial Chamber summarized the evidence of all the four Defence witnesses in question[224]. In the case of Witness VPG, it also indicated why it attached only limited importance to his testimony :

"the Witness stated that in 1994 he was neither in the military nor was he a combatant and that he did not personally visit the locations he was testifying about"[225].

The Trial Chamber was aware of the testimony of the four Defence witnesses, but apparently did not consider them important enough to address their evidence in detail. The Appellant does not demonstrate why it was unreasonable for the Trial Chamber to do so; he merely asserts that their evidence was meant to show that it was impossible to travel to Gikomero[226], without explaining how he reaches such a conclusion. Therefore, the Appeals Chamber finds that the Appellant has failed to establish an error of law in this respect.

107. Having reviewed the evidence of the four witnesses in question, the Appeals Chamber finds that a reasonable trier of fact considering this evidence could arrive at the conclusion that it was possible to travel from Kigali to Gikomero on 12 April 1994. Witness VPG, who identified himself as a friend of the Appellant[227], did not visit the sites about which he was testifying[228]. He appeared to testify that it was impossible to reach the Kanombe airport and military camp[229], whereas Witness RGG maintained that the government forces were able to protect the route to Kanombe military camp for at least two weeks after the start of the fighting[230]. Witness RGG, on the other hand, testified that on 8 April 1994 it would have been impossible for a civilian to go from Kacyiru (where the Appellant lived) to Kimihurura and to return from there[231], which contradicts the Appellant's own testimony, who had testified that, after a first attempt failed, he made precisely this trip on 8 April 1994[232].

108. Witnesses RGB and RGS testified about the situation on the Kigali – Byumba road only[233]. The Trial Chamber, relying on Witnesses GPR, GPE, GPF, GPT, and

[223] *Musema* Appeal Judgement, para. 21, quoting *Celebici Case* Appeal Judgement, para. 498.
[224] Trial Judgement, paras. 185-187 (Witness VPG); paras. 189, 190 (Witness RGG); para. 195 (Witness RGB); para. 196 (Witness RGS).
[225] Trial Judgement, para. 187.
[226] Appeal Brief, para. 145.
[227] T. 11 February 2003, p. 29.
[228] T. 11 February 2003, p. 43.
[229] T. 11 February 2003, p. 23.
[230] T. 30 April 2003, p. 54.
[231] T. 30 April 2003, p. 51.
[232] Trial Judgement, paras. 90, 91.
[233] Trial Judgement, paras. 195, 196; Appeal Brief, para. 290.

Laurent Hitimana, found that it had been possible to move between Remera, Rubungo, and Gikomero[234], indicating that it found it possible to travel from Kigali to Gikomero on the Kigali – Remera – Gikomero route. It was therefore not unreasonable for the Trial Chamber to decline further discussion of the evidence relating to the Kigali – Byumba road.

109. The Appeals Chamber accordingly rejects the argument that the Trial Chamber committed an error by not considering the evidence of Witnesses VPG, RGB, RGS, and RGG.

### C. *Hearsay Evidence*

110. The Appellant submits that the Trial Chamber, although it had recalled that hearsay evidence is not inadmissible *per se*, rejected the evidence given by Witnesses RKA (Laurent Hitimana), RGM, and RKF merely because it was second-hand or hearsay evidence[235]. By not examining this evidence, the Appellant argues, the Trial Chamber committed an error of law.

111. Nothing in the Trial Judgement suggests that the Trial Chamber did not examine the evidence of the three witnesses in question : it summarized their testimonies and analysed them, while noting that part of their evidence was hearsay or second-hand evidence. Despite such finding, the evidence was clearly considered. Therefore, the Appellant's argument supporting his allegation that the Trial Chamber erred in law by not considering this part of the evidence is without merit.

### D. *Distortion of the Defence Position*

112. The Appellant takes issue with the Trial Chamber's approach to the evidence of Witnesses GPR, GPE, GPF, and GPT. He submits that the Trial Chamber used their evidence to show that it was possible to travel from Kigali to Gikomero[236]. In the Appellant's view, the Trial Chamber thus distorted the Defence position, because these witnesses were called by the Defence to testify about the situation in Gikomero; at most, the Appellant submits, they could testify about the possibility of moving between Rubungo and Gikomero[237]. Thus, the Appellant argues, the Trial Chamber distorted his arguments and deprived him of his right to a fair trial.

113. The Appellant appears to argue that the Trial Chamber was not entitled to take into account the testimonies of Witnesses GPR, GPE, GPF, and GPT when it analysed the evidence of the alleged impossibility of travel between Kigali and Gikomero, because these witnesses were called by the Defence to testify only about the situation in Gikomero. The Appeals Chamber notes that neither the Statute nor the Rules nor general principles of procedural law prevent the Trial Chamber from considering that part of the testimony of a Defence witness which goes beyond the scope originally intended by the Defence, as long as it remains within the scope of the indictment. In the present case, Witness GPT gave his evidence about the origin of the refugees during examina-

[234] Trial Judgement, paras. 215, 219.
[235] Appeal Brief, paras. 46-50; Reply Brief, para. 14.
[236] Appeal Brief, para. 158.
[237] Appeal Brief, para. 159.

tion-in-chief, answering a direct question from Defence counsel[238]. Witness GPE gave this evidence answering a question from the Trial Chamber[239], whereas the Witnesses GPR and GPF were questioned about the origin of the refugees during cross-examination[240]. The Appellant did not challenge this evidence at trial; moreover, the question by the Prosecution was clearly admissible under Rule 90 (G) (i) of the Rules :

> Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, *where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case*[241].

The evidence of the four witnesses in question forms part of the Trial Record. The Trial Chamber had to consider all the evidence before it, which it considered credible and relevant to the issue at stake. This sub-ground of appeal is therefore rejected.

### E. *Alleged Errors of Law and Fact*

114. The Appellant submits that the Trial Chamber erred in its assessment of the evidence about the alleged impossibility of travel between Kigali and Gikomero, thus causing a miscarriage of justice[242]. The Appellant advances several sub-grounds to support this assertion, which will be addressed in turn by the Appeals Chamber.

#### 1. *Failure to Consider the Entire Body of Evidence*

115. The Appellant contends that the Trial Chamber erred in law and fact by failing to consider the entire body of the evidence[243]. He points out that, individually, none of the witnesses demonstrated the impossibility of travel between Kigali and Gikomero; but seen in conjunction, they showed that it was in fact impossible to travel between these two locations[244]. Instead, the Appellant argues, the Trial Chamber fragmented the Defence evidence and thereby invalidated its findings[245].

116. As to the alleged error of law on this point, the Appeals Chamber recalls the following statement of the Trial Chamber :

> "The Chamber has noted the testimony of the Accused and the various Defence Witnesses as to the impossibility of moving from Kigali to Gikomero *commune* during the period of 7 April 1994 to 17 April 1994"[246].

The Appellant has not demonstrated that the Trial Chamber indeed failed to act as it described. Accordingly, this sub-ground of appeal is rejected.

117. As to the alleged error of fact, the Appeals Chamber observes that the issue is not whether it was impossible to travel between Kigali and Gikomero in April

---

[238] T. 14 January 2003, p. 3.
[239] T. 16 January 2003, p. 51.
[240] T. 15 January 2003, pp. 27, 28 (Witness GPR); T. 20 January 2003, p. 25 (Witness GPF).
[241] Emphasis added.
[242] Appeal Brief, para. 305.
[243] Appeal Brief, paras. 113, 303.
[244] Appeal Brief, para. 302.
[245] Appeal Brief, para. 303.
[246] Trial Judgement, para. 213.

1994, but whether the Appellant was present in Gikomero on 12 April 1994[247]. The Trial Chamber had found that there was evidence showing that he had been present. The fact that it was difficult to travel, or that one of the several routes available was closed, could be disregarded by a reasonable trier of fact, because these facts alone did not necessarily rule out the Appellant's presence in Gikomero. Only if it were shown that it was impossible to travel, meaning that all the available routes were closed, could no reasonable trier of fact have found the Appellant's presence in Gikomero on 12 April 1994 proven beyond reasonable doubt. Once the Trial Chamber found, for example, that movement along the Kigali – Remera – Gikomero route was possible, it could reasonably disregard the evidence about the route following the Byumba road. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber's approach to the evidence in question was erroneous.

2. *The Trial Chamber's Reliance on Witnesses GPR, GPE, GPF, and GPT*

118. The Appellant argues that the Trial Chamber relied on the evidence of Witnesses GPR, GPE, GPF, and GPT, although these witnesses testified only about the situation at the Gikomero Parish Compound on 12 April 1994. At most, according to the Appellant, their evidence could show that it was possible to move between Rubungo and Gikomero, but not from Kigali to Gikomero[248].

119. The relevant paragraph of the Trial Judgement reads :

> The Chamber notes that the evidence of Defence Witnesses GPR, GPE, GPF and GPT, who all testified about the situation in Gikomero, showed that some of the refugees at Gikomero had come from Mbandazi, Rubungo, Musave, Gasogi and Ndera and therefore that it was possible to pass through these areas. Those areas were way out from Remera area of Kigali. This evidence, taken in conjunction with the evidence of Defence Witness Laurent Hitimana who testified that he fled to Rubungo on 7 April 1994 and came back to Remera on 11 April 1994, demonstrates that it was possible to move from Remera all the way to Rubungo and onwards to Gikomero[249].

It is clear from this paragraph that the Trial Chamber was aware of the fact that Witnesses GPR, GPE, GPF, and GPT did not testify about the whole Kigali – Remera – Gikomero route, but only about the situation prevailing in Gikomero and the neighbouring districts. The Trial Chamber therefore relied on this evidence only in conjunction with the testimony of Laurent Hitimana.

3. *Witness Laurent Hitimana (Witness RKA)*

120. With regard to Laurent Hitimana, the Appellant argues that the Trial Chamber erroneously disregarded his evidence as hearsay, although it was corroborated by other evidence. In addition, the Appellant submits that Laurent Hitimana travelled on foot from Remera to Kigali on 7 April 1994, whereas the Appellant allegedly went there on 12 April 1994, using a vehicle[250].

[247] See Chapter IV.
[248] Appeal Brief, paras. 292, 294.
[249] Trial Judgement, para. 219.
[250] Appeal Brief, para. 297.

121. According to his own testimony, Laurent Hitimana left the neighbourhood of Remera, where he was living and which formed a part of Kigali, on 7 April 1994[251]. He went to Rubungo and on to Gasogi, but returned from there to his house on 11 April 1994. At that time, the area where he lived was under the control of government forces[252]. About the Kigali – Gikomero route, he testified that it was impossible to use this road, although he admitted that he did not try to do so himself[253]. However, he indicated that he had learned the positions of the opposing forces from refugees, and had not visited the places himself[254]. It was thus not unreasonable for the Trial Chamber to attach only limited evidentiary value to facts which the witness had not observed himself.

122. With regard to the fact that the witness travelled on foot, he explained that he left his vehicle at home, because the main road was closed by soldiers of the government army[255], and that a special permit was needed to pass the roadblocks of the government forces[256]. But this testimony did not suggest that the Appellant, who was a senior government official and arrived in Gikomero accompanied by soldiers and policemen, would have been unable to pass through these government roadblocks. More importantly, Laurent Hitimana testified that he travelled between Rubungo, Gasogi, and Remera between 7 and 11 April 1994, and did not suggest that this passage was hindered by fighting[257]. A reasonable trier of fact could use this evidence to support the finding that it was possible to move between Kigali and Gikomero, either on foot or by vehicle.

4. *Witness RGM*

123. The Appellant contends that the Trial Chamber erred when it disregarded Witness RGM's evidence because it was "not satisfied that Witness RGM, a low ranking member of the *Gendarmerie,* could have had access to information about the various detailed positions, of which he testified"[258]. In fact, the Appellant submits, the witness obtained his information from various radio operators and his superiors, and his evidence was corroborated by other evidence[259].

124. The Appeals Chamber notes that the Trial Chamber summarized the testimony of Witness RGM and dismissed it because it found it unreliable[260]. The Appeals

[251] T. 13 February 2003, pp. 51, 53.
[252] T. 13 February 2003, p. 56.
[253] T. 13 February 2003, p. 57.
[254] T. 13 February 2003, pp. 71, 72.
[255] T. 13 February 2003, p. 54.
[256] T. 13 February 2003, p. 61.
[257] See, *e.g.,* T. 13 February 2003, p. 55 (evidence about the situation in Rubungo on 7 and 8 April 1994) :
*Q*. How was it at Rubungo on that 7th April at about 7 :00 in the afternoon?
*A*. Nothing in particular.
*Q*. And what about when you left on the 8th?
*A*. Also nothing in particular to mention, nothing of note.
[258] Appeal Brief, para. 298, quoting Trial Judgement, para. 216.
[259] Appeal Brief, para. 298.
[260] Trial Judgement, paras. 191, 216.

Chamber finds that Witness RGM admitted that he was not aware of all the positions of the opposing forces :

> "I didn't know all the positions in the whole of Kigali city, but I knew a few, especially where the Rwandan Armed Forces were"[261].

Considering the fact that the route to Gikomero was allegedly blocked by the forces of the Rwandan Patriotic Front (RPF), it was not unreasonable for the Trial Chamber not to rely on a witness who had second-hand knowledge only about a "few" positions of the Rwandan Armed Forces. In addition, the Appeals Chamber notes that Witness RGM was testifying about the situation on the Kigali – Byumba road exclusively, but not on the Kigali – Remera – Gikomero route. A reasonable trier of fact could conclude that this testimony did not create reasonable doubt about the Appellant's presence in Gikomero on 12 April 1994.

5. *Witness RKF*

125. With regard to Witness RKF, the Appellant argues that even if this witness did not have first-hand information about the military situation, as the Trial Chamber found, his evidence was nevertheless admissible and was corroborated by other evidence. The Prosecution, the Appellant adds, also acknowledged that this witness was an expert on the situation[262]. The Appellant submits that the Trial Chamber's reasoning was contradictory : on the one hand, it disregarded Witness RKF's testimony because he had no first-hand information; on the other hand, the Appellant argues, it relied on his testimony regarding the existence of secondary roads[263].

126. After a careful review of Witness RKF's testimony, the Appeals Chamber finds that a reasonable trier of fact could arrive at the conclusion that the impossibility of travel between Kigali and Gikomero had not been established. The Trial Chamber found, regarding Witness RKF, that "[w]hile he could have had access to intelligence regarding the general situation, he did not have firsthand information about the condition of travel between Kigali and Gikomero in the period in question"[264]. In fact, this witness provided detailed information about the situation on the Kigali – Byumba road, identifying the positions the RPF had taken and was using to block the road :

> [T]he RPF controlled Karuruma, Nyacyonga and all those areas belonged to them, and they had encircled our units which were behind them Nyarutarna and Byumba, and they had a commanding height which overlooked the road and they had their guns trained on the road. So it was impossible to go down that road[265].

With regard to the situation on the route Kigali – Remera – Gikomero, his information was much less specific :

> Q. Now, let us take the route that goes from Kigali through Remera and Dara, and from there I want to go on to Gikomero and back around the 12th of April. Was that possible ?

[261] T. 28 April 2003, p. 70.
[262] Appeal Brief, para. 299.
[263] Appeal Brief, para. 301.
[264] Trial Judgement, para. 217.
[265] T. 5 May 2003, p. 15.

> *A*. Now, where do you go from Kigali because the roads were blocked off and the people were fleeing, they could see the RPF troops moving towards the capital. So civilians cannot go where there is fire. Besides, in that direction there was heavy artillery, heavy artillery which shook the Kigali capital. And I can't imagine anyone moving towards heavy artillery. In that direction you say you feel it that there was shelling. The RPF wanted their troops to infiltrate to reinforce the CND. So it's not for nothing that they encircled those areas. So all those areas were practically their areas under their control[266].

The Appeals Chamber notes that in this instance the witness did not identify the positions taken by the RPF, but referred only generally to shelling by artillery fire and the movement of RPF troops. The witness appears to have assumed that the Remera and Dara areas were under the control of the RPF. This is not easily reconciled with the fact that, according to Witness RGG, the road to the military camp in Kanombe was open until mid-April 1994[267]; it is also inconsistent with the evidence given by Laurent Hitimana, who had testified that at least parts of Remera were under the control of the government forces until 27 April 1994[268].

127. The Appeals Chamber further finds that the Appellant's argument that the Trial Chamber's reasoning was contradictory is without merit. The issue is, the Appeals Chamber recalls, whether the travel conditions between Kigali and Gikomero cast reasonable doubt on the finding that the Appellant was present in Gikomero on 12 April 1994. The Trial Chamber had to determine whether the evidence given by Witness RKF, in conjunction with the other evidence relating to this issue, was sufficient to create reasonable doubt about the Appellant's presence in Gikomero. In doing so, the Trial Chamber identified two reasons which influenced the evidentiary value of Witness RKF's testimony : he had only second-hand information about the possibilities of travel towards Gikomero, and he admitted that there were secondary roads which probably allowed travel between Kigali and Gikomero. Both facts allowed a reasonable trier of fact to conclude that this testimony, considered in conjunction with other evidence, did not create reasonable doubt about the Appellant's presence in Gikomero on 12 April 1994.

F. *Conclusion*

128. The Appellant's main argument is that the evidence of the seven witnesses, assessed in its entirety, showed that it was impossible to travel between Kigali and Gikomero between 7 and 17 April 1994[269]. The Appeals Chamber recalls that it will not question factual findings where there was reliable evidence on which the Trial Chamber could reasonably base its findings. It is further admitted that two judges, both acting reasonably, can come to different conclusions, both of which are reasonable. A party that limits itself to alternative conclusions that may have been open to the Trial Chamber has little chance of succeeding in its appeal, unless it establishes

[266] T. 5 May 2003, p. 15.
[267] T. 30 April 2003, p. 54.
[268] T. 13 February 2003, pp. 55, 56.
[269] Appeal Brief, para. 304.

that no reasonable tribunal of fact "*could have* reached the finding of guilt beyond reasonable doubt"[270].

129. The Appeals Chamber recalls again that, in the present case, the issue is not the possibility of travel as such, but the Appellant's presence in Gikomero on 12 April 1994. The Appellant could only succeed with this ground of appeal if he demonstrated that no reasonable trier of fact could have found, taking into account the competing evidence concerning his presence in Gikomero, his presence in Kigali, and the road conditions between the two, that the Prosecution had proved beyond a reasonable doubt that he was present in Gikomero when the crimes were committed. The Appellant merely tries to replace the Trial Chamber's assessment of the evidence with his own, without showing that the Trial Chamber's assessment was unreasonable. Accordingly, this ground of appeal is rejected.

## X. Alleged Errors of Fact relating to the Distribution of Weapons (Grounds of Appeal 12, in its Entirety, and 2 and 7, in part)

130. In his second, seventh, and twelfth grounds of appeal, the Appellant submits that the Trial Chamber made several errors related to its finding that he distributed weapons to participants in the massacre at the Gikomero Parish. In relevant part, the Trial Chamber concluded as follows

> [A] meeting occurred sometime between 6 April 1994 and 10 April 1994 at the home of one of [the Appellant's] cousins in Gikomero. This meeting involved [the Appellant], two of his ... cousins, an *Interahamwe*, and a neighbour. The Chamber finds that at this meeting, [the Appellant] addressed those present and told them that the killings in Gikomero *commune* had not yet started and that "those [who] were to assist him to start had married Tutsi women". [The Appellant] told those present that he would bring "equipment" for them to start, and that if their women were in the way, they should first eliminate them. Whilst in his house, [the owner, one of the Appellant's cousins] received four grenades and a gun from [the Appellant]. Following the meeting which took place in the house, the group went a few steps next door to the home of [another cousin of the Appellant]. Whilst there, [the Appellant] gave the others grenades and machetes, for themselves, and also additional weapons which they were to distribute to others. [The Appellant] told them that they should distribute those weapons and that he would return to assist them. He also said that he would return to see if they had begun the killings, or so that the killings could start. [The Appellant] then left, and did not return that day[271].

The Appellant submits that these findings were unreasonable because they were based entirely on the testimony of Witness GEK, who, the Appellant contends, offered an untrustworthy, inconsistent, and incredible account of the events[272]. The Appeals Chamber understands the Appellant to argue that no reasonable Trial Chamber could

[270] *Rutaganda* Appeal Judgement, para. 22 (citations omitted), citing *Bagilishema* Appeal Judgement, para. 10.

[271] Trial Judgement, para. 273.

[272] T. 19 May 2005, pp. 65, 66.

have credited Witness GEK's testimony for the following reasons : (1) Witness GEK's statements about the distribution of weapons are so inconsistent as to be unreliable on their face; (2) substantial evidence unrelated to the specific charges of distributing weapons demonstrated that Witness GEK was not a credible witness; and (3) three Defence witnesses contradicted Witness GEK's testimony about the distribution of weapons[273].

131. In assessing these challenges to the Trial Chamber's findings, the Appeals Chamber finds it helpful to begin by reviewing the relevant portions of Witness GEK's testimony, as summarized by the Trial Chamber. Witness GEK testified that sometime between 6 and 10 April 2001, the Appellant came to Gikomero for a brief visit in order to distribute weapons and lay the groundwork for the pending massacre :

> Prosecution Witness GEK, a Tutsi woman, testified that her husband, who belongs to the Hutu ethnic group, was a member of [the Appellant's] family ... [She] saw [the Appellant] ... sometimes between 6 April 1994 and 10 April 1994 when he came to their residence in Gikomero and stayed to talk to her husband. She stated that she was not in the same room when the discussion occurred between [the Appellant] and her husband. She said, "When [the Appellant] entered the house my husband requested me to go inside the room, because, at that time war had erupted, so he asked me to hide myself. But I was not far away and I could hear what they were saying to each other."
>
> Prosecution Witness GEK testified that there were four people in the room with [the Appellant] and her husband. She identified those people ... [and] said that these people came approximately two minutes after [the Appellant]. She testified that [the Appellant] told Kamanzi that the killing had not yet started in Gikomero *commune* and went on to say that "... those who were to assist him to start had married Tutsi women ....". She said that [the Appellant] went on, saying that he would bring equipment for them to start, and that if their women were in the way they should first eliminate them.... She said that the meeting lasted between 20 and 30 minutes.
>
> Prosecution Witness GEK, when asked if she knew whether any weapon or item was handed over in that room, testified, "When I went outside I was able to see firearms, grenades, and machetes, which they distributed when he went outside the house." She said that [the Appellant] distributed firearms and grenades inside the house before they went outside and she saw her husband carrying "four grenades that resembled a hammer ..." She testified that she knew the grenades, because she had seen them before when her husband was carrying them while he was a soldier.
>
> Prosecution Witness GEK testified, "When [the Appellant] went outside he went to [my neighbour's] home, a distance of about between five and ten steps. He distributed to them ... grenades and machetes ... She said that [the Appellant] distributed the weapons to four persons, but he left them other weapons that these four

[273] The Appellant also charges that GEK misled Prosecution Witnesses GAA and GEX by telling them that her house had been used by the Appellant to store weapons used for the Gikomero Parish Compound massacres. Appeal Brief, paras. 336, 337. The Appellant has not provided citations or any other evidentiary basis for this argument, which amounts to little more than a strenuous assertion of its conclusion. The Appeals Chamber declines to review it in detail.

> were to distribute to others. [She ] said "... [f]rom where I was, from where they were, I could see [*sic*] what they were saying. [The Appellant] said to them to distribute those weapons and said that he would return to assist them." She testified that [the Appellant] said that he would return to see if they had started with the killings or that he would return so that the killings would start[274].

132. After describing the Appellant's distribution of weapons during that brief visit, Witness GEK then testified that the Appellant returned to Gikomero several days later, on the day of the massacre at the Gikomero Parish Compound. As summarized by the Trial Chamber, Witness GEK testified that, some time between 10 and 14 April 1994, the Appellant came to the house of a neighbour to arrange for the killings to start ... at the primary school. [The Appellant] parked his vehicl[e], which was followed by another vehicle, a blue Daihatsu carrying a large number of people. [Witness GEK] explained that in the second vehicle some people were carrying machetes, clubs, and guns, but not everyone was armed, and that occupants either wore ordinary clothes or the *Interahamwe* uniform. The vehicle came from the direction of Kigali. On leaving, [the Appellant] entered his vehicle and went towards the primary school where there were large numbers of refugees. The Witness testified that she heard gunshots and noise for between 20 and 40 minutes after [the Appellant] left. After the gunshots ceased, they were frightened, and could hear the vehicles' engines, but could not see them as they left. The Witness testified that she could see wounded children fleeing towards them and a young girl whose legs were amputated sought refuge in their house[275].

### A. *Internal Inconsistencies*

133. The Appellant argues that there were so many errors and inconsistencies in Witness GEK's account of the events in Gikomero *Commune* that it was patently unreasonable for the Trial Chamber to rely on her testimony in finding that the Appellant had distributed weapons[276]. Witness GEK gave four separate accounts of the events in the *commune* : an affidavit given to investigators in February 1998[277], court testimony in April 2001[278], court testimony in September 2001[279], and court testimony in January 2003[280]. After comparing these statements, the Appellant claims that he has identified the following sets of discrepancies[281] :

---

[274] Trial Judgement, paras. 251-256 (citations omitted).

[275] Trial Judgement, para. 314 (citations omitted).

[276] Appeal Brief, paras. 318-322.

[277] Defence Exhibit 2.

[278] T. 17 April 2001, pp. 118-165.

[279] T. 3 September 2001 pp. 157-186; T. 4 September 2001 pp. 6-117; T. 5 September 2001, pp. 3-83.

[280] T. 13 January 2003, pp. 58-76. The Appellant submits that Witness GEK's testimony against him in this case is also contradicted by her testimony in the Government I case. The Appeals Chamber has reviewed the relevant transcript excerpts from that case and declined to admit them as additional evidence on appeal because there is no reasonable probability that they could have affected the Trial Judgement. Rule 115 Decision, paras. 21-28.

[281] Not all of the alleged discrepancies listed here were raised in the Appeal Brief. In the interests of justice, however, the Appeals Chamber has chosen to review and address some particularly relevant points from the Defence Counsel's cross-examination of Witness GEK at trial. It should also be noted that some of the Appellant's allegations of discrepancies do not accurately reflect the trial record; the Appeals Chamber has nonetheless listed all discrepancies alleged by the Appellant in his Appeal Brief.

*Circumstances of the Weapons Distribution between 6 and 10 April 1994 :*

- *Colour of car* : In April 2001, Witness GEK testified that the Appellant arrived in a green vehicle[282]. In September 2001, however, she stated that he came in a white vehicle[283].
- *Number of people present* : In both her February 1998 *affidavit* and her April 2001 testimony, Witness GEK testified that the Appellant spoke with three people in her house[284]. In September 2001, Witness GEK testified that he spoke with four people in her house[285].
- *Grenades accepted by Witness GEK's husband* : In her February 1998 *affidavit*, Witness GEK stated that the Appellant gave her husband two grenades[286]. In April 2001, she testified that her husband refused to accept the weapons the Appellant tried to give him[287]. In September 2001, Witness GEK testified that her husband received four grenades from the Appellant[288].
- *Willingness of others to accept weapons from the Appellant for distribution* : In her February 1998 affidavit, Witness GEK stated that the Appellant "told [the participants in the meeting] that there were other pruning knives in his pick-up and told them to handle the distribution to the people"[289].

"[H]is three listeners refused to handle the distribution," however, and the Appellant therefore "left with his cargo," stating that he would "hand [the knives] over to the *Bourgmestre* so he could take care of the situation"[290]. In her April 2001 and September 2001 testimony, however, Witness GEK testified that, before taking the truck that was carrying weapons to the *Bourgmestre*[291], the Appellant did leave "other weapons that [ the participants in the meeting] were to distribute to others"[292].

*Circumstances of the Massacre on 12 April 1994 :*

- *Witness GEK's initial failure to mention seeing the Appellant on the day of the massacre* : In her statement to investigators in February 1998, Witness GEK did not mention seeing the Appellant in Gikomero on the day of the massacre at Gikomero Parish Compound[293]. In April 2001 and September 2001, however, Witness GEK testified that she saw the Appellant near her house in Gikomero and then head toward the parish compound along with a truckload of *Interahamwe*[294].

---

[282] Appeal Brief, para. 320. See also T. 17 April 2001, p. 128.
[283] Appeal Brief, para. 320. See also T. 3 September 2001, pp. 165, 166.
[284] Appeal Brief, para. 320. See also Defence Exhibit 2, p. 2; T. 17 April 2001 pp. 125, 126.
[285] Appeal Brief, para. 320. See also T. 3 September 2001, p. 168; T. 4 September 2001, pp. 46-56.
[286] Defence Exhibit 2, p. 2.
[287] Appeal Brief, para. 320. See also T. 17 April 2001, pp. 127, 136.
[288] Appeal Brief, para. 320. See also T. 3 September 2001, p. 175; T. 4 September 2001, p. 59.
[289] Defence Exhibit 2, p. 2. See also T. 4 September 2001, pp. 72-74.
[290] Defence Exhibit 2, p. 2. See also T. 4 September 2001, pp. 72-74.
[291] T. 17 April 2001, p. 132; T. 4 September 2001, pp. 70, 71, 73.
[292] T. 3 September 2001, p. 176. See also T. 17 April 2001, pp. 129, 131.
[293] Defence Exhibit 2. See also T. 4 September 2001, pp. 82, 83.
[294] T. 17 April 2001, pp. 141-144; T. 3 September 2001, pp. 180-182; T. 4 September 2001, pp. 82, 83.

- *Whether the Appellant stopped near Witness GEK's house* : The Appellant claims that, in April 2001, Witness GEK testified that she saw the Appellant pass her house without stopping on his way to the Gikomero Parish Compound[295]. In September 2001, Witness GEK testified that the Appellant parked his vehicle in front of the house of Witness GEK's neighbour and that the vehicle was carrying a number of people[296].
- *When Witness GEK saw killings in front of her house* : In April 2001, Witness GEK testified that she witnessed killings in front of her house the day after the massacre in the parish compound[297]. In September 2001, Witness GEK testified that she witnessed killings on the day of the attack as well as in the following days[298].

*Witness GEK's trip(s) to Kibobo :*

- *Witness GEK's initial failure to mention her time in Kibobo* cellule : In her statement to investigators in February 1998, Witness GEK did not suggest that she had taken any trips to Kibobo *cellule* (a two hour walk from Gikomero[299]) around the time of the massacre at Gikomero Parish Compound[300]. Nor did she mention any such visit in her April 2001 testimony[301]. She mentioned her trips to Kibobo for the first time in September 2001, when she stated that she went to Kibobo after the massacre and remained there for an unspecified period of time before returning to Gikomero[302].
- *When Witness GEK left for Kibobo* : In September 2001, Witness GEK testified that she went to Kibobo three days after the massacre in order to flee *Interahamwe*[303]. In January 2003, Witness GEK testified that she went to Kibobo the day after the killings[304].

134. In response to these alleged inconsistencies, the Prosecution argues that they must be assessed "'on a case-by-case basis'", with due attention given to both "the

[295] Appeal Brief, para. 321, citing T. 17 April 2001, pp. 73, 74.
[296] Appeal Brief, para. 321. See also T. 3 September 2001, pp. 180, 181.
[297] Appeal Brief, para. 321. See also T. 17 April 2001, pp. 139, 145, 146.
[298] Appeal Brief, para. 321, citing T. 3 September 2001, p. 177. See also T. 4 September 2001, pp. 9, 10, 12; T. 5 September 2001, pp. 19-23.
[299] T. 30 January 2003, p. 8 (Witness EM).
[300] Defence Exhibit 2.
[301] Appeal Brief, para. 322.
[302] Appeal Brief, para. 322. See also T. 4 September 2001, pp. 8, 9.
[303] T. 4 September 2001, p. 8.
[304] T. 13 January 2003, pp. 61, 62. The Appellant might also point to an apparent discrepancy as to whether or not Witness GEK stayed the night in Kibobo. In January 2003, Witness GEK testified that "I didn't spend the night there". T. 13 January 2003, p. 61. In September 2001, however, she testified that "I went to Kibobo fleeing from the *Interahamwe*. The *Interahamwe* came to attack us and then they went back, and then *I went back to Kibobo to spend the night* and I came back to my house. I didn't remain in Kibobo for several days". T. 5 September 2001, pp. 16, 17 (emphasis added). The Appeals Chamber considers that in context, however, it is clear that Witness GEK intended to say "I went back to *Gikomero* to spend the night". The unintentional transposing of two proper names is not an unfamiliar phenomenon; since her testimony on this point was not followed up on by either the Appellant or the Prosecutor, the Appeals Chamber does not attach much weight to the apparent slip.

explanations given by the witness for the discrepancies between his or her testimonies and the materiality of such apparent discrepancies"[305].

The Prosecution further notes that "the alleged inconsistencies and discrepancies in the testimony of Witness GEK were already before the Trial Chamber, which did not fail to consider them properly before reaching its final conclusions"[306].

In the Prosecution's view, the Trial Chamber made a reasonable decision that Witness GEK was credible, "based on the cogency of her evidence, her demeanour in court, and the context of all the evidence adduced at trial"[307].

135. After considering the parties' submissions, the Appeals Chamber concludes that the discrepancies in Witness GEK's testimony do not, either individually or collectively, so undermine her credibility as to require a reasonable Trial Chamber to discount her testimony. A review of the trial testimony demonstrates that a reasonable Trial Chamber could have viewed Witness GEK's testimony on these points as internally consistent :

- *Number of people present when the Appellant arrived to distribute weapons* : In September 2001, when Witness GEK was listing the people present in her house when weapons were distributed, she added one name to the list of three that she had mentioned the previous April[308]. She identified this individual – Ngiruwonsanga – as "a very famous *Interahamwe* in the *secteur*" who was present at all of the massacres in the region[309]. When cross-examined about her addition of Ngiruwonsanga to the list, she seemed surprised to be told that she had not previously mentioned him, insisting that he had indeed been present[310]. In reviewing this apparent discrepancy, the Appeals Chamber notes that Witness GEK's April 2001 testimony did in fact refer to "[an]other soldier who was with [the Appellant]" during his visit to Gikomero to distribute weapons[311]. Based on Witness GEK's September 2001 description of Ngiruwonsanga, that "other soldier" could very well have been Ngiruwonsanga; she did not specifically state that the list of names she gave in April was exhaustive, and from the context of her testimony, it appears that the unnamed "other soldier" was in the room with the Appellant, along with the three named persons[312]. The Appeals Chamber thus finds that it would not be unreasonable for a Trial Chamber to find Witness GEK's accounts consistent on this score.
- *Witness GEK's husband's refusal to accept grenades from the Appellant* : Witness GEK testified that "[m]y husband said that he could not accept that grenade because his own wife was Tutsi"[313] and that when the Appellant "handed over the

[305] Respondent's Brief, para. 152, quoting *Musema* Trial Judgement, para. 88 (Prosecution's emphasis omitted).

[306] Respondent's Brief, para. 154 (noting that the Trial Judgement acknowledged that GEK gave some incorrect testimony), citing Trial Judgement, para. 266.

[307] Respondent's Brief, para. 171.

[308] T. 3 September 2001, p. 168.

[309] T. 4 September 2001, pp. 50, 51.

[310] T. 4 September 2001, pp. 46-56.

[311] T. 17 April 2001, p. 126.

[312] T. 17 April 2001, pp. 125-126 ("I saw 'the Appellant' in the sitting room of our house …, I went into 'a nearby room and when I got to the corridor and I shut the door and I stayed in there. Before entering 'the nearby'room, I saw the Appellant with some grenades in his hand. The other soldier who was with him was holding a machete.").

[313] T. 17 April 2001, p. 127.

grenades to my husband and my husband refused to take them I thought [the Appellant] was going to kill me at the time"[314].

Read in context, however, it is clear that these quotes are simply describing an initial refusal by the witness's husband, whose reluctance to take the weapons was eventually overcome by the Appellant's insistence. The Appeals Chamber therefore finds that it would not be unreasonable for a Trial Chamber to find Witness GEK's accounts consistent on this point.

- *Witness GEK's initial failure to mention seeing the Appellant on the day of the massacre* : Witness GEK's February 1998 *affidavit* describes both the Appellant and the 12 April massacre, concluding that "[t]his is all I remember for the moment", but does not mention that she saw the Appellant on the day of the massacre[315]. While this could be seen as strange, two things must be remembered. First, the February 1998 *affidavit* was actually written on Witness GEK's behalf by an investigator after an initial, wide-ranging oral interview, the course of which was dictated, according to her testimony, by the investigator's specific questions[316]. Second, Witness GEK testified that on 12 April she only saw the Appellant for a very short period outside her house; it is reasonable that such a brief sighting might not have been foremost in her mind during her recounting of that day's events. Furthermore, Witness GEK's failure to mention her brief sighting of the Appellant on that day is not, strictly speaking, inconsistent with her later testimony that she did see him. The Appeals Chamber therefore finds that it would not be unreasonable for a Trial Chamber to find Witness GEK's accounts consistent on this score.
- *Whether the Appellant stopped near Witness GEK's house on the day of the massacre* : The Appeals Chamber does not see any discrepancy in Witness GEK's testimony on this point. While Defence Counsel's inaccurate citations make it difficult to know what they were relying on in pressing this ground, they may have been misled by ambiguity in part of the relevant French translation of Witness GEK's testimony. In the French version, Witness GEK's testimony is recorded as follows :

  "[The Appellant] *était venu chercher Witness GEK's neighbourg, et ils sont passés par la route qui passe derrière notre maison, et ils se sont rendus à l'école*"[317].

Further on, however, in describing the group that headed to the Gikomero Parish Compound, Witness GEK stated that

> "[The Appellant] *est passé tout près de chez moi. Il était avec* Witness GEK's neighbourg, *et également avec des militaires dans son véhicule....*"[318].

This implies, or, at the very least, is consistent with the implication, that the Appellant found Witness GEK's neighbour at his house (across from the house of Witness GEK) and then continued on to the school – which would have required stopping there, precisely as Witness GEK testified in September 2001. The English translation

[314] T. 17 April 2001, p. 136.
[315] Defence Exhibit 2.
[316] T. 4 September 2001, p. 82.
[317] T. 17 April 2001, pp. 174, 175 (French).
[318] T. 17 April 2001, p. 177 (French).

of these April 2001 statements is even more obviously consistent with her September 2001 testimony : on the day of the massacre, the Appellant "came to look for my neighbour and they followed the road that passes behind our house and they went to the school"[319]. Witness GEK then elaborated that "it was quite close to my house. He was with my neighbour and soldiers in his vehicle ..."[320]. The Appeals Chamber therefore finds that it is reasonable for a Trial Chamber to find Witness GEK's accounts consistent on this point.

- *Witness GEK's initial failure to mention her time in Kibobo* : The Appeals Chamber considers that like Witness GEK's initial failure to mention seeing the Appellant on the day of the massacre, this is not an inconsistency as such. Unlike Witness GEK's failure to mention seeing the Appellant, this ellipsis in her initial statements is not surprising. Nothing of relevance to the massacres in Gikomero happened in Kibobo; it was simply the place that she fled to after the events she testified about had already occurred.

136. Other discrepancies identified by the Appellant, however, appear at first glance to be genuinely irreconcilable. The Appeals Chamber recalls the inherent difficulties presented by eyewitness testimony as a class of evidence. The Appeals Chamber has previously noted the following :

> It is ... normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at trial and depending on the questions posed to the witness by the Prosecution. It is, moreover, not unusual for a witness's testimony about a particular event to improve when the witness is questioned about the event again and has his memory refreshed. The witness may become more focused on the event and recall additional details[321].

137. Witness GEK herself said – when asked how easy it was for her to testify with precision about events that occurred years earlier during a very chaotic time – "it was not easy for me because I did not know before that I was going to be questioned about these events. Had I known that I would have taken notes, so that I said what I could remember"[322].

As she pointed out,

> "[i]t all depends.... [S]omething could prompt you to remember something else, or something could get you to forget something else ... [T]he fact that I forget something does not mean that I did not say the truth ... [I]t all depends on the type of question put to you. With every question you can not remember everything"[323].

[319] T. 17 April 2001, p. 141.

[320] T. 17 April 2001, p. 143. The minor but substantive differences between these two translations of the original Kinyarwanda (see T. 17 April 2001, p. 131) shed light on an important point : because even the most expert translation can vary in minor detail from an original statement, it can be unfair and even misleading for the Appellant to rely on an overly close parsing of the translated text to assert that Witness GEK was inconsistent.

[321] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, para. 26 n. 42, quoting *Ntakirutimana* Reasons for Rule 115 Decision, para. 31.

[322] T. 5 September 2001, p. 73.

[323] T. 4 September 2001, pp. 44, 54.

In addition to these general observations on difficulties with eyewitness testimony, the Appeals Chamber also finds it relevant that Witness GEK, in general, does not appear to have overstated her testimony. On multiple occasions, she readily acknowledged her inability to recall specific details about the events in Gikomero[324]. Similarly, she readily acknowledged the limits of her testimony on the central fact of the Prosecution's case against the Appellant : his alleged direct participation in the massacre in the Gikomero Parish Compound. As to that question, she testified only that she saw him going in that direction on the day of the massacre with a group of armed men. These expressions of hesitation are, in the Appeal Chamber's view significant indicia of her credibility.

138. The Appeals Chamber notes that on the critical elements of her testimony against the Appellant, Witness GEK's testimony was unwavering : the Appellant came to her house shortly after the crash of President Habyarimana's plane, he rebuked the men he met there for not yet having started to kill Tutsis, he told them that their Tutsi wives should be killed if they posed any problem, and he distributed weapons for them to use in the coming massacre. Then, on the day of the massacre, the Appellant came by her house with a truckload of *Interahamwe* and headed toward the encamped refugees at Gikomero Parish Compound, after which she heard gunshots and noise for roughly half an hour. In the final analysis, the need to defer to the Trial Chamber on issues of credibility, particularly given the importance of witness demeanour, leads the Appeals Chamber to hold that these inconsistencies do not make it unreasonable for the Trial Chamber to have credited Witness GEK's evidence.

### B. *Impeachment of Witness GEK's Credibility by the Defence*

139. The Appellant's attack on Witness GEK's credibility is not limited to an exegesis of the internal inconsistencies in her statements. The Appellant also argues that at least three independent factors should have led the Trial Chamber to conclude that Witness GEK was an untrustworthy witness. The Appeals Chamber will analyze each contention in turn.

#### 1. *Witness GEK was Convicted of Murder*

140. First, the Appellant observes that, following Witness GEK's initial trial court testimony, but before the close of the Appellant's trial, Witness GEK was convicted of murder in an unrelated affair. The Trial Chamber was put on notice of this fact when Witness GEK was called back for re-cross-examination[325]. "[T]he fact that GEK ordered the killing of one of her colleagues", the Appellant argues, "means that she is capable of worse things, including giving false testimony for shady motives"[326].

141. The Prosecution responds that

[324] *E.g.*, T. 3 September 2001, p. 167 (inability to state precisely what day the Accused came to Gikomero to distribute weapons); T. 3 September 2001, p. 180 (inability to state precisely what day the massacre in Gikomero Parish Compound occurred).

[325] T. 13 January 2003, pp. 63-70.

[326] Appeal Brief, para. 335.

"the fact that the witness was condemned, with the pending possibility of an appeal, for alleged acts that do not relate to the Appellant's case, does not imply that her credibility was thereby automatically undermined"[327].

142. During Witness GEK's subsequent testimony later in the trial proceedings, the witness admitted that she had been convicted of participation in a murder, noting that her appeal was pending. This fact is certainly troubling. However, the perpetrator of a murder is not necessarily prone to commit an offence against the proper administration of justice. In fact, there is nothing inherent in a murder conviction, particularly one wholly unrelated to the facts of the case at hand, that *per se* precludes a witness's testimony from being deemed credible by the trier of fact. Indeed, the testimony of persons allegedly[328] involved in the planning and execution of murders and other terrible crimes is often a crucial basis for the conviction of other participants in the scheme, in this Tribunal, in the ICTY, and in other courts. It is for the trier of fact to take into account criminal convictions and any other relevant evidence concerning the witness's character along with all the other relevant factors – for instance, the witness's demeanour, the content of her testimony, and its consistency with other evidence – in determining whether the witness is credible. Here, the Trial Chamber did so, and found that in light of all these factors, the unrelated murder conviction did not provide a reason to doubt the truthfulness of Witness GEK's testimony. The Trial Chamber is in the best position to evaluate credibility issues, and the Appeals Chamber sees no reason to disturb its judgement.

2. *Witness GEK Allegedly Lied About Being in Gikomero on the Day of the Massacre*

143. Second, the Appellant alleges that Witness GEK lied during her account of the massacre in Gikomero Parish Compound on 12 April 1994. This argument is intended to impugn Witness GEK's credibility more broadly : since Witness GEK, the Appellant contends, made up her entire story about the massacre, she is a demonstrably untrustworthy witness, and the Trial Chamber should not have believed her statement regarding the distribution of weapons several days earlier.

144. The Appeals Chamber recalls that Witness GEK testified that she was at home in Gikomero on 12 April 1994 and that she saw the Appellant arrive in town in a vehicle that was leading a truck full of *Interahamwe*. Witness EM, however, who was then Witness GEK's domestic employee, testified that, after spending days in Gikomero and nights in Kibobo from 7 to 9 April, she and Witness GEK actually moved to Kibobo *cellule* on the evening of 9 April 1994 and remained there without departing again, in one another's company at all times, through 13 April 1994[329]. Witness EM further alleged that Witness GEK delivered a baby in Kibobo around 8:00 in the evening of 12 April 1994, such that it would have been physically impossible for her to be in Gikomero on that day[330]. This testimony was corroborated in part by Xaviera Mukaminani, who lived in Witness GEK's neighbourhood, and who claimed that she

[327] Respondent's Brief, para. 221.

[328] The Appeals Chamber was not able, and does not deem it necessary, to ascertain whether the domestic conviction was upheld on appeal.

[329] T. 30 January 2003, pp. 8, 9.

[330] T. 30 January 2003, pp. 9, 27.

did not see Witness GEK in Gikomero after the crash of President Habyarimana's plane on 6 April 1994[331]. Mukaminani testified that she was told that Witness GEK, whom she knew to be "in an advanced state" of pregnancy, sought refuge in Kibobo immediately following the crash of the presidential plane and did not return until after the 12 April massacre[332]. Similarly, Witness GPK testified that he was told that Witness GEK was in Kibobo on 12 April 1994[333], although, as the Appellant admits, Witness GPK did not claim to have personally seen Witness GEK there[334].

145. The Prosecution argues that the Appellant

> "fails again to demonstrate any error in the Trial Chamber's finding that 'the testimony of Defence Witness EM lacks credibility, and is not sufficient to impugn the credibility of Prosecution Witness GEK'"[335].

As to the other witnesses, the Prosecution contends, "[th]ere is no reason, in law or fact, why the Trial Chamber should have put more weight" on their testimony, or should have

> "consider[ed], as the Appellant seems to suggest, that any evidence from the [D]efence contrary to the [P]rosecution case should automatically raise a reasonable doubt"[336].

This is underscored, the Prosecution suggests, by the fact that

> "[t]he Trial Chamber showed no hesitation in dismissing [P]rosecution allegations, where it found the evidence lacking credibility"[337].

146. The Appeals Chamber concludes that the Trial Chamber was not unreasonable in accepting that Witness GEK was in Gikomero and not Kibobo on 12 April 1994. Witness EM offered the most potentially damaging counterevidence on that point, but Witness EM's credibility was itself badly damaged, if not destroyed, during a wide-ranging cross-examination. Witness EM's allegation that Witness GEK delivered a child on the day of the massacre was all but refuted when the Prosecution introduced Witness GEK's official Rwandan identity card, which shows that the child in question

[331] T. 10 February 2003, p. 30. Xaviera Mukaminani was initially identified as Witness TMF, but elected to reveal her identity before beginning her testimony. T. 10 February 2003, pp. 20, 21.

[332] T. 10 February 2003, pp. 30, 31.

[333] Appeal Brief, para. 315. See also T. 20 January 2003, pp. 58, 59.

[334] Appeal Brief, para. 312. See also T. 20 January 2003, pp. 58, 59. Witness GPK's testimony on this point is slightly ambiguous. Witness GPK stated that Witness GEK's cousin told him that Witness GEK was in Kibobo. *Id.* Witness GPK also stated that he went to Kibobo on the day of the massacre. *Id.* But Witness GPK did not claim to have personally seen Witness GEK in Kibobo when he went there on 12 April 1994. *Id.* The Appellant actually relies on this last fact to explain why Witness GPK did not corroborate Witness EM's assertion that Witness GEK was pregnant at the time these events occurred. Appeal Brief, para. 312 (noting that Witness GPK "never testified that he saw" Witness GEK in Kibobo on the day of the massacre) (emphasis in original). The Prosecution contests this point, suggesting that Witness GPK's testimony can be read to imply that he did see Witness GEK on 12 April 1994. Respondent's Brief, paras. 72-75. The Appeals Chamber, however, rejects Witness EM's testimony regarding Witness GEK's alleged pregnancy on other grounds.

[335] Respondent's Brief, para. 213, quoting Trial Judgement, para. 270.

[336] Respondent's Brief, para. 215.

[337] Respondent's Brief, para. 215.

was actually born five months later, in September 1994[338]. The Prosecution also repeatedly highlighted the implausibility of Witness EM's version of the events leading up to the massacre :

> "[s]o what you are saying is that [Witness GEK], who was literally about to have a child, that this caring husband we have heard about, made her walk two hours away from the house and two hours back on three separate nights into areas where he didn't know whether it was safe or not"[339],

with each trip made "in daylight [when you] could be seen by anyone who could have killed you"[340]. The Prosecution further emphasized the implausibility of Witness EM's claim that Witness GEK's husband took her back to Gikomero on 13 April 1994 :

> "what you are saying is that [Witness GEK's] husband took her, a Tutsi, back to Gikomero when in actual fact he knew the Tutsis were being killed at that time, in that area"[341].

147. As for Xaviera Mukaminani and Witness GPK, neither one testified to having seen Witness GEK in Kibobo; they offered hearsay evidence that they were told she had been there. The Appeals Chamber considers that even if Witness GPK's testimony is interpreted – against the Defence's own reading of it[342] – to suggest that he personally saw Witness GEK in Kibobo, Witness GPK's credibility was itself drawn into substantial question. Witness GPK was insistently evasive about his ties to the Appellant[343]. Only after persistent questioning by the Prosecution did Witness GPK finally acknowledge that, in fact, his wife was the younger sister of one of the Appellant's close cousins[344]. Moreover, while at one point Witness GPK denied ever having been a suspect in the 12 April massacre in Gikomero[345], at another point he acknowledged that "the government [initially] considered me as a criminal who had partici-

[338] Prosecution Exhibit 49. See also T. 3 February 2003, p. 10 (initially introducing the identity card); T. 3 February 2003, pp. 25-27 (noting Defence Counsel's acknowledgment of the card's validity). It is also worth mentioning that Witness EM was unable to keep the day of the baby's alleged birth straight. First she alleged – including a number of date-specific details – that she was "sure" that the baby was born at 8 in the evening on the day that the massacre occurred. T. 30 January 2003, pp. 9, 27. Four days later, however, Witness EM changed her testimony to claim with precise phrasing that the baby was actually born at 8 in the morning on the day *after* the massacre. T. 3 February 2001, p. 6. There were other inconsistent aspects of her testimony that went directly to the core issue at hand : Witness EM testified on the one hand that Witness GEK was so pregnant that she was "not moving around" and unable to fetch firewood and water (T. 30 January 2003, p. 12) and on the other hand that Witness GEK was making daily two hour trips to Kibobo and spending time harvesting bananas in the fields (T. 30 January 2003, pp. 8, 9).

[339] T. 30 January 2003, pp. 25-26. Witness EM's response was "Yes, that's what I said." T. 30 January 2003, p. 26.

[340] T. 30 January 2003, p. 26.

[341] T. 30 January 2003, p. 30.

[342] See Appeal Brief, para. 312.

[343] When the Prosecution asked him, "[i]sn't it right that you have links with [the Appellant] through marriage?", Witness GPK responded only that "I have no family connection with him because no one in my family had taken a wife in [the Appellant's] family; nor had anyone in his family taken a wife from our family." T. 21 January 2003, p. 50.

[344] T. 21 January 2003, pp. 51, 52.

[345] T. 21 January 2003, p. 13.

pated in the acts" in Gikomero[346]. In short, there were substantial problems with all of the Appellant's evidence on this point. It was therefore reasonable for the Trial Chamber to discredit the Appellant's effort to place Witness GEK in Kibobo on the day of the massacre.

3. *Witness GEK's Testimony that the Appellant Drove His Own Car*

148. Witness GEK testified that she saw the Appellant drive his vehicle to and from Gikomero[347]. In light of evidence that the Appellant cannot drive a car, however, the Trial Chamber concluded that "Witness [GEK] may have been mistaken about the driver of the vehicle"[348]. The Appellant points to this discrepancy as further evidence that Witness GEK was an unreliable witness[349].

149. The Prosecution responds that,

> "despite *apparent* inconsistencies or contradictions, including that 'the Witness may have been mistaken about the driver of the vehicle', the Trial Chamber duly assessed her evidence and, with respect to its fundamental features, reasonably found [it] to be ... credible"[350].

150. The Appeals Chamber has already discussed the inevitable problems that arise with eyewitness recollection of minor details[351]. The Appeals Chamber concludes that any error Witness GEK made about the driver of Appellant's car does not make it unreasonable for the Trial Chamber to have relied on the core elements of the witness's testimony to find that the Appellant did distribute weapons in Gikomero.

4. *Witness GEK Allegedly Lied About Her Identity*

151. Finally, the Appellant alleges that Witness GEK "testified under a false identity by changing her name," thereby "l[ying] about her identity"[352]. The point of this evidence at trial, the Appellant claims, was not that "the Defence […] submitted that [Witness GEK] was an imposter", but that Witness GEK had "appeared for the hearing under a false identity by changing her name"[353]. Specifically, while Witness GEK testified that her name is "Jane Doe"[354] and produced a Rwandan identity card to document that fact, the Appellant suggests that Witness GEK was actually known in

[346] T. 21 January 2003, p. 4.
[347] Appeal Brief, paras. 54, 55, 119, 323-325. *See also, e.g.*, T. 17 April 2001, p. 132.
[348] Trial Judgement, para. 266.
[349] Appeal Brief, paras. 54, 55, 119, 323-325; Reply Brief, para. 116.
[350] Respondent's Brief, para. 154, quoting Trial Judgement, paras. 266, 439 (emphasis in original).
[351] See *supra* paras. 142, 143.
[352] Appeal Brief, paras. 326, 333 (emphasis in original).
[353] Appeal Brief, para. 152 (emphasis in original).
[354] As will be seen shortly, the explanation for the apparent discrepancy hinges on a close analysis of Witness GEK's last name. For the purpose of this discussion, the Appeals Chamber will therefore use the obviously pseudonymous "Jane Doe" instead of the name that Witness GEK asserts is hers.

Gikomero as "Jane Mukadoe"[355]. The Appellant requests the Appeals Chamber to find that Witness GEK is deceitful and unreliable as she lied about her identity[356].

152. The Prosecution contends that the fact that the witness, whose real last name was indeed "Doe", might have been better known to her peers as "Mukadoe" does not in any way prove that she lied about her name or that she changed her name[357]. The Prosecution argues that Witness GEK gave an entirely satisfactory explanation for the reason that her legal name is different from the name she is commonly known by[358].

153. The Appeals Chamber concludes that the allegations regarding Witness GEK's "true" name are no more than an effort to create confusion. The Appeals Chamber notes that notwithstanding their representations at this stage of the proceedings, the Appellant's Counsel clearly suggested at trial that Witness GEK was not who she said she was, that is that she was an impostor who had never been married to the Appellant's cousin. This is unequivocally borne out by the trial record[359], and it was how the Trial Chamber understood the Defence submissions[360]. This effort to discredit Witness GEK failed, however, when the Appellant acknowledged that he actually did know Witness GEK and that she was precisely who she claimed to be[361].

154. Now, as best as the Appeals Chamber understands the Appellant's submissions, Defence Counsel is trying to repackage its trial claims as an assertion that Witness GEK changed her name without properly notifying the Trial Chamber[362]. But the Appellant has never challenged Witness GEK's explanation of the apparent discrepancy between her official name and the name she was known by in Gikomero. Witness GEK testified that because her real last name "Doe" is ordinarily thought of as masculine, she is commonly, but incorrectly, known to her peers as "Mukadoe" because adding the prefix "Muka-" renders the name gender-appropriate[363]. As she explained,

> I was given this name [Doe] after my grandfather. That is the name of my grandfather. But since in Rwanda people are used to [Doe] being masculine, they

[355] Appeal Brief, paras. 327-332. Explained in terms of the pseudonym discussed in the preceding footnote, the Appellant agrees that Witness GEK's first name is "Jane", but argues that the Kinyarwanda prefix "Muka" is attached to "Doe" to form GEK's real last name : "Mukadoe".

[356] Appeal Brief, para. 333.

[357] Respondent's Brief, para. 203.

[358] Respondent's Brief, para. 203.

[359] In particular, the Appellant's assertion that "the Defence never submitted that Witness GEK was an imposter and that she was not the wife of ?the man she identified as her husbandg" borders on outright falsehood. Appeal Brief, para. 152. See also *id.,* paras. 151-156. The trial record demonstrates that the Defence plainly suggested precisely that. See*, e.g.*, T. 4 September 2001, p. 23 ("We question your identity as being the woman that married the late [man identified as her husband],"); T. 5 September 2001, pp. 58, 59 ("I return to my earlier proposition that you Madam are not the wife of [the man identified as your husband].").

[360] Trial Judgement, para. 266 ("The Defence initially claimed that Prosecution Witness GEK was not the person she claims to be.").

[361] Trial Judgement, para. 266. See also T. 26 August 2002, pp. 124, 128.

[362] See Appeal Brief, para. 156 (arguing that "the allegation that the witness had changed her family name ... showed that Witness GEK lacked credibility.").

[363] T. 4 September 2001, pp. 18-22.

> tend to add Muka, so that it becomes [Mukadoe] instead of [Doe], but in truth, I am called [Doe] ... And even on my ID card that was issued to me by the Republic of Rwanda, the name therein is [Doe, Jane][364].

The Appeals Chamber notes that the Appellant does not attempt to discredit this account. In any event, even if it were true that Witness GEK legally changed her name at some point by dropping the "Muka-" prefix, the Appellant neither explains how that is suggestive of deceitfulness nor proposes any conceivable reason Witness GEK could have had for doing so.

### C. *Contradictory Testimony by Defence Witnesses*

155. The Appellant concludes his attack on Witness GEK's testimony by contending that several Defence witnesses contradicted her account of the distribution of weapons on at least two separate grounds. First, three witnesses in Witness GEK's neighbourhood stated that they did not see the Appellant distribute weapons[365]. Second, the Appellant alleges that three witnesses testified that Witness GEK was not even "[in Gikomero] on the dates she alleged the weapons distribution took place"[366].

#### 1. *Three Witnesses in Witness GEK's Neighbourhood Did Not See the Appellant Distribute Weapons*

156. The Appellant notes that three Defence witnesses testified that they were either with Witness GEK or in the vicinity of the alleged weapons distribution during the relevant time period, and that they did not witness any of the events described by her. On direct examination, Witness GEK stated that, sometime between 6 and 10 April 1994, she saw the Appellant distribute weapons to purported Hutu allies in Gikomero. But Xaviera Mukaminani, who lived in Witness GEK's neighbourhood, testified that she was home between 6 and 10 April and did not witness any weapons distribution[367]. Similarly, Witness GPK testified that he was in the neighbourhood until 12 April 1994 and that he was not aware of any distribution of weapons[368]. And Witness EM, who was Witness GEK's domestic employee, testified that she was constantly in Witness GEK's company between 6 and 10 April and that she neither witnessed any weapons distribution nor saw the Appellant during that period of time[369]. All three witnesses testified, in essence, that if such a thing had happened during their absence, they would not have failed to find out about it[370].

157. While the Trial Chamber concluded that the failure of these witnesses to see the Appellant in Gikomero "does not exclude that he could have been there, as claimed by Witness GEK," the Appellant contends that this was unfair[371].The Appellant argues that since Witness GEK could not pinpoint precisely when the distribution of weapons occurred, "it

[364] T. 4 September 2001, p. 21.
[365] Appeal Brief, paras. 310-314
[366] Appeal Brief, paras. 315-317.
[367] Appeal Brief, para. 310. See also T. 10 February 2003 pp. 30, 40, 41.
[368] Appeal Brief, para. 310. See also T. 20 January 2003 pp. 60-62.
[369] Appeal Brief, para. 310. See also T. 30 January 2003 pp. 7-12.
[370] Appeal Brief, para. 310. See also T. 30 January 2003 pp. 9, 11 (Witness EM); T. 10 February 2003, pp. 30, 40, 41 (Witness Xaviera Mukaminani); T. 20 January 2003 pp. 61, 62 (Witness GPK).
[371] Appeal Brief, para. 313, quoting Trial Judgement, para. 271.

was therefore impossible for [the Appellant] to rebut these allegations in a precise and detailed manner"[372]. Furthermore, the Appellant contends, it was not his burden to "exclude" the possibility that he was in Gikomero in the relevant time period; he need have only demonstrated that there is a reasonable doubt about his alleged visit to Gikomero[373].

158. The Appeals Chamber finds that the Appellant's submissions on this point are unavailing. As the Prosecution argues, and as the Trial Chamber noted, the mere fact that Witnesses GPK and Xaviera Mukaminani did not witness or hear about the arms distribution does not mean that such a distribution of arms could not have occurred. Moreover, as discussed above, Witness EM's credibility was so badly damaged during cross-examination that it was not unreasonable for the Trial Chamber to discount her testimony entirely.

2. *Witness GEK's Alleged Absence from Gikomero at the Time of the Alleged Weapons Distribution*

159. The Appellant contends that three Defence witnesses further testified that Witness GEK was not even in Gikomero between 6 and 10 April 1994, when the Appellant allegedly distributed weapons there[374]. Witness EM stated that from 7 to 9 April, she and Witness GEK spent each night and a portion of every day in Kibobo *cellule*[375], a two hour walk from Gikomero[376]. Witness EM further testified that, from the evening of 9 April until at least the day of the massacre, she and Witness GEK abandoned Gikomero entirely and spent all their time in Kibobo *cellule*[377]. Witness EM also claimed that during this entire period of time, she never left Witness GEK's side[378]. Witness EM's claims on this point were corroborated by Xaviera Mukaminani, who testified that she did not see Witness GEK in Gikomero after President Habyarimana's plane crashed (6 April 1994), and that she was told Witness GEK had sought refuge in Kibobo[379].

160. As noted above, the Prosecution argues that there is no reason that the Trial Chamber was required to give more credence to the testimony of Defence witnesses than it did.

161. The Appeals Chamber first notes that, even if taken at face value, neither Witness EM's nor Xaviera Mukaminani's testimony rules out the possibility that Witness GEK was in Gikomero at the time of the alleged weapons distribution. Witness EM's testimony acknowledges, at a minimum, that Witness GEK was in Gikomero on 6 April 1994, and Mukaminani's testimony was simply that she did not see Witness GEK in Gikomero during that time. Equally important, as discussed above, Witness EM's credibility was badly damaged on cross-examination. Accordingly, the Appeals Chamber finds, it was not unreasonable for the Trial Chamber to give credence to

[372] Appeal Brief, para. 313.
[373] Appeal Brief, para. 87.
[374] Appeal Brief, para. 315.
[375] Appeal Brief, para. 315. See generally T. 30 January 2003, pp. 8, 32.
[376] T. 30 January 2003, p. 8.
[377] T. 30 January 2003, pp. 8, 9, 32.
[378] T. 30 January 2003, p. 9.
[379] Appeal Brief, para. 315. See also T. 10 February 2003, pp. 30, 31.

Witness GEK's assertion that she was in Gikomero on the date of the alleged weapons distribution.

D. *Conclusion*

162. In addition to considering each of these challenges to Witness GEK's testimony individually, the Appeals Chamber has considered whether, in their aggregate effect, the Appellant's contentions cast such doubt on Witness GEK's credibility as to render the Trial Chamber's reliance on her testimony unreasonable. The Appeals Chamber concludes that the principle of deference to the Trial Chamber on issues of fact, and particularly on questions involving the in-person evaluation of demeanour and credibility, must prevail. There is no sign that the Trial Chamber unreasonably accepted the testimony of all Prosecution witnesses; rather, there is every indication that it engaged in a careful and discerning process of genuinely seeking to determine the credibility of each witness on a case-by-case basis[380]. While the Appellant has presented substantial reasons in support of his arguments, the Appeals Chamber cannot find that it was unreasonable for the Trial Chamber to reach the opposite conclusion. Accordingly, the Appellant's submissions related to Witness GEK are dismissed.

## XI. Alleged Errors relating to the Gikomero Parish Compound Massacre and the Assessment of Alibi Evidence Grounds of Appeal 3, 10, 13, and 14, in their Entirety, and 2, 4, 5, and 7, in part)

A. *Introduction*

163. In separate grounds of appeal, the Appellant made submissions in relation to the Trial Chamber's assessment of the alibi evidence and in relation to the Trial Chamber's finding on his presence at the Gikomero Parish Compound, respectively. Both issues, however, are inextricably interrelated : if the Trial Chamber erred in rejecting the Appellant's alibi evidence, this would have an influence on the examination of the Trial Chamber's finding on his presence at the Gikomero Parish Compound, and *vice versa*. For this reason, the grounds of appeal related to the Trial Chamber's assessment of the alibi evidence and the finding on the Appellant's presence at the Gikomero Parish Compound are considered together in this chapter.

164. The Trial Chamber found that on 12 April 1994 the Appellant led a group of armed people to the Gikomero Parish Compound, where a large number of refugees, mainly of Tutsi origin, had assembled. The Trial Chamber found that the Appellant initiated the attack on the assembled refugees and found, by majority, that he gave the order to attack. According to the Trial Chamber, the attackers killed and injured a large number of Tutsi refugees; the Appellant left the compound when the killings began[381]. The Trial Chamber based its findings in this regard on the testimony of

[380] See*, e.g.*, Trial Judgment, paras. 282, 283 (finding Prosecution evidence "not credible" and rejecting the claim that the Appellant distributed weapons in another location as well).

[381] Trial Judgement, paras. 499-506.

three witnesses who had known the Appellant prior to 12 April 1994, and eight other witnesses who had heard at the site of the attack that the leader of the attack was called Kamuhanda[382]. In addition, the Trial Chamber relied on Witnesses GEK and GEB, who had testified that they had seen the Appellant in a vehicle in Gikomero *Commune* on 12 April 1994, shortly before the massacre began[383].

165. The Appeals Chamber first considers the Appellant's submissions regarding alleged errors in the assessment of alibi evidence.

### B. *Alleged Errors in the Assessment of Alibi Evidence*

166. Before turning to the relevant submissions of the Parties, the Appeals Chamber notes that the Trial Chamber stated in relation to the issue of alibi as follows :

> 83. As has been held by the Appeals Chamber in the *Celibici* [*sic*] *Case*, the submission of an alibi by the Defence does not constitute a defence in its proper sense. The relevant section of the judgment reads : "It is a common misuse of the word to describe an alibi as a "Defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the defendant does no more [than] require the Prosecution to eliminate the reasonable possibility that the alibi is true"[384].

167. The Trial Chamber correctly[385] stated that an alibi "does not constitute a defence in its proper sense"[386]. In general, a defence comprises grounds excluding criminal responsibility although the accused has fulfilled the legal elements of a criminal offence. An alibi, however, is nothing more than the denial of the accused's presence during the commission of a criminal act. In that sense, an alibi differs from a defence in the abovementioned sense in one crucial aspect. In the case of a defence, the criminal conduct has already been established and is not necessarily disputed by the accused who argues that due to specific circumstances he or she is not criminally responsible, *e.g.* due to a situation of duress or intoxication. In an alibi situation, however, the accused "is denying that he was in a position to commit the crimes with which he is charged because he was elsewhere than at the scene of the crime at the time of its commission"[387].

An alibi, in contrast to a defence, is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an element of the prosecution's case, thus the burden of proof is on the prosecution.

168. The Appellant submits that the Trial Chamber erred in law and fact in rejecting his alibi. In support of this submission he argues that the Trial Chamber errone-

[382] Trial Judgement, para. 466.

[383] Trial Judgement, paras. 439 (Witness GEK), 441 (Witness GEB).

[384] Trial Judgement, paras. 83-85, citing *Celebici Case* Appeal Judgement, para. 581 (internal citations omitted).

[385] See also *Kajelijeli* Appeal Judgement, para. 41.

[386] This has been agreed upon in similar terms by the Prosecution upon a question from Judge Schomburg, *cf.* T. 19 May 2005 p. 93 : Judge Schomburg : "So you agree that alibi has no longer to be seen as a specific Defence ?" Ms. Reichman : "It isn't raised as a specific defence here. I would say that is true".

[387] *Kajelijeli* Appeal Judgement, para. 42.

ously arrived at the following conclusions : (i) that the Appellant contradicted Witness ALS[388]; (ii) that the Appellant contradicted his wife[389]; (iii) that Witness ALR's testimony as to the dates of the alibi was not reliable[390]; (iv) that Witnesses ALR and ALB contradicted each other[391]; (v) that the Appellant did not explain what the men who were at Witness ALS's house did during the alibi period[392]; (vi) that the evidence of Witnesses ALB and ALM did not rule out the possibility that the Appellant went to Gikomero[393]; and (vii) that it was incredible that patrols were mounted just to protect the witnesses from looters[394]. The Appellant also argues that the Trial Chamber failed to consider the alibi comprehensively[395] and concludes that his alibi succeeded in casting reasonable doubt on the Prosecution case[396].

169. The Prosecution responds that the Trial Chamber assessed the alibi correctly[397]. The Prosecution posits that the Trial Chamber rejected the alibi because the alibi evidence was not credible and because the Prosecution case in respect of the arms distribution and the massacre at Gikomero Parish was strong[398].

170. The Appeals Chamber will now examine in turn the Appellant's arguments in respect of the alibi. The Appeals Chamber will also address in this section related submissions and arguments presented under other grounds of appeal.

### C. *Alleged Errors in distorting the Testimonies of Witness ALS and Mrs. Kamuhanda and in finding that the Appellant contradicted their Evidence*

171. The Appellant submits that the Trial Chamber erred in law by distorting the testimonies of Witness ALS and Mrs. Kamuhanda and then relied on such distortions in order to reject the witnesses' alibi evidence in violation of Article 20 of the Statute guaranteeing him a fair hearing[399]. The Appellant further submits that the Trial Chamber erred in fact in holding that Witness ALS and Mrs. Kamuhanda were not credible in respect of his alibi on the ground that he contradicted their testimonies[400].

172. In respect of the testimony of Witness ALS, the Appellant recalls that at paragraph 169 of the Trial Judgement, the Trial Chamber found that the witness testified "that the Accused never left her house except on 8 April 1994" and "that she saw the Accused practically 24 hours a day and that the Accused never left the house again until 18 April 1994"[401].

---

[388] Appeal Brief, paras. 248-252.
[389] Appeal Brief, paras. 253-257.
[390] Appeal Brief, paras. 258-262.
[391] Appeal Brief, paras. 263-265.
[392] Appeal Brief, paras. 266-268.
[393] Appeal Brief, paras. 269-275.
[394] Appeal Brief, paras. 276-279.
[395] Appeal Brief, paras. 280-284.
[396] Appeal Brief, paras. 285-287.
[397] Respondent's Brief, para. 77.
[398] Respondent's Brief, para. 78. See also T. 19 May 2005, pp. 85-87.
[399] Appeal Brief, paras. 150, 165-172.
[400] Appeal Brief, paras. 248-257.
[401] Appeal Brief, paras. 166, 248.

The Appellant contends that this is a distortion of Witness ALS's testimony, because she did not state that she saw the Appellant twenty-four hours a day[402]. The Appellant points out that the witness testified as follows, emphasizing the highlighted parts :

> *A*. No, he didn't go away, apart from that trip when he went to get his son. We were always together, he was either in front of the house or by the house, so that one could call him – a very short distance from which one could call him.
>
> *Q*. That means that you saw him, that you talked to him; How frequently; once a day, twice a day?
>
> *A*. I couldn't tell you exactly the number of occasions, but on the whole we were together all the time because we shared meals in the morning, we shared meals in afternoon and even in evening he was there. And when he was not with us he was either resting or he was walking around in front of the compound. He was always around[403].

173. The Appellant then submits that the Trial Chamber, relying on the distorted evidence, erroneously held in paragraph 171 of the Judgement that Witness ALS was not credible since

> "it was the [Appellant] himself who contradicted the testimony by testifying that he saw her twice or sometimes thrice during the day"[404].

174. The Appeals Chamber notes that the Appellant approves the Trial Chamber's summary of Witness ALS's testimony that

> "she could not specify the number of times she saw [the Appellant] during the day because they were always together. She stated that she never lost sight of him for longer than a two hour period"[405].

However, the Appellant objects to the Trial Chamber's subsequent characterization of this testimony as meaning that Witness ALS testified to seeing the Appellant "practically 24 hours a day"[406]. The Appeals Chamber finds that the Appellant has not established an error in such a characterization of the testimony of Witness ALS. In the view of the Appeals Chamber, the Trial Chamber's correct conception of the evidence is reflected in its use of the term "practically". The Trial Chamber did not find that Witness ALS testified to having seen the Appellant literally twenty-four hours a day, but, rather, that she claimed to have been with him much more than his testimony supported[407]. The Appeals Chamber finds that the Appellant has not demonstrated an error in this finding and, accordingly, dismisses the subgrounds of appeal related to Witness ALS.

175. In respect of the testimony of Mrs. Kamuhanda, the Appellant highlights that at paragraph 170 of the Trial Judgement the Trial Chamber stated that Mrs. Kamu-

---

[402] Appeal Brief, paras. 171, 250, 251. See also Reply Brief, paras. 38-42; T. 19 May 2005, p. 53.
[403] T. 29 August 2002, pp. 47-48 (emphasis in the Appeal Brief, para. 249).
[404] Appeal Brief, paras. 172, 248.
[405] Appeal Brief, para. 250, quoting Trial Judgement, para. 102.
[406] Appeal Brief, paras. 166, 168, 171, citing Trial Judgement, para. 169.
[407] See Trial Judgement, para. 171.

handa "testified that she was always in the company of the Accused, *never taking her eyes off him*"[408]. The Appellant submits that this is a distortion of the evidence, for Mrs. Kamuhanda did not tell the Chamber that during the period in question she never took her eyes off her husband, "but rather that he was always within calling distance"[409]. The Appellant refers the Appeals Chamber to the hearing of 9 September 2002 where Mrs. Kamuhanda testified as follows :

> *Q*. What about your husband, specifically, did he participate on a regular basis in these patrols ?
>
> *A*. Yes, he was never absent. All the time he was with the others, they regrouped together. And like I said, he would come to eat something, take a blanket, and then go and join the others. All the time he was with the others, like I said. So, he stayed with us in the house when the shells were very, very intense.
>
> *Q*. When he was not with you where was he ?
>
> *A*. He was with the others. However, he did not go very far. I must say they stayed around our house … we could even call them because they were walking in the street, and so we could call them. Even in turn something could happen to us inside, they could come to our rescue[410].

176. The Appellant then submits that the Trial Chamber, relying on the distorted evidence that Mrs. Kamuhanda did not lose sight of her husband, found that the Appellant contradicted her by testifying that he saw her "twice or sometimes thrice during the day"[411]. The Appellant thus argues that the Trial Chamber erred by holding Mrs. Kamuhanda not credible on the ground of this contradiction[412].

177. In the view of the Appeals Chamber, the Appellant correctly points out that Mrs. Kamuhanda did not testify to never losing sight of her husband, but rather to having him within calling distance[413]. The Appeals Chamber recalls that the Trial Chamber correctly summarized this portion of Mrs. Kamuhanda's testimony in the Judgement[414], but observes that in a subsequent discussion of this testimony, the Trial Chamber referred to her "never taking her eyes off him"[415]. This imprecision does not amount to an error of fact occasioning a miscarriage of justice. A review of the Trial Judgement shows that the Trial Chamber found the alibi evidence in general not credible because it "appeared designed for a purpose"[416]. The fact that the Trial Chamber characterized Mrs. Kamuhanda's testimony imprecisely does not undermine this ultimate finding which, fundamentally, was based on the Trial Chamber's reasonable appreciation of the evidence. Accordingly, the Appeals Chamber, Judge Weinberg

[408] Appeal Brief, para. 167 (emphasis in the Appeal Brief).
[409] Appeal Brief, para. 170. See also Reply Brief, paras. 43-45.
[410] T. 9 September 2002, pp. 163, 164.
[411] Appeal Brief, para. 253, citing Trial Judgement, paras. 170, 171.
[412] Appeal Brief, para. 257. See also T. 19 May 2005, p. 55.
[413] T. 9 September 2002, p. 164.
[414] See Trial Judgement, para. 115 ("Thus when her husband was not with the family, he was with the other men, conducting patrols in the neighborhood within calling distance.").
[415] Trial Judgement, para. 170.
[416] See Trial Judgement, para. 176.

de Roca dissenting, dismisses the sub-grounds of appeal related to Mrs. Kamuhanda's alibi evidence.

### D. *Alleged Errors relating to Witness ALR's Evidence*

178. The Appellant submits that the Trial Chamber erred in law and fact when it held that it could not rely on Witness ALR with reference to the dates of the alibi because the witness could not recall the dates on his own[417]. The Appellant argues that the only reason for refusing to rely on the evidence of Witness ALR was that "he had been influenced by a third person", namely his wife, who reminded him of the correct dates, and posits that influence of third parties does not automatically exclude reliance on the evidence[418].

179. The Appeals Chamber notes the following statement made by the ICTY Appeals Chamber in the *Kupreškic et al.* case :

> As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence[419].

180. As both parties point out, the Trial Chamber in the present case recalled this statement in paragraph 36 of the Judgement[420]. The Appellant argues, however, that although the Trial Chamber recalled the relevant rule, it refused to rely on Witness ALR's testimony as to alibi dates because he had been influenced by a third person[421].

181. The Appeals Chamber endorses the above-mentioned statement made in the *Kupreškic et al.* Appeal Judgement and notes that while factors such as influence of third persons or evidentiary inconsistencies do not require the trier of fact to not rely on the evidence, they are to be taken into consideration in weighing the evidence. The trier of fact is bound to consider such factors in deciding whether the evidence is reliable. In the present case, the Trial Chamber noted that Witness ALR stated in a prior written statement that the Appellant left the Kacyiru neighbourhood on 12 April 1994, whereas he testified during trial that the Appellant left on 18 April 1994[422]. The Trial Chamber recalled in the Judgement the witness's explanation that

---

[417] Appeal Brief, paras. 34-41, 258-262.
[418] Appeal Brief, paras. 36, 258. See also Reply Brief, para. 7.
[419] *Kupreškic et al.* Appeal Judgement, para. 31 (citations omitted).
[420] Appeal Brief, para. 34; Respondent's Brief, para. 36.
[421] Appeal Brief, paras. 36, 41, 258. *See also* T. 19 May 2005 p. 54.
[422] Trial Judgement, paras. 109, 110.

he had made a mistake in his witness statement and that his wife told him subsequently that the Appellant left on the 18th of April[423]. Significantly, during cross-examination on this point, the witness stated the following :

> To show you that I am saying the truth, when the Canadian investigator came this was in 1999, five years after. So it goes without saying that for me the dates were not important. It is only in the evening when I came to my house that when I explained to my wife that somebody visited me, has interviewed me. So when I talked about this date, she reminded me that it was not the 12th but it was the 18th that we left. So that's the truth. So maybe I made mistakes, maybe I made mistakes about the date, but I must state that I do not have in my mind all this dates, especially during that period[424].

182. In view of the foregoing, the Appeals Chamber finds that it has not been shown that the Trial Chamber erred in law or in fact when it concluded that Witness ALR's testimony as to the alibi dates was not reliable. Accordingly, this sub-ground of appeal is dismissed.

### *E. Alleged Errors in distorting the Testimonies of Witnesses ALR and ALB and in finding that their Testimonies contradicted each other*

183. The Appellant submits that the Trial Chamber erred in law and fact when it found at paragraph 173 of the Trial Judgement that the testimonies of Witnesses ALR and ALB contained "some contradictions" which,

> "[considering] that if these Witnesses were together as they claimed to be, 24 hours a day, seven days a week, then it is most inconsistent that they should have differing accounts of what happened"[425].

The Appellant argues that the witnesses did not state that they were together twenty-four hours a day, but rather that they saw each other during patrols[426]. Additionally, the Appellant contends, the Trial Chamber failed to point out the contradictions it found between the testimonies of these two witnesses[427].

184. The Prosecution responds that the Trial Chamber correctly summarized Witnesses ALR's and ALB's testimonies and that, although the Trial Chamber did not list the contradictions, the two testimonies indeed differed in certain respects[428].

185. The Appeals Chamber observes that Witnesses ALR and ALB did not claim to have been together twenty-four hours a day. The Trial Chamber's erroneous statement in this regard, made at paragraph 173 of the Trial Judgement[429], appears to stem from an incorrect summary of the testimony of Witness ALB. When summarizing his evidence, the Trial Chamber wrote :

---

[423] See Trial Judgement, paras. 109, 110.

[424] T. 4 September 2002 pp. 29, 30.

[425] Appeal Brief, para. 173, quoting Trial Judgement, para. 173. See also Appeal Brief, paras. 263, 264.

[426] Appeal Brief, paras. 173, 264. See also Reply Brief, para. 46.

[427] Appeal Brief, para. 264. See also Reply Brief, paras. 59, 60; T. 19 May 2005, pp. 56, 57.

[428] Respondent's Brief, paras. 69-71, 82, 83 (pointing out two contradictions relating to the patrols).

> "Defence Witness ALB stated that his family and that of the Accused had, for security reasons, moved to stay in the house of Witness ALS on 8 April 1994"[430].

In support of this, the Trial Chamber cited the record[431]. However, the identified portion of the transcript does not support the Trial Chamber's summary of the evidence. As the Appellant points out[432], Witness ALB never stated that he moved to the house of Witness ALS; rather, it was the family of Witness ALR who did so[433]. Witness ALB testified that he was with the Appellant and with others during nightly neighbourhood patrols as well as during morning and afternoon periods[434]. Witness ALB did not state or imply that he was together with Witness ALR at all times during the relevant period. The record reveals that Witness ALR did not claim to have been with Witness ALB twenty-four hours a day either, and his testimony could not be reasonably construed to reach such a conclusion.

186. Nevertheless, the Appeals Chamber considers that this mischaracterization of the evidence did not occasion a miscarriage of justice. It is not of vital importance for the appreciation of the alibi evidence whether Witnesses ALR and ALB were together most of the time or only some of the time during the relevant period. What is significant is that the Trial Chamber found, after hearing the alibi witnesses testify before it and considering their testimonies in light of all the evidence, that the witnesses "ended up relating stories that appeared designed for a purpose"[435]. As recalled above, it was for this reason that the Trial Chamber found the alibi witnesses' testimonies not credible. The Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in that overall finding.

187. The Appellant also submits that while the Trial Chamber found that "there are some contradictions" in the testimonies of Witnesses ALR and ALB, it did not point out any contradiction in their accounts[436]. The Appeals Chamber notes that the Appellant has not developed this argument in any way beyond mentioning it in one sentence in the Appeal Brief, failing to specify whether the Trial Chamber's finding amounts to an error of law or fact and provide any support for his contention[437]. The Appeals Chamber reiterates that it cannot be expected to consider submissions that are presented in a vague or insufficient manner[438]. Nevertheless, the Appeals Chamber notes that the testimonies of Witnesses ALR and ALB indeed did differ in certain

[429] The Trial Chamber stated the following : "The Chamber has considered the testimonies of Witnesses ALR and ALB and finds that there are some contradictions in their testimonies. The Chamber considers that if these Witnesses were together as they claimed to be, 24 hours a day, seven days a week, then it is most inconsistent that they should have differing accounts of what happened." Trial Judgement, para. 173.

[430] Trial Judgement, para. 111.

[431] Trial Judgement, para. 111, n° 122, citing T. 5 September 2002, p. 100.

[432] Appeal Brief, paras. 173, 264.

[433] Trial Judgement, para. 104.

[434] T. 5 September 2002, pp. 109-111, 118-122.

[435] See Trial Judgement, para. 176.

[436] Appeal Brief, paras. 263, 264.

[437] The Appeals Chamber notes that the Appellant has reiterated this submission in the Reply Brief and during the hearing of the appeal without, however, clarifying or substantiating it. See also Reply Brief, paras. 59, 60; T. 19 May 2005, pp. 56, 57.

respects[439]. Consequently, the Trial Chamber's finding of "some contradictions" is not unreasonable. Moreover, the fact that the Trial Chamber did not bother detailing the contradictions is a further indication that it did not intend to rely on them to any significant degree in its conclusion that the alibi witnesses were not credible, but rather relied on its sense that the witnesses' stories seemed concocted.

188. For the foregoing reasons, the Appeals Chamber, Judge Weinberg de Roca dissenting, dismisses the present sub-ground of appeal.

### F. *Alleged Error in noting that the Appellant did not fully explain the Situation at the House of Witness ALS*

189. The Appellant submits that the Trial Chamber erred in fact when it noted the following in the Judgement[440] :

> The Chamber has also noted that the Accused in his testimony does not really go into detail as to what the men who were in ALS's house did during that period. The Chamber notes that the Accused just testified that they were together 24 hours a day and that he does not really state what the exact routine was during that 24 hour period[441].

190. The Appellant, pointing to the record, argues that he provided such details[442].

191. The Prosecution responds that the Trial Chamber was entitled to make an observation about the vague account the Appellant gave of his time during the alibi period and adds that the observation

> "merely identifies one factor that the Chamber properly used in assessing the evidence, to determine whether the alibi could reasonably possibly be true …"[443].

192. The Appeals Chamber notes that while the Appellant provided an account of the routine followed during the period of his alibi[444], the Trial Chamber's characterization of this account as not particularly detailed was reasonable. Accordingly, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in fact in making such an observation.

193. The Appellant also submits, in summary form, that in making the impugned observation about the Appellant's testimony, the Trial Chamber appeared to reverse the burden of proof[445]. The Appeals Chamber disagrees. As discussed in the following sub-section, the Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber erred in law in respect of the burden of proof applicable to alibi.

---

[438] See Chapter I. See also *Kajelijeli* Appeal Judgement, para. 7; *Blaškic* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljevic* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras. 43, 48.

[439] *Cf, e.g.,* T. 3 September 2002, p. 69 (Witness ALR) and T. 5 September 2002, p. 111 (Witness ALB); T. 3 September 2002, p. 66 (Witness ALR) and 5 September 2002, p. 118 (Witness ALB).

[440] Appeal Brief, para. 266.

[441] Trial Judgement, para. 173.

[442] Appeal Brief, paras. 266, 268.

[443] Respondent's Brief, para. 86.

[444] See T. 21 August 2002, pp. 24, 25, 28; T. 27 August 2002, pp. 48-89.

[445] Appeal Brief, paras. 266, 267.

194. Accordingly, the Appeals Chamber, Judge Weinberg de Roca dissenting, dismisses this sub-ground of appeal.

### G. *Alleged Error in finding that Witnesses ALB and ALM did not rule out the Possibility that the Appellant was in Gikomero*

195. The Appellant submits that the Trial Chamber erred in law and fact in holding that the testimonies of Witnesses ALB and ALM did not rule out the possibility that the Appellant was present in Gikomero[446]. The Appellant argues that such a holding reverses the burden of proof and adds that as regards the testimony of Witness ALB, the Trial Chamber did not state in what way his evidence did not rule out the possibility that the Appellant went to Gikomero[447].

196. The Prosecution responds that the Trial Chamber's conclusion in respect of the weight and impact of the testimonies of Witnesses ALB and ALM was reasonable[448]. Moreover, in the Prosecution's view, the Trial Chamber did not reverse the burden of proof, "but was merely observing that the defence evidence in question failed to raise a reasonable doubt, when considered in the light of the prosecution case, generally because the evidence proffered by the Appellant was not incompatible, even if accepted, with his guilt, as established by the prosecution evidence"[449].

197. The Appeals Chamber notes that the Trial Chamber formulated the burden of proof regarding the alibi in the following terms :

> 83. As has been held by the Appeals Chamber in the *Celibici* [*sic*] *Case*, the submission of an alibi by the Defence does not constitute a defence in its proper sense. The relevant section of the judgment reads : "It is a common misuse of the word to describe an alibi as a "Defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a Defence in its true sense at all. By raising this issue, the defendant does no more [than] require the Prosecution to eliminate the reasonable possibility that the alibi is true".
>
> 84. Therefore, as consistently held throughout the jurisprudence of the Tribunal and as asserted by the Defence, when an alibi is submitted by the Accused the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects. Indeed, the Prosecution must prove "that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence". If the alibi is reasonably possibly true, it will be successful.
>
> 85. Pursuant to Rule 67 (A) (ii), the Defence is solely required at the pre-trial phase – in addition to the notification of his intention to rely on the alibi – to disclose to the Prosecution the evidence upon which the Defence intends to rely to establish the alibi. Thus, during the trial the Defence bears no onus of proof of the facts in order to avoid conviction. But, during the trial, the Accused may adduce evidence, including evidence of alibi, in order to raise reasonable doubt regarding the case for the Prosecution. It must be stressed, however, that the fail-

[446] Appeal Brief, paras. 83, 85, 91, 92, 269-275.
[447] Appeal Brief, paras. 85, 91, 92, 269-273, 275.
[448] Respondent's Brief, para. 87.
[449] Respondent's Brief, para. 46.

> ure of the Defence to submit credible and reliable evidence of the Accused's alibi must not be construed as an indication of his guilt[450].

198. The Appeals Chamber finds no error in this statement and considers that it indicates the Trial Chamber's correct conception of the burden of proof regarding the alibi. Read against this background, the Trial Chamber's use of terms such as that certain testimony did not "exonerate" the Appellant from being at a crime site[451], or that certain testimony "cannot foreclose" the possibility that the Appellant was at a crime site[452], or that certain testimony does not "exclude" the possibility that the Appellant went to the crime site[453], does not indicate a reversal of the burden of proof. Rather, when considered in the proper context of the entire discussion of such evidence, the Appeals Chamber understands these terms to mean that even if fully accepted as true, such evidence, in the view of the Trial Chamber, would be insufficient to cast a reasonable doubt on the evidence showing that the Appellant was at the crime site. Accordingly, the Appeals Chamber dismisses the Appellant's submission that the Trial Chamber erred in law by reversing the burden of proof regarding the alibi.

199. The Appeals Chamber also rejects the Appellant's contention that the Trial Chamber did not explain in what way the testimony of Witness ALB did not rule out the possibility that the Appellant went to Gikomero. The Appeals Chamber notes that the Trial Chamber devoted an entire paragraph of the Trial Judgement to considering this very matter[454]. The Appellant has failed to demonstrate any error on the part of the Trial Chamber on this point.

200. Accordingly, the Appeals Chamber, Judge Weinberg de Roca dissenting, dismisses the present sub-ground of appeal.

### H. *Alleged Error in finding that Patrols were mounted to protect Families from Looters*

201. The Appellant submits that the Trial Chamber erred in law and in fact when it found as follows[455] :

> The Chamber has carefully analysed these testimonies and finds it incredible that a patrol as intensive as this would be mounted just to protect the Witnesses and their families from looters. The Chamber finds that in an attempt to provide an alibi for the Accused, the Witnesses ended up relating stories that appeared designed for a purpose and therefore not credible[456].

202. The Appellant argues that the Prosecution did not challenge the existence of the patrols and that when cross-examining Witnesses ALS and ALF and, in particular, Witness ALB, the Prosecution admitted their existence[457]. He contends that the Tribunal's jurisprudence holds that

---

[450] Trial Judgement, paras. 83-85 (citations omitted).
[451] Trial Judgement, para. 174.
[452] Trial Judgement, para. 174.
[453] Trial Judgement, para. 175.
[454] See Trial Judgement, para. 174.
[455] Appeal Brief, paras. 71-78, 276-279.
[456] Trial Judgement, para. 176.
[457] Appeal Brief, para. 73. See also Reply Brief, para. 15.

"a party who fails to cross-examine a witness upon a particular statement tacitly accepts the truth of the witness's evidence on the matter"[458].

Consequently, in the Appellant's view, the Trial Chamber committed an error of law when it rejected the evidence of patrols which was not called into question by the Prosecution[459].

203. The Prosecution responds that it did not accept the account of the night patrols given by the alibi witnesses and that the Trial Chamber made no error in its assessment of the witnesses and evidence on this point[460]. Moreover, the Prosecution points out that it was not the existence of the patrols that was at issue, but rather their intensity[461]. Finally, the Prosecution argues that whatever position the parties may take, the Trial Chamber has the ultimate responsibility for assessing the evidence and making factual findings[462].

204. The Appeals Chamber considers that regardless of any position which parties may take in respect of certain evidence, it is for the trier of fact alone to assess that evidence and reach its findings accordingly. In other words, whether or not a party challenges certain evidence at trial does not dictate to the trier of fact how it should assess that evidence and what findings it is to reach in respect of it. The Appellant's reliance on the *Rutaganda* Appeal Judgement[463] in support of its allegation of an error of law in this regard is misplaced. The point addressed in *Rutaganda* was whether the Trial Chamber erred in inferring that where the Defence did not cross-examine a witness on some of his testimony it meant that it did not challenge the truth of the evidence given in that testimony[464]. The Appeals Chamber held that such an inference would not constitute an error of law[465]. However, *Rutaganda* does not stand for the proposition that a trier of fact *must* infer that statements not challenged during cross-examination are true. The Trial Chamber was free to decline to so infer, as it did here.

205. Accordingly, the Appeals Chamber dismisses the present allegation of an error of law.

206. The Appellant also argues that the Trial Chamber's finding constituted an error of fact[466]. He observes that the existence of the patrols was undisputed by the Prosecution and supported by other evidence in the record, including the testimony of Witness ALM, who stated that he participated in a patrol in his neighbourhood, and that of a Defence expert witness who explained the reasons for the patrols[467]. The Appeals Chamber observes that the Appellant did not provide any references to the record which would enable the Appeals Chamber to review the relevant portions of the testimony of the expert witness and Witness ALM on the issue of patrols. The Appeals Chamber again stresses that it cannot assess the merits of submissions which are not

[458] Appeal Brief, para. 77, quoting *Rutaganda* Appeal Judgement, para. 310.
[459] Appeal Brief, para. 78; Reply Brief, para. 19.
[460] Respondent's Brief, paras. 40, 88.
[461] Respondent's Brief, para. 41.
[462] Respondent's Brief, para. 42.
[463] See Appeal Brief, para. 77, citing *Rutaganda* Appeal Judgement, para. 310.
[464] *Rutaganda* Appeal Judgement, para. 310.
[465] *Rutaganda* Appeal Judgement, para. 310.
[466] See Appeal Brief, paras. 276-279, referring to Trial Judgement, para. 176.
[467] Appeal Brief, para. 279.

presented properly[468]. The Appeals Chamber, Judge Weinberg de Roca dissenting, therefore dismisses this sub-ground of appeal without further consideration.

I. *Alleged Error in Finding That the Alibi is Not Credible*

207. In conclusion, the Appellant submits that the Trial Chamber erred in its overall assessment of the alibi[469]. The Appellant asserts that the Trial Chamber assessed the alibi in a fragmented fashion, failed to assess the alibi evidence thoroughly, and misrepresented testimonies of witnesses[470]. The Appellant submits that the alibi witnesses confirmed, without contradictions, that he was in Kacyiru from 7 to 18 April 1994, only leaving on 8 April to pick up his son and on 18 April to go to Gitarama, and that the Trial Chamber erred in finding the alibi not credible and dismissing it[471]. The Appellant urges the Appeals Chamber to set aside the Trial Chamber's findings on the alibi and assess the alibi evidence on its own[472].

208. The Prosecution responds that the Trial Chamber's rejection of the alibi was reasonable[473]. In the Prosecution's view, the Trial Chamber acted within the scope of its recognized discretion in assessing the testimony of the witnesses and determining what weight to give to their evidence[474]. The Prosecution argues that the Trial Chamber did not assess the alibi in a fragmented fashion, but rather "weighed all of the different testimonies that [had] been adduced" in order to reach its conclusion[475].

209. Having addressed the allegations of errors relating to the Trial Chamber's assessment of the testimonies of individual alibi witnesses in the foregoing sections, the Appeals Chamber considers here whether, as the Appellant asserts, the Trial Chamber assessed the alibi in a fragmented fashion, leading it to err in its overall evaluation. The Appeals Chamber notes the Appellant's reference to the *Kayishema and Ruzindana* Appeal Judgement, stating that whenever a Trial Chamber's approach to the assessment of evidence

> "leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof"[476].

210. The Appeals Chamber finds that a review of the Trial Judgement disproves the Appellant's present contention of error. After reviewing the alibi evidence at length, the Trial Chamber concluded as follows :

> The Chamber has weighed all the different testimonies that have been adduced and comes to the following conclusion as to the alibi of the Accused. In coming to its conclusion about the alibi of the Accused, the Chamber noted in particular

[468] See Chapter I.
[469] Appeal Brief, paras. 280-287.
[470] Appeal Brief, paras. 112, 280, 283, 284. See also T. 19 May 2005, p. 60.
[471] Appeal Brief, paras. 284-287.
[472] Appeal Brief, para. 284.
[473] Respondent's Brief, para. 90.
[474] Respondent's Brief, para. 90.
[475] Respondent's Brief, para. 51, quoting Trial Judgement, para. 176. See also T. 19 May 2005, p. 86.
[476] *Kayishema and Ruzindana* Appeal Judgement, para. 119 (referred to in Appeal Brief, paras. 242, 243, 281; T. 19 May 2005, pp. 60, 61).

> the testimonies of the different Witnesses as to the patrols that took place in the quarter from 7 April 1994 to 17 April 1994. The Chamber noted the testimonies of these Witnesses that these patrols were mounted primarily to protect them and their families from looters. The Chamber has also noted from the testimonies that these patrols were very intensive and around the clock. The Chamber has carefully analysed these testimonies and finds it incredible that a patrol as intensive as this would be mounted just to protect the Witnesses and their families from looters. The Chamber finds that in an attempt to provide an alibi for the Accused, the Witnesses ended up relating stories that appeared designed for a purpose and therefore not credible. The Chamber finds that the Accused may have been at the house of Defence Witness ALS at times during 7 to 18 April 1994. The Chamber finds, however, that the Accused was able to travel to and from Gikomero *commune* between 6 and 17 April 1994. The Chamber refers to its earlier findings that it was not impossible for the Accused to move around from 6 April 1994 to 17 April 1994. The Chamber therefore finds that the alibi of the Accused from 6 April 1994 to 17 April 1994 is not credible[477].

This discussion plainly shows that rather than considering the alibi evidence in a fragmented fashion, the Trial Chamber considered it as a whole. The Appeals Chamber, Judge Weinberg de Roca dissenting, therefore finds that the Appellant has not demonstrated any error in the Trial Chamber's method of assessing the alibi evidence and, accordingly, dismisses this last sub-ground of appeal relating to the alibi.

### J. *Additional Evidence*

211. The Appeals Chamber will now turn to the examination of the Trial Chamber's finding in relation to the Appellant's presence at the Gikomero Parish Compound. With regard to this finding, the Appeals Chamber has admitted the additional evidence of two witnesses, Witnesses GAA and GEX[478]. The Appeals Chamber heard these witnesses together with two witnesses called in rebuttal, Witnesses GAG and GEK[479].

#### 1. *Witness GAA*

212. Witness GAA testified before the Trial Chamber that he had seen the Appellant at the Gikomero Parish Compound on 12 April 1994[480]. In fact, the Trial Chamber held that he was one of the three witnesses who had prior knowledge of the Appellant and were therefore capable of identifying him when he arrived at the compound[481]. With his motion to admit additional evidence, the Appellant presented a written declaration in which Witness GAA stated that he had never gone to Gikomero Parish in April 1994, that he had not seen the Appellant there, that many Prosecution witnesses had colluded prior to testifying to avoid contradictions, and that it was upon receiving information from Witness GEK that he had agreed to testify falsely[482].

---

[477] Trial Judgement, para. 176.
[478] Rule 115, Decision, para. 74.
[479] See T. 18 May 2005; T. 19 May 2005.
[480] Trial Judgement, paras. 330-334.
[481] Trial Judgement, para. 445.
[482] Rule 115 Decision, para. 38.

213. During the evidentiary hearing before the Appeals Chamber, Witness GAA testified that he had lied during trial when he stated that he had been at the Gikomero Parish Compound and that he had seen the Appellant there. In fact, the witness testified, he had sought refuge in Kibara, not in Gikomero, and had never seen the Appellant in Gikomero[483]. When asked about his motive for giving allegedly false testimony at trial, Witness GAA testified that he had lost many members of his family. Therefore, when he was told by Witness GEK that the Appellant had been the leader of the attack, Witness GAA decided to do everything to have him prosecuted[484]. He agreed to help Witness GEK by locating survivors of the massacre. However, some of them declared that they had not seen the Appellant at the massacre. Only later did Witness GAA discover that the Appellant had never been at the parish[485]. Witness GAA denied that he had discussed the details of his trial testimony with other witnesses before testifying[486].

214. The Appellant argues that, since Witness GAA retracted his evidence, his conviction by the Trial Chamber rests on the testimony of only two witnesses who allegedly knew him prior to the events in 1994[487].

215. If additional evidence admitted on appeal is subsequently determined by the Appeals Chamber to be irrelevant or not credible, it provides no basis for disturbing the Trial Chamber's judgement, since it could not have been a decisive factor if the Trial Chamber had considered it[488].

216. The Appeals Chamber notes first that Witness GAA's testimony during the additional evidence hearing showed clear contradictions with his statement of March 2004, which was submitted as part of the Appellant's motion to admit additional evidence[489]. In the statement, Witness GAA explained that, after he had returned to his *cellule*, he had been appointed as *responsable de cellule* by the RPF administration. As part of his duties, Witness GAA stated, he had to investigate the persons responsible for the massacres. Because the majority of Tutsi from his *cellule* had been killed at Gikomero, Witness GAA continued, he went there to make inquiries. In the course of his inquiries, he took part in several meetings in Witness GEK's bar, during which, Witness GAA stated, "they" agreed upon the details of their testimonies against the Appellant[490].

217. Before the Appeals Chamber, Witness GAA's testimony was quite different. He maintained that Witness GEK had taken the initiative to contact him, but stated that this had had nothing to do with his official responsibilities[491]. He also testified that he had had two meetings with Witness GEK. Only during the first meeting was she accompanied

[483] T. 18 May 2005 p. 3.
[484] T. 18 May 2005 p. 4.
[485] T. 18 May 2005 p. 5.
[486] T. 18 May 2005 p. 6.
[487] T. 19 May 2005, pp. 31, 35.
[488] *Kvocka* Appeal Judgement, para. 428. See also *Semanza* Appeal Judgement, paras. 171, 180; *Rutaganda* Appeal Judgement, paras. 488, 489.
[489] Admitted into evidence as Prosecution Exhibit ARP 1. T. 18 May 2005, p. 76.
[490] Prosecution Exhibit ARP 1 ("*Nous nous sommes mis d'accord lors de nos réunions sur les termes que nous devions utiliser pour éviter les contradictions*").
[491] T. 18 May 2005, p. 18.

by two persons. Further, Witness GAA testified that he was not aware of Witness GEK organizing meetings of a group of people to discuss the case against the Appellant[492].

218. When Witness GAA was asked during the evidentiary hearing how he knew some of the details which he had given during his allegedly false testimony at trial, he answered that he had invented them. Amongst other details, Witness GAA claimed to have invented the fact, set out in a statement given to the Prosecution in 1999, that the Appellant "headed for his native village". Witness GAA maintained during his testimony before the Appeals Chamber that in fact he did not know the Appellant's native village in 1994. Witness GAA also explained that he had invented the fact that the Appellant arrived in a white truck at the compound[493].

219. The Appeals Chamber finds it to be highly implausible that Witness GAA would have been able to invent these details, which are corroborated by other evidence. Moreover, his testimony that he invented these details on his own is inconsistent with his own written statement, attached to the Appellant's motion to admit additional evidence, that the witnesses had colluded to harmonize their respective testimony. This inconsistency undermines the credibility of both explanations.

220. The Appeals Chamber notes that Witness GAA was consistent for many years in his statements that he had been at the Gikomero Parish in 1994, and that he had seen the Appellant there. This started with a statement given to the Rwandan authorities in 1995, and continued through 1999, when he gave his statement to the Prosecution, and 2001, when he testified before the Trial Chamber[494]. The Appeals Chamber also notes that Witness GAA, when he allegedly decided to tell the truth in 2004, neither contacted the Prosecution nor the Tribunal, but instead contacted the Defence and subsequently went to a notary in Kigali, whose fee he had to pay himself[495].

221. The Appeals Chamber therefore finds that Witness GAA's recantation during the evidentiary hearing in May 2005 is not credible. Thus, the Appeals Chamber concludes that Witness GAA's additional evidence could not have been a decisive factor in reaching the decision at trial. Because of the consistency of his earlier statements, and the corroboration by other witnesses, a reasonable trier of fact could still rely on Witness GAA's trial evidence. Thus, the Defence failed to verify those facts presented in its Rule 115 Motion as alleged knowledge of Witness GAA.

2. *Witness GEX*

222. Prior to the trial phase, Witness GEX provided a statement to the Prosecution stating that the Appellant was present at the Gikomero Parish Compound on 12 April 1994 and that he had started the attack by saying the word "mukore", meaning "to work". The Prosecution disclosed this statement to the Defence, but did not call Witness GEX to testify at trial[496]. With his motion to admit additional evidence, the Appellant submitted a new statement by Witness GEX stating that, in reality, she had

[492] T. 18 May 2005, p. 31.
[493] T. 18 May 2005, p. 33.
[494] T. 18 May 2005, p. 26.
[495] T. 18 May 2005, pp. 22, 26, 27.
[496] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, para. 41.

not seen the Appellant at the compound, and that several witnesses had colluded to incriminate the Appellant[497].

223. Witness GEX testified before the Appeals Chamber that she had been at Gikomero and had seen the killing of the preacher Augustin Bucundura. However, she maintained that contrary to her earlier statement given to the Prosecution, she had not seen the Appellant at the scene, nor had she heard his name spoken there[498]. Witness GEX explained that it was only after the events that she had been told by two persons, a man and a woman, that the Appellant was responsible for the massacre[499]. The man, Witness GAA, had told her that he had been given this information by Witness GEK[500]. Prior to making her first statement, she had spoken with Witness GAA and another person about the contents of her statement, and both of them suggested that she claim to have heard the Appellant's name from a person called Nzaramba[501]. Witness GEX testified that she had never met Witness GEK personally, but that she was convinced that Witness GEK executed a plan against the Appellant[502].

224. With regard to Witness GEX, the Appellant submits that her new evidence shows that a certain number of individuals had indicated that the Appellant had been at the Gikomero Parish Compound, although they had never seen him there, thus casting doubt on the testimony of the witnesses who had testified that they had heard that the Appellant led the attack[503].

225. The Appeals Chamber recalls that Witness GEX's additional evidence was admitted to assist in the assessment of the credibility and reliability of Witness GAA's additional evidence[504]. Witness GEX's testimony before the Appeals Chamber does not support the contention that Witness GEK organized meetings where a conspiracy to get the Appellant convicted was planned[505]. Moreover, the credibility of Witness GEX's testimony at the appeal hearing is undermined by another discrepancy. According to Witness GEX's written statement to the Prosecution, some local traders at the Gikomero Parish Compound shouted "There is Kamuhanda"[506]. During her testimony before the Appeals Chamber, Witness GEX emphasized that she had been told to say that the Appellant's name was mentioned by a person called Nzaramba[507]. However, the name "Nzaramba" is not mentioned in her written statement[508]. The Appeals

[497] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, para. 42.
[498] T. 18 May 2005, p. 45.
[499] T. 18 May 2005, p. 48.
[500] T. 18 May 2005, p. 50.
[501] T. 18 May 2005, p. 52.
[502] T. 18 May 2005, p. 69.
[503] T. 19 May 2005, p. 32.
[504] *Kamuhanda*, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, para. 53.
[505] T. 18 May 2005, p. 68.
[506] Prosecution Exhibit ARP 5, T. 18 May 2005, p. 76. During cross-examination, Witness GEX denied that she stated that the Appellant's name had been shouted by residents of Gikomero. But she was unable to give an explanation as to how this information found its way into her statement, which was read back to her in Kinyarwanda. T. 18 May 2005, pp. 61, 62.
[507] T. 18 May 2005, p. 52.
[508] T. 18 May 2005, p. 61.

Chamber considers that Witness GEX's confusing attempt to recant a statement that was not in her written statement undermines the credibility of the recantation. Finally, the Appeals Chamber also notes that Witness GEX, like Witness GAA, did not contact the Prosecution to correct her allegedly false earlier statement, but instead went together with Witness GAA to the notary in Kigali to do so by means of an *affidavit*[509].

226. The Appeals Chamber concludes that Witness GEX's testimony during the evidentiary hearing in May 2005 is unreliable. The Appeals Chamber finds that there is no evidence supporting a collusion of the Prosecution witnesses with the goal to testify falsely against the Appellant.

3. *Evidence in Rebuttal*

227. Witnesses GAG and GEK were called by the Prosecution to rebut the additional evidence given by Witnesses GAA and GEX. The Appeals Chamber, having found that the additional evidence could not affect the Trial Chamber's decision, does not consider it necessary to discuss the rebuttal evidence, and notes only that both rebuttal witnesses testified during the evidentiary hearing that they had told the truth before the Trial Chamber[510].

4. *"Additional Information"*

228. The Appeals Chamber did not consider the Prosecutor's Filing of Additional Information relating to the rebuttal testimony of Witness GAG[511].

5. *Conclusion*

229. In summary, the Appeals Chamber dismissed the additional evidence in its entirety. It will, therefore, rely on the evidence on the trial record in dealing with this appeal.

[509] T. 18 May 2005, p. 22.

[510] T. 18 May 2005, p. 83 (Witness GAG); T. 19 May 2005, p. 3 (Witness GEG).

[511] Prosecutor's Filing of Additional Information in relation to the Rule 115 Evidentiary Hearing Held on 18 and 19 May 2005, 8 July 2005. After the conclusion of the evidentiary hearing on 19 May 2005, the Prosecution could only seek the Appeals Chamber's consideration of the additional information through a motion pursuant to Rule 115 of the Rules. However, the Prosecutor's Filing of Additional Information does not meet the prerequisites of a Rule 115 motion, as it does not include any submission in relation, *inter alia*, to its credibility and relevance, and as to whether it could have been a decisive factor in reaching the decision at trial. Also, as Rule 115 is *lex specialis* for the admission of evidence on appeal, the request of the Prosecution could not be based on the general Rule 54 of the Rules. Finally, the Appeals Chamber did not deem it necessary to act pursuant to Rule 98 of the Rules. It must be also noted that the Appellant is not prejudiced by the non-consideration of the additional information as he sought the dismissal of the Prosecutor's Filing of Additional Information (*cf. Conclusions en réplique à la requête du Procureur du 8 juillet 2005*, p. 7).

### *K. Finding that the Appellant was present at the Gikomero Parish Compound*

230. The Appellant submits that in convicting him, the Trial Chamber relied primarily on the testimony of Witnesses GAF, GES, and GAA, who had attested to having known him prior to the massacre at Gikomero[512]. The Appellant argues that the Trial Chamber erred in fact when it concluded that these witnesses knew him prior to 12 April 1994, and that they were thus able to identify him on that date[513]. In this context, the Appellant refers to his earlier arguments relating to identification evidence[514].

231. The Appeals Chamber notes that the Appellant's summary of the Trial Chamber's reasoning is incomplete. The Appellant only refers to his identification by Witnesses GAF, GES, and GAA, and the corroborating evidence provided by other Prosecution witnesses. In addition, the Trial Chamber relied also on Witnesses GEK and GEB, who had testified that they had seen the Appellant in a vehicle in Gikomero *Commune* on 12 April 1994, shortly before the massacres began[515]. The Appellant does not address the evidence provided by these two witnesses relating to his presence in Gikomero *Commune* on 12 April 1994. While the Appellant challenges the credibility of Witness GEK in general, the Appeals Chamber recalls its earlier finding that the Appellant has not shown that the Trial Chamber erred in relying on her testimony[516]. With regard to Witness GEB, the Appellant only submits that this witness was not credible because of alleged contradictions in his testimony in general, without particular reference to Witness GEB's testimony about the presence of the Appellant in Gikomero *Commune* shortly before the massacres[517].

#### 1. *Alleged Errors of Law relating to the Identification of the Appellant*

##### (a) *Reliability and Credibility*

232. The Appellant submits that the Trial Chamber erred in law by disregarding the standards established by the jurisprudence of both the ICTR and the ICTY regarding identification evidence. In particular, he argues that although the Trial Chamber correctly recognized that it had to assess the credibility of the witnesses and the reliability of their evidence independently, it failed to adhere to this standard[518].

233. The Prosecution responds that the Trial Chamber correctly distinguished between the credibility of the witnesses and the reliability of the information provided by them. The Prosecution points to the examples of Witness GEM, whose evidence the Trial Chamber found not reliable, and Witness GEI, whom the Trial Chamber found not credible[519].

---

[512] Appeal Brief, paras. 340, 341.
[513] Appeal Brief, para. 345.
[514] Appeal Brief, para. 346.
[515] Trial Judgement, paras. 439 (Witness GEK), 441 (Witness GEB).
[516] See Chapter X.
[517] Appeal Brief, para. 123.
[518] Appeal Brief, paras. 96-100.
[519] Respondent's Brief, para. 109.

234. The Appeals Chamber observes that it is well established in the jurisprudence of the ICTR and the ICTY that

> "a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction"[520].

In particular, the Trial Chamber has to assess the credibility of the witness and determine whether the evidence provided by the witness is reliable[521]. A witness may be credible – *i.e.*, in general worthy of belief[522] – and still not, *in concreto*, trustworthy, because she may simply be mistaken due to difficulties in observation.

235. In paragraphs 445 to 449 of the Trial Judgement, the Trial Chamber analyzed the testimony of Witnesses GAF, GAA, and GES and arrived, with regard to Witness GAF by majority, at the conclusion that they were credible. The Trial Chamber then went on to assess the evidence of Witnesses GAF, GES, and GAA with respect to their identification of the Appellant[523]. In doing so, the Trial Chamber took into account the distance between the witnesses and the Appellant's position and the fact that their observations were made in broad daylight.

236. With regard to the testimony of Witness GEU, the Trial Chamber disregarded it because the basis of his account was "uncorroborated hearsay, and anyhow of questionable credibility"[524]. The Trial Chamber found Witness GEM's evidence to be unreliable on issues of time and numbers[525], and considered Witness GEI's testimony to be implausible and therefore not credible[526]. The Appeals Chamber concludes that the Appellant's assertion that the Trial Chamber did not assess the reliability of the evidence before it is unfounded. The Trial Chamber's method of assessing the evidence as such was beyond reproach. The Trial Chamber correctly distinguished between the credibility of the witnesses and the reliability of the information provided by them. In its assessment of the reliability, it took into account the conditions under which the observations were made. Accordingly, the Appellant's arguments in this respect are dismissed.

(b) *Corroborative and Circumstantial Evidence*

237. In a related argument, the Appellant submits that the Trial Chamber erred by varying its assessment test for the witnesses who did not know him before 12 April 1994. He argues that instead of analyzing the reliability of their identification, the Trial Chamber relied on the corroboration of their accounts[527]. In his view, the mere

[520] *Kupreškic et al.* Appeal Judgement, para. 34. See also *Niyitegeka* Appeal Judgement, paras. 100, 101.

[521] *Musema* Appeal Judgement, para. 90; *Kupreškic et al.* Appeal Judgement, paras. 138, 139; *Vasiljevic* Trial Judgement, para. 16; *Kunarac et al.*, Decision on Motion for Acquittal, 3 July 2000, para. 8.

[522] Black's Law Dictionary, 8th edition (St. Paul, West Group, 2004), p. 396. See also "credible witness" : a witness whose testimony is believable, *Id.,* p. 1633.

[523] Trial Judgement, para. 450.

[524] Trial Judgement, para. 442.

[525] Trial Judgement, para. 459.

[526] Trial Judgement, para. 457.

[527] Appeal Brief, para. 105.

fact that these witnesses had heard the name of the Appellant when the vehicles arrived at the Gikomero Parish Compound, was insufficient to identify him[528]. The Appellant submits that this approach of the Trial Chamber is inconsistent with its own finding that corroboration does not necessarily establish the credibility of a testimony[529].

238. The Prosecution argues that the testimonies of the witnesses who lacked prior knowledge of the Appellant constituted corroborative evidence on which the Trial Chamber was free to rely[530]. The Prosecution submits that the evidence of this group was partly circumstantial, but that as such, it is not necessary that it proves the guilt of the Appellant on its own, merely that it forms part of a chain of evidence which establishes guilt[531].

239. In paragraph 40 of the Trial Judgement, the Trial Chamber quoted the *Musema* Trial Judgement to the effect that a Trial Chamber is not bound by any rule of corroboration, but may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which *are* corroborated : the corroboration of testimonies, even by many Witnesses, does not establish absolutely the credibility of those testimonies[532].

The Appeals Chamber finds that the Trial Chamber's approach to corroborative evidence, as articulated above, is correct[533]. Contrary to the Appellant's assertion, the Trial Chamber's assessment of the evidence is not inconsistent with this approach. The relevant parts of the Trial Judgement have to be read in the light of the statement in paragraph 40 of the Trial Judgement. The Trial Chamber correctly held that it is free to disregard evidence even if it is corroborated by other evidence. But this does not by any means suggest that the Trial Chamber is not *permitted* to take corroborative evidence into account; rather, it has discretion to do so. Nothing in the Trial Judgement suggests that the Trial Chamber found itself bound to accept the evidence of Witnesses GAF, GES, and GAA only because it was corroborated by other evidence.

240. The Appeals Chamber notes that evidence given by the witnesses who had not previously seen the Appellant should be accepted with caution[534]. However, the Trial Chamber relied on their testimonies as corroborative evidence of those witnesses who had actually recognized the Appellant[535]. The Trial Chamber concluded in respect of these witnesses that their "identification of the Accused"[536] was credible[537], because they personally heard the name "Kamuhanda" shouted by other people present. The

[528] Appeal Brief, para. 105.
[529] Appeal Brief, para. 104.
[530] Respondent's Brief, para. 107.
[531] Respondent's Brief, para. 110.
[532] Trial Judgement, para. 40, quoting *Musema* Trial Judgement, para. 46 (emphasis in original).
[533] See also *Musema* Appeal Judgement, paras. 37, 38.
[534] *Kupreškic et al.* Appeal Judgement, paras. 34, 39, 40.
[535] The eight witnesses are : Witness GEE (Trial Judgement, para. 453); Witness GEA (Trial Judgement, para. 454); Witness GEC (Trial Judgement, para. 455); Witness GEG (Trial Judgement, para. 456); Witness GAG (Trial Judgement, para. 458); Witness GEV (Trial Judgement, para. 460); Witness GEP (Trial Judgement, para. 461); Witness GEH (Trial Judgement, para. 462).
[536] See *e.g.,* Trial Judgement, para. 453 (Witness GEE).

Appellant's argument that the Trial Chamber did not assess the reliability of their evidence according to the standards applicable to identification evidence is therefore inapposite.

241. The Appeals Chamber finds that a reasonable Trial Chamber could, based on a free assessment of the evidence before it, come to the conclusion beyond reasonable doubt as it did. The fact that the witnesses heard other refugees shouting the name "Kamuhanda" alone is indeed no proof of the fact that it was the Appellant who had arrived at the Gikomero Parish Compound. However, nothing prevents a conviction being based on circumstantial evidence[538]. The Appeals Chamber finds that the Trial Chamber was aware of the specific difficulties which have to be taken into account for the assessment of the mere shouting of "Kamuhanda"[539]. The inference drawn from this, *i.e.* that other persons recognized the Appellant, is a possible one and, therefore, has to be accepted on appeal. The Trial Chamber clearly distinguished between the testimony of Witnesses GAF, GES, and GAA (who saw Kamuhanda) on the one hand, and those witnesses who heard the Appellant's name only on the other hand. The fact that, with regard to the latter group, the Trial Chamber found

> "that their testimonies provide further corroboration regarding the identification of the Accused by other Witnesses with prior knowledge of the Accused"[540]

indicates that the Trial Chamber was aware of the lesser probative value of their evidence and duly took it into account. This sub-ground of appeal is therefore dismissed.

2. *Alleged Error in relying on Witnesses GAF's, GES's, and GAA's Identification of the Accused*

(a) *Courtroom Identification*

242. The Appellant argues that his identification in court by some of the witnesses was not sufficient to support the conclusions of the Trial Chamber. The Appellant repeats this argument several times[541]; but as this issue is of importance only regarding the testimony of Witnesses GAF, GES, and GAA, the Appeals Chamber addresses it in this context.

243. Regarding the issue of in-court identification, the Trial Chamber stated :

> The Chamber notes that in Court the Witnesses were not asked to look at a specific part of the Courtroom to identify the Accused. The Chamber is mindful of the fact that the Witnesses were asked to look in the Courtroom as a whole and see if they could identify the Accused. The Chamber notes further that the process of the identification of the Accused in the Courtroom does not stand in

[537] See Trial Judgement, para. 465 : "Due to the circumstances of the event, the Chamber finds nothing unusual in the fact that these Witnesses could not give the Chamber names of those shouting out the name "Kamuhanda", and therefore finds that this fact does not adversely affect their credibility".

[538] *Cf. Kupreškic et al.* Appeal Judgement, para. 303.

[539] *Cf.* Trial Judgement, para. 465.

[540] Trial Judgement, para. 465.

[541] *E.g.,* Appeal Brief, paras. 350, 370, 410.

> isolation : it is rather part of a process, the culmination of which is the identification of the Accused in the Courtroom[542].

To the extent that the Trial Chamber's language suggests that weight should be given to an identification given for the first time by a witness while testifying, who identifies the accused while he is standing in the dock, it is misleading. Courts properly assign little or no credence to such identifications. The Appeals Chamber notes, for instance, that an ICTY Trial Chamber held in *Kunarac et al.* :

> Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely resembles the man who committed the offence charged), no positive probative weight has been given by the Trial Chamber to these "in court" identifications[543].

This view was confirmed by the ICTY Appeals Chamber, which held "that the Trial Chamber was correct in giving no probative weight to in-court identification"[544]. It is thus not sufficient to support the credibility of an in-court identification, contrary to the Trial Chamber's suggestion, that the witness be able to scan the whole courtroom for the accused, for the context of the trial makes it clear who the accused is.

244. The Appeals Chamber does not consider, however, that this misleading suggestion of the Trial Chamber amounted to an error invalidating the decision. The Trial Chamber made clear that the in-court identification was considered only as one element in a larger "process". Moreover, in the course of its evaluation of the evidence, the Trial Chamber apparently gave little weight to these identifications. The Trial Chamber noted, when it summarized the evidence, that Witnesses GAF, GES, and GAA identified the Appellant in court[545]. When evaluating the evidence, the Trial Chamber, in the case of Witness GAF, did not mention the courtroom identification at all. In the cases of Witnesses GES and GAA it did mention the courtroom identification among other factors without emphasizing this particular factor[546]. Having carefully reviewed the evidence on which the Trial Chamber based its findings that Witnesses GES and GAA identified the Appellant, the Appeals Chamber is satisfied that a reasonable trier of fact could have arrived at the conclusion that this identification was reliable even when disregarding the courtroom identification. The Trial Chamber thus did not commit any error invalidating the decision or occasioning a miscarriage of justice.

---

[542] Trial Judgement, para. 63.

[543] *Kunarac et al.* Trial Judgement, para. 562.

[544] *Kunarac et al.* Appeal Judgement, para. 320.

[545] Trial Judgement, paras. 316 (Witness GAF), 325 (Witness GES), 330 (Witness GAA). The Trial Chamber further noted that Witnesses GEB and GEI identified the Appellant in court (paras. 297, 363), but did not rely on their testimony.

[546] Trial Judgement, paras. 447 (Witness GES), 448 (Witness GAA).

(b) *Witness GAF*

(i) *Credibility*

245. The Appellant submits that the Trial Chamber erred in fact when it relied on Witness GAF's testimony to establish the Appellant's presence at the Gikomero Parish Compound on 12 April 1994. He argues that the Trial Chamber's reliance on this witness was inconsistent with the fact that it did not believe this witness's testimony that the Appellant was known to be an influential politician before 1994. In addition, the Appellant submits, the witness was unable to relate any details about the Appellant, such as the names of his sisters[547].

246. The Prosecution responds that the Trial Chamber's approach to Witness GAF's testimony was cautious and fair. It argues that the Trial Chamber was free to accept the fundamental features of this testimony, in particular because they were supported by Witnesses GEK and GEB, and at the same time to reject the unsubstantiated parts of Witness GAF's testimony[548].

247. The Appellant replies that Witness GAF's description of the Appellant as an influential politician in 1994 was related to the core of his testimony[549]. The Appellant submits that the witness had testified that he had seen the Appellant several times when the Appellant was a politician and an influential member of the MRND[550].

248. The Appeals Chamber notes that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony[551]. Witness GAF had testified that he knew the Appellant because he had met him several times, for instance at the inauguration of the Kayanga Health Centre, and, in addition, that the Appellant "was very well known in his area […] He was known to be a very influential politician"[552]. The majority of the Trial Chamber accepted that the witness had met the Appellant at the opening of the Kayanga Health Centre, noting that Witnesses GEK and GEB had confirmed the Appellant's presence at this event. The Appeals Chamber considers that the majority decision of the Trial Chamber to reject Witness GAF's unsubstantiated statement that the Appellant was an influential politician before 1994, but to rely on the testimony that the witness had met the Appellant at the opening of the Kayanga Health Centre and was thus able to identify him, was not unreasonable.

249. In a related argument, the Appellant submits that the Trial Chamber applied an incorrect standard of proof when it relied on Witness GAF's evidence. He argues that the Trial Chamber had accepted that the Appellant was living in Butare from 1990 to 1992. In his view, the Trial Chamber reversed the burden of proof when it found that, even if the Appellant had been posted in Butare at this time, this alone would not demonstrate the impossibility of his presence at the inauguration of the Kayanga Health Centre[553].

---

[547] Appeal Brief, para. 353.
[548] Respondent's Brief, para. 173.
[549] Reply Brief, para. 90.
[550] Reply Brief, para. 89.
[551] *Kupreškic et al.* Appeal Judgement, para. 333.
[552] T. 13 September 2001, p. 46.

250. The Appeals Chamber rejects this argument. The Trial Chamber observed "that even if the Accused had been posted in Butare at this time, this alone would not demonstrate the impossibility of the Accused's presence"[554]. This does not mean that the Trial Chamber considered that it was incumbent on the Appellant to prove that Witness GAF's testimony was false; the Trial Chamber was simply saying that the fact alone that the Appellant lived at a different place at the relevant time was insufficient to raise reasonable doubt about his presence at the opening of the Kayanga Health Centre, because it was possible for the Appellant to travel from his place of residence to an event in another *commune*.

(ii) *Identification of the Appellant*

251. The Appellant submits that his identification by Witness GAF was unreliable. He argues that the witness had testified that he had seen the Appellant at the Gikomero Parish Compound for one or two minutes. In the Appellant's view, this was insufficient to allow the witness to make the identification[555], all the more so because "in all likelihood" panic broke out among the refugees once the attack began[556]. In addition, the Appellant refers to the contradictions in Witness GAF's testimony which were set out in Judge Maqutu's separate opinion, and with which he concurs[557].

252. The Appeals Chamber is not convinced by the Appellant's arguments. Normally, it is possible to recognize a person within a time-span of one or two minutes, and a reasonable trier of fact can accept such an identification. The Appellant's speculation that "in all likelihood" panic broke out, preventing the witness from identifying the Appellant, is not supported by the Trial Record. Witness GAF testified that he recognized the Appellant when his vehicle was still approaching the Gikomero Parish Compound, whereas the refugees tried to flee after the vehicles had arrived and the attack had begun[558]. With regard to the Appellant's reference to Judge Maqutu's separate opinion, the Appeals Chamber recalls the view expressed by the ICTY Appeals Chamber in the *Tadic* Appeal Judgement that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence"[559]. It is for the Appellant to show that the testimony in question could not have been accepted by any reasonable trier of fact and that the majority of the Trial Chamber was in error[560]. The Appellant has failed to do so here.

(c) *Witness GES*

253. The Appellant challenges his identification by Witness GES. He argues that the fact that both the Appellant and the witness had been members of the civil service

[553] Appeal Brief, para. 88.
[554] Trial Judgement, para. 446.
[555] Appeal Brief, para. 356.
[556] Appeal Brief, para. 357.
[557] Appeal Brief, para. 358, referring to Trial Judgement, Judge Maqutu's Separate and Concurring Opinion on the Verdict, paras. 44-47.
[558] T. 17 September 2001, pp. 4, 5, 22, 23.
[559] *Tadic* Appeal Judgement, para. 64.
[560] *Musema* Appeal Judgement, para. 92.

was not sufficient proof to establish that the witness knew him[561]. Moreover, the Appellant adds, a close reading of Witness GES's testimony reveals that the witness knew only the Appellant's name, whereas the question was whether the witness could identify the Appellant[562]. In addition, the Appellant submits, Witness GES had claimed that he had seen the Appellant regularly between 1989 and 1994, whereas the Trial Chamber had accepted that the Appellant was posted in Butare from 1990 to 1992[563]. Finally, the Appellant argues that it was impossible for Witness GES to observe him on a regular basis, because their offices were located in different parts of the city, and not opposite each other, as the witness claimed[564]. Regarding Witness GES's testimony, the Appellant submits that the Trial Chamber did not assess the reliability of this information, and ignored contradictions between the testimonies of Witness GES and Witness GAF[565]. In a related argument, the Appellant submits that the Trial Chamber erred in fact by not taking into account his own explanations rebutting the testimony of Witness GES[566].

254. The argument that the Trial Chamber disregarded the Appellant's explanations when it assessed Witness GES's testimony has already been addressed above[567]. Regarding the Appellant's submissions that the witness could not observe him on a regular basis, because their offices were located in different parts of the city, the Appeals Chamber notes that the Trial Chamber was aware of this argument, but was satisfied with Witness GES's explanations as to the location of his and the Appellant's office[568]. The Appellant has not shown that this was unreasonable.

255. Although Witness GES did testify that he knew the Appellant's name, he did not, contrary to the Appellant's contention, testify that this was all he knew of him. Rather, he testified that he had seen the Appellant at the ministry, and had no doubts that the person he had seen at Gikomero was the Appellant.

256. Regarding the Appellant's posting to Butare from 1990 to 1992, the Appeals Chamber notes that Witness GES did not testify that he saw the Appellant on a regular basis and emphasized that he did not monitor the Appellant's activities[569]. In addition, the witness estimated that he had known the Appellant for "around three years" when he saw him at the Gikomero Parish in 1994[570]. The Appeals Chamber notes further that Witness GES explained that the *Institut de Recherche Scientifique et Technologique (IRST)* in Butare, where the Appellant was posted from 1990 to 1992, was a research organization under the responsibility of the Ministry of Higher Education, so that, in the view of the witness, the Appellant still worked for this Ministry[571]. Given these circumstances, the Appeals Chamber finds that it was open to a

[561] Appeal Brief, para. 361.
[562] Reply Brief, paras. 91, 92.
[563] Appeal Brief, para. 363.
[564] Appeal Brief, para. 364.
[565] Appeal Brief, paras. 365, 366.
[566] Appeal Brief, paras. 231, 232.
[567] See Chapter VIII.
[568] Trial Judgement, para. 447.
[569] T. 30 January 2002, p. 65.
[570] T. 29 January 2002, p. 116.
[571] T. 30 January 2002, pp. 71, 72.

reasonable trier of fact to conclude that Witness GES had prior knowledge of the Appellant.

257. The Appeals Chamber observes that, with his contention that the Trial Chamber did not assess the reliability of Witness GES's testimony, the Appellant claims that the Trial Chamber's reasoning is insufficient. The Appeals Chamber recalls that the Trial Chamber is not obliged to refer to every piece of evidence in its judgement, nor does it have to articulate every step in its reasoning[572]. When assessing identification evidence, the Trial Chamber "must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting *negatively* on the reliability of the identification evidence"[573].

In the opinion of the Appeals Chamber, the Trial Chamber gave sufficient reasons why it relied on Witness GES's testimony. Having carefully reviewed the Trial Record, the Appeals Chamber does not find any significant factors impacting negatively on the reliability of Witness GES's evidence. Accordingly, this sub-ground of appeal is dismissed. The alleged contradictions between Witness GES's and GAF's testimony will be considered below[574].

(d) *Witness GAA*

(i) *Prior Knowledge of the Appellant*

258. The Appellant submits that the evidence Witness GAA gave to show his prior knowledge of the Appellant has no probative value. In the Appellant's view, the Trial Chamber relied on the fact that Witness GAA knew the Appellant's sister and her husband. This, the Appellant argues, does not mean that the witness knew the Appellant[575].

259. The Appeals Chamber finds that the Appellant's representation of the relevant part of the Trial Judgement is misleading. The Trial Chamber did not base its finding that Witness GAA knew the Appellant on "the fact that he knew the [Appellant's] sister and her husband", as the Appellant puts it[576]. Rather, the Trial Chamber found that Witness GAA saw the Appellant on two occasions : at the birth of the Appellant's sister's child, and at the burial of the Appellant's sister. The Trial Chamber noted that Witness GAA did not speak to the Appellant on these occasions, but that the Appellant was pointed out to the witness[577]. The Appeals Chamber finds that the Appellant has not shown that it was unreasonable for the Trial Chamber to conclude that Witness GAA knew the Appellant prior to April 1994.

[572] See Chapter VIII. See also *Kupreškic et al.* Appeal Judgement, para. 32.
[573] *Kupreškic* Appeal Judgement, para. 39 (emphasis added).
[574] See Chapter XI. K. 3.
[575] Appeal Brief, paras. 370, 371.
[576] Appeal Brief, para. 370.
[577] Trial Judgement, para. 448.

(ii) *Identification of the Appellant*

260. The Appellant submits that Witness GAA could not identify him with any certainty in court, that on 12 April 1994 the Witness had fled before he was able to identify the Appellant, and that the witness's evidence that the Appellant gave the order to kill the refugees was contradicted by Witnesses GEA, GEE, GEG, GEM, GAG, GEH, GES, and GEV[578].

261. The Appeals Chamber notes that the Appellant does not provide any reference to support his assertion that Witness GAA could not identify him in court with certainty. When Witness GAA was asked if he had any doubts about his identification of the Appellant, he replied : "I have no doubt"[579].

262. Having reviewed the transcript of Witness GAA's trial testimony, the Appeals Chamber notes that the witness recounted clearly that he saw two vehicles arriving, with the Appellant in the second vehicle, and that he witnessed the start of the massacre and then fled when some persons were killed close to him[580]. The Appellant's argument that the witness was not able to see the Appellant is, therefore, without merit.

263. As to the Appellant's argument that Witness GAA's evidence was contradicted by the testimony of other witnesses, the Appeals Chamber observes that Witness GAA did not say directly that the Appellant gave the order to start the attack. Witness GAA recounted that, when the Appellant came out of his vehicle, he threw his arms up "as though to greet the people"[581]. Later, when the attack began, people shouted "[g]et to work, Kamuhanda is here now"[582]. The argument that his testimony was inconsistent with the testimony given by other witnesses, because they did not confirm that the Appellant gave the order to attack, is without merit. Given the circumstances in which various witnesses were in different places of the compound, some of them inside the classrooms[583], a reasonable Trial Chamber could arrive at the conclusion that a certain fact was established, even if this fact was confirmed only by some of the witnesses. The fact that three witnesses[584] recounted that the Appellant gave a direct order to start the attack made it reasonable for the Trial Chamber to find that the Appellant ordered the attack.

3. *Alleged Error in Relying on the Testimony of Witnesses GAF, GES, and GAA that the Appellant Participated in the Massacre*

264. The Appellant submits that no reasonable trier of fact could have relied on the testimony of Witnesses GAF, GES, and GAA that he was present at the Gikomero Parish Compound because their evidence was inconsistent as to the material facts[585].

265. With regard to Witness GAF, the Appellant argues that only this witness recounted that four vehicles arrived and that Augustin Bucundura, a Tutsi preacher,

[578] Appeal Brief, para. 372.
[579] T. 19 September 2001, p. 112.
[580] T. 20 September 2001, pp. 32, 33.
[581] T. 19 September 2001, p. 114.
[582] T. 19 September 2001, p. 115 (Witness GAA).
[583] See, *e.g.,* T. 18 September 2001, p. 8 (Witness GEE).
[584] Witnesses GAF, GEC, and GEP.
[585] Appeal Brief, para. 373.

was shot while the vehicles were still in motion. Witnesses GES and GAA testified, in contrast, that Augustin Bucundura was shot after the Appellant had left his vehicle and had had a conversation with Pastor Nkuranga[586]. The Appellant further argues that, according to Witness GAF, the Appellant was the only person to leave his vehicle, that he said "Mukore", and that he left with three other vehicles one or two minutes after he had arrived. This, the Appellant argues, is contradicted by Witness GES's testimony that the Appellant left his vehicle together with the other occupants and then had a conversation with Pastor Nkuranga for about ten minutes[587]. In the Appellant's view, Witness GAF's testimony does not support the findings in paragraphs 500 to 506 of the Trial Judgement[588].

266. The Appeals Chamber notes that the evidence about the number of vehicles that arrived at the Gikomero Parish Compound on 12 April 1994 is unclear. Witness GAF mentioned four vehicles[589], whereas other witnesses testified that they saw one[590], two[591], or three[592] vehicles. However, given the fact that the vehicles did not arrive at exactly the same time[593], and that the witnesses observed the events from different locations within the compound, the Appeals Chamber finds that this inconsistency does not affect the core of their testimony.

267. The Appeals Chamber takes the same view in respect of Witness GAF's evidence regarding the shooting of Augustin Bucundura. As the Appellant points out, Witness GAF testified that Bucundura was shot while the vehicles were still moving whereas other witnesses testified that the vehicles had come to a stop at that point[594]. The Appellant also notes that Witness GAF did not mention a conversation between the Appellant and Pastor Nkuranga which was recounted by other witnesses[595]. The Appeals Chamber notes that Witness GAF testified that he had tried to hide near a corner of the church when he saw the vehicles approaching the compound[596]. He was still at this place when he heard the sound of a gunshot :

> "I was at that place and I heard the sound of gunshot. I turned around and I saw the preacher who was going down"[597].

Considering the situation, the Appeals Chamber finds that a reasonable trier of fact could accept the fundamental features of Witness GAF's account of the events.

---

[586] Appeal Brief, paras. 375-377.
[587] Appeal Brief, paras. 375, 376.
[588] Appeal Brief, para. 380.
[589] T. 13 September 2001, p. 42. This was confirmed by Witness GEC : T. 24 September 2001, p. 51.
[590] T. 29 January 2002, p. 106 (Witness GES).
[591] *E.g.,* T. 19 September 2001, pp. 104-106 (Witness GAA).
[592] *E.g.,* T. 18 September 2001, p. 6 (Witness GEE); T. 24 September 2001, p. 20 (Witness GEA); T. 25 September 2001, p. 18 (Witness GEG); T. 6 February 2002, p. 18 (Witness GEV).
[593] Most witnesses who had seen three vehicles testified that the Appellant's vehicle arrived first and then, after a short time-span, two others. See T. 18 September 2001 p. 6 (Witness GEE); T. 25 September 2001, p. 18 (Witness GEG); T. 6 February 2002 pp. 53, 54 (Witness GEV).
[594] T. 13 September 2001 pp. 45, 51.
[595] *E.g.,* T. 29 September 2001, p. 110 (Witness GES); T. 19 September 2001, p. 30 (Witness GEE); T. 20 September 2001, p. 79 (Witness GEA).
[596] T. 17 September 2001 p. 8.
[597] T. 17 September 2001 p. 19.

268. Regarding the argument that Witness GAF testified that only the Appellant left his vehicle, the Appeals Chamber notes that in fact the testimony was to the effect that the Appellant left his vehicle and told those who came with him to start to "work"; and the people he had brought with him started the killing[598], implying that they also left the vehicle. This argument is, therefore, unfounded.

269. The Appeals Chamber finds that, contrary to the Appellant's assertion, Witness GAF's testimony supports a number of the findings made by the Trial Chamber in paragraphs 500 through 506 of the Trial Judgement : the Appellant's arrival at the Gikomero Parish Compound in a white vehicle in the early afternoon of 12 April 1994[599]; his order to the attackers to start to "work"[600]; and the fact that Augustin Bucundura was shot by someone who arrived with the Appellant, while the Appellant was still at the compound[601].

270. Also with regard to Witnesses GES and GAA, the Appellant points to the fact that they do not agree about the number of vehicles accompanying the Appellant on 12 April 1994. The Appellant argues that Witness GES testified that the Appellant had a conversation with Pastor Nkuranga for about ten minutes, then they were joined by Augustin Bucundura, who was subsequently shot, whereas Witness GAA recounted that Pastor Nkuranga came out of his house, accompanied by Bucundura, who was shot with three other people. In addition, the Appellant argues that neither Witness GES nor Witness GAA mentioned an order of the Appellant to start the killing.

271. The Trial Chamber was aware of the discrepancy between Witness GES's and Witness GAA's testimony in relation to the moment when Bucundura was killed, but still found that this discrepancy did not affect the substance of their testimony[602].

272. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to disregard the discrepancies between Witness GES's and Witness GAA's versions of the events. The fact that the Appellant had a brief conversation with Pastor Nkuranga is well supported by other witnesses[603]. Whether Augustin Bucundura left the house together with Pastor Nkuranga, or whether he joined him a few minutes later, is not significant. The core of Witness GES's and Witness GAA's evidence is that the Appellant arrived, there was some kind of interaction with Pastor Nkuranga, and Augustin Bucundura was the first victim of the massacre, being shot by one of the persons who accompanied the Appellant. With regard to these facts, Witness GES's and Witness GAA's testimony is consistent. Both witnesses even mentioned the detail that Pastor Nkuranga told the attackers "I am Pastor Nkuranga" just before Bucundura was killed[604].

---

[598] T. 13 September 2001 pp. 47, 52.

[599] Trial Judgement, para. 501; T. 13 September 2001, pp. 41, 43.

[600] Trial Judgement, para. 502; T. 13 September 2001, pp. 47, 52.

[601] Trial Judgement, para. 503; T. 13 September 2001, pp. 45, 51; T. 17 September 2001, p. 19.

[602] Trial Judgement, para. 481.

[603] *E.g.,* T. 19 September 2001, p. 30 (Witness GEE); T. 25 September 2001, p. 20 (Witness GEG); T. 5 February 2002, p. 45 (Witness GAG); T. 6 February 2002, pp. 55, 61 (Witness GEV).

[604] Witness GES : T. 30 January 2002, p. 48 ("'I am Pastor Nkuranga' and they shot Bucundura dead immediately."); Witness GAA : T. 19 September 2001, p. 114 ("I am Pastor Nkuranga, do not shoot at me").

273. The Appeals Chamber recalls that the additional evidence rendered by Witness GAA at the appeal stage was not credible and therefore could not have been a decisive factor in reaching the decision at trial[605]. The Appeals Chamber concludes that a reasonable trier of fact could rely on the trial testimony of Witnesses GAF, GES, and GAA regarding the Appellant's identification and his participation in the massacre.

4. *Alleged Error in relying on the Testimony of Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH that the Appellant participated in the Massacre*

274. The Appellant submits that Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH contradicted each other and did not corroborate Witnesses GES's, GAF's, and GAA's evidence. According to the Appellant, the Trial Chamber based the conviction on the following principal facts :

- the Appellant arrived at the Gikomero Parish Compound on 12 April 1994, accompanied by armed people;
- the Appellant stepped out of his vehicle and had a conversation with Pastor Nkuranga;
- after the conversation with the pastor, he gave the order to start the killing of the refugees;
- after the killings had started, the Appellant left.

The Appellant contends that no reasonable court could have relied on the evidence given by Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH to support these findings[606].

(a) *The Appellant's Arrival at the Gikomero Parish Compound*

275. The Appellant submits that only Witness GEG testified that the Appellant carried a rifle when he arrived at the Gikomero Parish Compound on 12 April 1994, showing that Witness GEG was in fact observing someone else[607].

276. Witness GEG testified that, when the vehicles arrived, the refugees shouted : "That is Kamuhanda. Now that Kamuhanda is here, we are finished"[608]. The Appeals Chamber finds that it was reasonable for the Trial Chamber to find that Witness GEG's evidence corroborated the finding that the Appellant led the attackers to the Gikomero Parish Compound. Regarding the question whether the Appellant was armed, the Trial Chamber was aware that Witness GEG was the sole witness to have testified to seeing the Appellant with a weapon at the Gikomero Parish Compound, but was of the opinion that Witness GEG may have been mistaken about that fact[609]. Given that Witness GEG mentioned the weapon only in cross-examination and had not mentioned a weapon in his statement given to the Prosecution before the trial[610],

[605] See Chapter XI.J.1.
[606] Appeal Brief, paras. 385, 386.
[607] Appeal Brief, para. 387.
[608] T. 25 September 2001, p. 19.
[609] Trial Judgement, para. 456.
[610] T. 25 September 2001, pp. 79-81.

it was not unreasonable for the Trial Chamber to disregard this part of the witness's evidence. The Appeals Chamber reiterates that a Trial Chamber is entitled to accept some, but reject other, parts of a witness's testimony[611].

(b) *The Appellant's Conversation with Pastor Nkuranga*

277. The Appellant submits that Witness GEE did not testify to the conversation between Pastor Nkuranga and the person pointed out to Witness GEE as being the Appellant[612]. The Appeals Chamber notes that Witness GEE explicitly stated about the Appellant that "when is vehicle arrived, he came out of his vehicle and he spoke to a pastor called Nkuranga"[613]. This argument is, therefore, without merit.

(c) *The Order to Start the Killing*

278. The Appellant submits that the evidence about the order he allegedly gave to start the killing was contradictory[614]. The Prosecution responds that the Appellant is merely trying to renew factual arguments that were rejected by the Trial Chamber. In the Prosecution's view, the Trial Chamber addressed the inconsistencies upon which the Appellant relies to support his argument, and that, despite different vantage points during the massacre, the evidence given by the eight corroborating witnesses bore striking similarities[615].

279. The Appellant argues that the Trial Chamber accepted Witness GAA's evidence to the effect that the Appellant had raised his hands as if greeting the people, and that the assailants, not the Appellant, had shouted "get to work". Other witnesses, the Appellant adds, did not mention that he made a gesture or gave an order[616].

280. The Trial Chamber based its findings "on the totality of the evidence"[617]. It is therefore misleading to state that the Trial Chamber "accepted" Witness GAA's evidence; the Trial Chamber was aware of the differences between the testimonies of Witnesses GES and GAA, but found they did not prevent it from relying on the substance of their testimonies[618]. The Appellant has not shown that it was unreasonable for the Trial Chamber to do so.

281. The Appellant challenges Witness GAF's testimony, because "it appears that" the witness had testified that the killing had already started when the Appellant said "Mukore"[619].

282. The relevant part of the transcript reads :

> A. As far as [the Appellant] was concerned, he did not carry any weapons but he did raise his arm and ordered or gave orders to the people.

[611] See Chapter XI.K.2.b.i.
[612] Appeal Brief, para. 389.
[613] T. 19 September 2001, p. 30.
[614] Appeal Brief, para. 390.
[615] Respondent's Brief, paras. 128, 129.
[616] Appeal Brief, para. 391.
[617] Trial Judgement, para. 502.
[618] Trial Judgement, para. 481.
[619] Appeal Brief, para. 393.

*Q*. Did they obey his orders?

*A*. No, but they had already agreed with the people who came with him about what was to be done. He made that gesture, that was to incite the people that were there.

*Q*. When he made that gesture, did they start killing?

*A*. Yes.

They almost instantaneously started because these young people he had brought with him had already started killing and the others too. So that they immediately began the killing as soon as he gave the order[620].

Earlier, Witness GAF had testified :

Indeed, he used one word, he said : "Mukore". Let me spell : M-U-K-O-R-E. And in a nutshell, let me explain what that means. In view of the fact that he had come with killers and that he was the leader, by so saying, he was telling them that they should begin the killings because, as a matter of fact, it was after he pronounced that word that the killings started and all the vehicles went away except for one[621].

The Appeals Chamber acknowledges that it is not clear from this testimony if the killing had already started when the Appellant gave the order. A reasonable trier of fact could nevertheless rely on this evidence to establish that at least some of the killers began killing in response to the Appellant's order, even if part of the violence had commenced earlier. The Appeals Chamber notes that Witness GEC had testified that Augustin Bucundura and his family were shot first; the Appellant then raised his hand and said "start working"; then the shooting started and the assailants started to throw grenades[622]. Witness GEP also testified that the Appellant told the attackers to "start working" after Bucundura had been shot[623]. In the view of the Appeals Chamber, it was therefore reasonable to find that, after the first shooting had already occurred, the Appellant gave the order to start the general attack.

283. With regard to Witness GEC, the Appellant argues that she was caught in a crowd and could not see the Appellant clearly when he gave the order. In fact, he argues, the witness did not even know whether the Appellant was present when the killings started.

284. Witness GEC had testified that she had been with other refugees in one of the classrooms, and that the *Interahamwe* had ordered them to leave the classrooms and to lie on the ground when she witnessed the Appellant giving the order "start working" :

We were at the entrance, literally at the door of the classroom, and we were sort of pushing each other when the decision had been made that we go out and lie on the ground. It was at that point in time that we heard those words. …

*Q*. Can you remember if Mr. Kamuhanda was still there when shots were fired at the people?

[620] T. 13 September 2001, p. 52.
[621] T. 13 September 2001, pp. 47, 48.
[622] T. 24 September 2001, pp. 53, 57.
[623] T. 7 February 2002, pp. 38, 39.

*A*. I immediately went to lay on the ground, so I didn't know whether he was still there or whether he had left. And, by the way, I didn't know him, I just saw someone who raised his arms[624].

Earlier, Witness GEC had already indicated that she did not know the Appellant, but that the person who gave the order had been identified by other refugees as Kamuhanda :

"As for the person who went by the name – who was said to go by the name 'Kamuhanda', well, he was the one who raised his hand and said 'start working'"[625].

It was not unreasonable for the Trial Chamber to find that Witness GEC, immediately before lying down, had seen the person identified as Kamuhanda raising his hands and giving the order "start working". The fact that she, after having lain down, could not see whether this person had already left, did not render her testimony as to the earlier events unreliable.

285. In the view of the Appeals Chamber, the fact that some witnesses did not testify about an order or a gesture of the Appellant did not prevent a reasonable trier of fact from concluding that the Appellant gave such an order. The witnesses were scattered about the compound and had different vantage points; it was therefore likely that some of them observed not all the events at the parish.

(d) *The Death of Bucundura*

286. The Appellant submits that the evidence about the death of Augustin Bucundura was contradictory[626]. The Appellant points to Witness GAF's testimony that Bucundura was shot while the vehicles were still in motion, and argues that this testimony was not credible[627]. In addition, he argues that Witnesses GAG, GEP, and GEH testified that Bucundura was shot after the conversation between the Appellant and Pastor Nkuranga. In the Appellant's view, it was therefore not correct for the Trial Chamber to find that these witnesses corroborated the testimony of Witnesses GAF, GES, and GAA[628].

287. The Appeals Chamber recalls its earlier finding regarding Witness GAF's testimony about the death of Bucundura and in particular that the Trial Chamber found that Bucundura was shot after the arrival of the Appellant, thus disregarding Witness GAF's testimony that he was shot while the vehicles were still moving[629]. With regard to Witnesses GAG, GEP, and GEH, the Appeals Chamber notes that Witness GES testified that Bucundura was shot after the Appellant spoke with Pastor Nkuranga[630], so that, contrary to the Appellant's assertion, there is in this regard no discrepancy between the testimony of Witness GES on the one hand and that of Witnesses GAG, GEP, and GEH on the other hand.

[624] T. 24 September 2001, pp. 56, 57.
[625] T. 24 September 2001, p. 53.
[626] Appeal Brief, para. 396.
[627] Appeal Brief, para. 397.
[628] Appeal Brief, para. 398.
[629] Trial Judgement, para. 503. See Chapter XI.K.3.
[630] T. 29 January 2001, pp. 110, 111.

The Appeals Chamber concludes that, even if there existed some discrepancies in other aspects of the evidence, it was still open for a reasonable trier of fact to rely on Witness GAG's, GEP's, and GEH's testimony as corroborative evidence insofar as they supported the evidence of Witnesses GAF, GES, and GAA.

288. The Appellant contends that Witness GAA could not observe the events, because he fled directly after the arrival of the Appellant. The Appellant provides only a reference to paragraph 332 of the Trial Judgement, where the Trial Chamber found that Witness GAA left the compound as soon as the second vehicle, in which the Appellant traveled, arrived. This shows that the Trial Chamber was aware of this part of Witness GAA's testimony, but still accepted Witness GAA's evidence that he witnessed a soldier shooting Bucundura to be reliable. Given the fact that all witnesses agreed that the events took place in a rather short time-span[631], the Appeals Chamber finds that a reasonable trier of fact could disregard the apparent inconsistency in Witness GAA's testimony.

289. Further, the Appellant argues that it was difficult for the witnesses to concentrate on the Appellant's actions in this traumatizing situation. As an example, he points to the testimony of Witnesses GEA and GEV, who did not know whether the Appellant was still present when Bucundura was shot[632].

290. The Appeals Chamber observes that the Trial Chamber was aware of the difficult situation of the witnesses and duly took it into account :

> The Chamber notes that many of the Witnesses who have testified before it have seen and experienced atrocities. They, their relatives, or their friends have, in many instances, been the victims of such atrocities. The Chamber notes that recounting and revisiting such painful experiences may affect the Witness's ability to recount the relevant events fully or precisely in a judicial context[633].
>
> …
>
> After careful consideration of all the evidence presented, and mindful of the fact that the Witnesses who had taken refuge at the Gikomero Parish Compound were fearful for their lives and were hiding when the attack started on 12 April 1992, the Chamber finds credible the evidence that the Accused spoke with pastor Nkuranga, witnessed the killing of a Tutsi man named Bucundura by an armed person who arrived together with him…[634].

This approach to assessing the effects of trauma on testimony – recognizing that trauma may impair perceptions or memory and may explain apparent inconsistencies, but does not necessarily render it impossible for witnesses to testify credibly and reliably – is consistent with the approach the Appeals Chamber recently affirmed in the *Kajelijeli* case[635]. In addition, the Appellant has not shown that the Trial Chamber's assessment of Witness GEA's and GEV's testimony was unreasonable.

---

[631] The longest period of time mentioned was ten minutes for the conversation between the Appellant and Pastor Nkuranga (Witness GES : T. 29 January 2002, p. 110); other witnesses spoke in this respect about two or three minutes (Witness GEG : T. 25 September 2001, p. 33; Witness GEV : T. 6 February 2002, p. 61).

[632] Appeal Brief, para. 399.

[633] Trial Judgement, para. 34.

[634] Trial Judgement, para. 491.

[635] See *Kajelijeli* Appeal Judgement, paras. 10-13.

291. The Appellant submits that Witness GEC testified that Bucundura was shot with his family in front of the classrooms, and that she had learned this fact from other refugees. But, the Appellant argues, she had testified that she was about five meters away from the Appellant, so that she should have witnessed Bucundura's death herself[636].

292. The Appeals Chamber notes that Witness GEC watched the events from within one of the classrooms[637]. She was able to observe the Appellant because he was standing in front of the classrooms[638]. Then the refugees were ordered to leave the classrooms, and Witness GEC saw the bodies of Bucundura and members of his family lying in front of Pastor Nkuranga's home, where they had been shot, as a survivor of the massacre later told Witness GEC[639]. The Appeals Chamber finds that this evidence is consistent. Nothing indicates that Bucundura was killed when he was near the Appellant; some witnesses rather testified that this happened at a certain distance from the Appellant[640]. A reasonable trier of fact could therefore conclude that it was possible for Witness GEC to observe the Appellant standing in front of the classrooms, but not the killing of Bucundura at a different place in the compound.

293. Finally, the Appellant submits that while Witness GEG testified that Bucundura's wife was shot, other witnesses testified that only Bucundura was shot at that moment. Further, the Appellant submits that the Trial Chamber did not accept Witness GEG's evidence about the death of Bucundura's wife. Therefore, the Appellant appears to argue, the Trial Chamber erred in relying on Witness GEG's testimony[641].

294. To support his argument, the Appellant relies on paragraph 503 of the Trial Judgement. In this paragraph, the Trial Chamber found that, shortly after the Appellant's arrival at the Gikomero Parish Compound, Augustin Bucundura was shot, while the Appellant was still present. Nothing in this paragraph indicates that the Trial Chamber rejected Witness GEG's evidence about the killing of Bucundura's wife. The death of Bucundura's wife was also mentioned by Witness GEC[642]. Given the fact that immediately after the killing of Bucundura the massacre began, resulting in the death of "a large number of Tutsi refugees"[643], a reasonable trier of fact could disregard the circumstance that the death of one particular victim was mentioned only by some of the witnesses.

(e) *Start of the Killings*

295. The Appellant contends that neither Witness GAA nor Witness GEG was in a position to witness the Appellant giving the order to start the killings[644].

[636] Appeal Brief, para. 400.
[637] T. 24 September 2001, p. 92.
[638] T. 24 September 2001, p. 93.
[639] T. 24 September 2001, pp. 94, 95.
[640] T. 19 September 2001, p. 30 (Witness GEE); *cf.* also T. 29 September 2001, p. 113 (Witness GES).
[641] Appeal Brief, para. 401.
[642] T. 24 September 2001, p. 95 (Witness GEC).
[643] Trial Judgement, para. 506.
[644] Appeal Brief, para. 402.

296. The Appeals Chamber recalls its earlier observation that Witness GAA, in fact, did not testify that he observed the Appellant giving the order to start the killings[645]. The Trial Chamber observed that

> "Witness GAA testified that when the Accused alighted from the vehicle he raised his hands up and the shooting began"[646].

This paraphrase of Witness GAA's testimony is somewhat misleading, as it suggests that Witness GAA testified that the Appellant's gesture was a signal to start the killings, whereas in fact Witness GAA testified that he understood the gesture as a greeting[647]. It is not clear whether the Trial Chamber actually misinterpreted Witness GAA's testimony on this point, but, in any event, such a misinterpretation would not have occasioned a miscarriage of justice. To support its finding that the Appellant ordered the attack on the refugees the Trial Chamber relied also on the evidence given by Witnesses GAF, GEC, and GEP[648]. The Appellant has not shown that it was unreasonable to do so, even disregarding the evidence of Witness GAA.

5. *Alleged Error in Relying on the Identification of the Appellant by Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH*

297. The Appellant contends that the Trial Chamber committed an error when it accepted the evidence of Witnesses GEE, GEA, GEC, GEG, GAG, GEV, GEP, and GEH as corroborative evidence[649]. The Appellant submits a list of factors which, in his view, the Trial Chamber should have taken into consideration with regard to the conditions under which these witnesses claimed to have identified the Appellant[650]. In particular, he argues that his identification in court by some of the witnesses was not sufficient to support the conclusions of the Trial Chamber[651].

298. The Appeals Chamber recalls that the eight witnesses in question did not "identify" the Appellant in the strict sense of the word, but provided corroborative evidence as to the identity of the person who led the attack[652]. The Appeals Chamber notes that the Appellant acknowledges that neither the Rules nor the jurisprudence of the Tribunal obliged the Trial Chamber to require a particular type of identification evidence[653]. Accordingly, the Appeals Chamber declines to address the general observations of the Appellant, but turns directly to the specific arguments advanced by him. The issue of courtroom identification has already been addressed above[654].

[645] See Chapter XI.K.2.d.ii.
[646] Trial Judgement, para. 480.
[647] T. 19 September 2001, p. 114.
[648] Trial Judgement, paras. 478 (Witness GAF), 485 (Witness GEC), 489 (Witness GEP).
[649] Appeal Brief, paras. 405, 406, 412.
[650] Appeal Brief, para. 407.
[651] Appeal Brief, para. 410.
[652] See Chapter XI.K.1.b.
[653] Appeal Brief, para. 97.
[654] See Chapter XI.K.2.a.

(a) *Witness GEE*

299. The Appellant submits that the Trial Chamber did not assess the reliability of his identification by Witness GEE, and that this witness was the only one attesting to a first attack of *Interahamwe* on the refugees, prior to the arrival of the vehicles, and a second attack in the night, rendering his testimony unreliable[655]. He argues that, if there had been a second attack, Witness GAG, who had spent the night at Pastor Nkuranga's home, would have mentioned it[656].

300. Witness GEE recounted that, when the vehicles arrived, people in the compound shouted "We're going to be killed, Kamuhanda is coming"[657]. The Appeals Chamber notes that this witness did not identify the Appellant in the strict sense of the word, but rather testified that other people present identified one of the attackers as a person called "Kamuhanda". As stated earlier, it was not erroneous to rely on this type of hearsay evidence as corroborative evidence[658]. The argument that the Trial Chamber did not address the conditions under which the witness identified the Appellant is, therefore, inapposite.

301. The Appellant does not provide any reference to support the alleged contradictions to the evidence given by other witnesses. Regarding the alleged first attack, Witness GEE mentioned only one attack that took place "[t]he next morning – or, in the afternoon, between 2.00 and 3.00 p.m."[659]. The attack during the following night took place, according to Witness GEE, at 4.00 a.m., when *Interahamwe* came back to kill the survivors[660]. At that time, most other witnesses had already left the compound. Witness GAG, in fact, mentioned that on the morning of 13 April 1994, *Interahamwe* came to search for survivors[661], thus supporting Witness GEE's testimony. The Appeals Chamber therefore finds that the Appellant did not identify any inconsistencies which made it unreasonable for the Trial Chamber to rely on Witness GEE's testimony.

(b) *Witness GEA*

302. The Appellant argues that Witness GEA's testimony contained many inconsistencies, that the witness was unable to recognize the church premises, and that he mentioned a veranda attached to the church, although the church did not have a veranda.

303. The Trial Chamber did

> "not find it unusual that the Witness did not recognise the Church premises from photographs shown to him during his testimony insofar […] as he had been at the Gikomero Parish Compound on this one occasion"[662].

[655] Appeal Brief, para. 414.
[656] Appeal Brief, para. 444.
[657] T. 18 September 2001, p. 5.
[658] See Chapter XI.K.1.b.
[659] T. 18 September 2001, p. 5. During cross-examination, the witness clarified that there was only one attack on the 12 April. T. 19 September 2001, p. 24.
[660] T. 18 September 2001, p. 11.
[661] T. 4 February 2002 pp. 74, 75.
[662] Trial Judgement, para. 454.

The Trial Chamber was also aware of the argument that Witness GEA had mentioned a veranda at the church[663]. The Appeals Chamber finds that the Appellant did not show that the Trial Chamber's explanation of the alleged inconsistencies was unreasonable.

(c) *Witness GEC*

304. The Appellant argues that Witness GEC's testimony was inconsistent with that of the other witnesses, because she testified that she was five metres from the Appellant when he ordered the assailants to "start working", and that he was in the classroom when other refugees pointed out the Appellant to her, whereas other witnesses placed the Appellant in front of the pastor's house[664].

305. The Appellant misrepresents Witness GEC's testimony. Witness GEC stated repeatedly that the person pointed out to her stood "in front of the classrooms", not in one of them[665]. Furthermore, the Appellant does not explain why it was unreasonable for the Trial Chamber to find that, from her vantage point near the entrance to one of the classrooms[666], Witness GEC was able to identify the Appellant. Finally, the Appellant's further observation that Judge Maqutu stated in his separate opinion that he did not find Witness GEC credible is irrelevant, as the Appellant has not shown that it was unreasonable for the majority to rely on her testimony.

(d) *Witness GAG*

306. The Appellant submits that Witness GAG's testimony was unreliable, because she was the only witness to testify as to several points : the distribution of weapons to *Interahamwe* at the parish, the rape of some of the female refugees by the attackers, and the fact that the Appellant returned to his vehicle and parked it (whereas other witnesses testified that he could not drive)[667]. The Appellant argues that the Trial Chamber committed an error when it found that Witness GPE had recognized Witness GAG at the Gikomero Parish Compound, because the question was not whether Witness GAG was at the scene, but whether the Appellant was present. The Appellant adds that Witness GPE testified that Witness GAG made false accusations against Pastor Nkuranga and Witness GPE, thus showing that Witness GAG was not credible[668].

307. The Appeals Chamber notes that the Trial Chamber found that Witnesses GAG and GEP testified that during the attack, female refugees were taken away by the assailants to be raped later. The Trial Chamber found both witnesses' testimonies credible but, considering the hearsay nature of the evidence as to the rapes, it declined to find the Appellant guilty of this crime[669]. It was therefore not only Witness GAG who testified as to the rapes, but also Witness GEP. The Trial Chamber found both witnesses credible, and the Appellant has not shown that it was unreasonable to do so.

[663] Trial Judgement, para. 454.
[664] Appeal Brief, para. 416.
[665] T. 24 September 2001, pp. 63, 93.
[666] T. 24 September 2001, p. 56.
[667] Appeal Brief, para. 421.
[668] Appeal Brief, para. 422.
[669] Trial Judgement, paras. 495-497.

308. With regard to the fact that Witness GAG allegedly testified that the Appellant parked the vehicle in which he arrived, the Appellant does not provide any reference to the record to substantiate this submission. The Appeals Chamber notes that the witness testified that "the [Appellant] moved towards his vehicle and the vehicle moved a little bit away to park near the church"[670], and later,

> "[t]he vehicle did not move, neither did Kamuhanda or the pastor, they were there. But the driver of the vehicle backed up the vehicle, so the vehicle was a bit away from the group"[671].

This testimony clearly indicates that the Appellant was *not* the driver. Consequently, this argument is without merit.

309. The Appellant also failed to provide any reference to the record with regard to the alleged testimony about the distribution of weapons at the parish. Witness GAG, in fact, testified that she had heard from her son, who had temporarily left her, that weapons had been distributed to well-known *Interahamwe*[672]. From the context it is evident that this distribution did not take place in the Gikomero Parish Compound, but somewhere else in the *commune*. Consequently, the Appeals Chamber finds no merit in the argument that other witnesses did not mention this distribution of weapons.

310. With regard to Witness GPE, the Appeals Chamber rejects the Appellant's argument. Of course, the issue before the Trial Chamber was not the presence of Witness GAG at the Gikomero Parish Compound, but that of the Appellant. However, a reasonable trier of fact could find that Witness GPE confirmed that Witness GAG was at the Gikomero Parish Compound on 12 April 1994, thus supporting the credibility of Witness GAG's testimony.

311. The Appellant's submission that Witness GAG made false accusations against Pastor Nkuranga and Witness GPF is addressed below[673].

(e) *Witness GEG*

312. The Appellant submits that the Trial Chamber erred in accepting the evidence of Witness GEG because he was the only witness to testify that the Appellant was armed[674]. In addition, the Appellant submits that the Trial Chamber erred in relying on his identification evidence because Witness GEG was fifteen to twenty metres from the Appellant, and, moreover, was inside the church, so that it was unclear whether he could see the Appellant talking to Pastor Nkuranga[675].

313. The Appeals Chamber has already discussed the argument that only Witness GEG testified that the Appellant was armed[676]. Regarding the "identification", the Appeals Chamber notes that the Appellant misrepresents Witness GEG's testimony. The Appellant does not provide any reference to support his assertion that Witness GEG witnessed the events from inside the church; in fact, the witness testified that

[670] T. 4 February 2002, p. 54.
[671] T. 5 February 2002, p. 45.
[672] T. 4 February 2002, p. 49.
[673] See Chapter XI.L.4.
[674] Appeal Brief, paras. 418, 419.
[675] Appeal Brief, para. 423.
[676] See Chapter XI.K.4.a .

he was by the side of the church facing the courtyard when the vehicles arrived[677]. With regard to the argument that the Trial Chamber did not take into account the conditions under which the witness "identified" the Appellant, the Appeals Chamber notes that Witness GEG had no prior knowledge of the Appellant, but testified that the refugees shouted when the vehicles arrived : "That is Kamuhanda. Now that Kamuhanda is here, we are finished"[678]. The conditions under which Witness GEG observed the Appellant are therefore irrelevant for the evidentiary value of his testimony.

(f) *Witness GEP*

314. With regard to Witness GEP, the Appellant points to a number of circumstances, among them the fact that only this witness mentioned in her testimony that Hutus arrived in the morning of 12 April 1994 to segregate the Hutu refugees from the Tutsi refugees, and that some girls were taken away from the parish before the Appellant left[679]. In addition, the Appellant contends that her testimony was unreliable, because she neither knew the name of the locality where she took refuge, nor was able to identify the Gikomero Parish Compound on photographs. In sum, the Appellant submits that Witness GEP's testimony totally contradicts the testimony of Witnesses GAF, GES, and GAA and was therefore not suited to corroborate it[680].

315. The Trial Chamber noted that Witness GEP was unable to recognize the Gikomero Parish Compound from photographs presented to her. Nevertheless, the Trial Chamber was satisfied with her description of the compound as it was on 12 April 1994[681]. The Appellant has not shown that this conclusion was unreasonable.

316. With regard to circumstances mentioned only by this witness, the Appeals Chamber observes that they do not affect the core of Witness GEP's testimony. The Appellant himself identified four principal points on which his conviction was based : (1) his arrival at the compound, accompanied by armed people, (2) his alighting from the vehicle and his conversation with Pastor Nkuranga, (3) his order to start the killing, (4) his departure after the start of the massacre[682]. Witness GEP confirmed all four points :

– a vehicle with *Interahamwe* arrived, and one man, who was identified by the refugees as "Kamuhanda", left the vehicle[683];
– he spoke to another man[684];
– the man identified as Kamuhanda told the people "start working", meaning to kill[685]; and
– he left after the beginning of the killing[686].

[677] T. 25 September 2001, pp. 18, 19.
[678] T. 25 September 2001, p. 19.
[679] Appeal Brief, para. 424.
[680] Appeal Brief, paras. 425, 426.
[681] Trial Judgement, para. 461.
[682] Appeal Brief, para. 385.
[683] T. 7 February 2002, pp. 33, 34.
[684] T. 7 February 2002, p. 37.
[685] T. 7 February 2002, p. 39.

The Appeals Chamber finds that a reasonable trier of fact could have accepted Witness GEP's testimony as corroborative evidence.

6. *Alleged Change of Approach by the Trial Chamber*

317. The Appellant argues that the Trial Chamber changed its approach during the course of the Trial Judgement by rejecting the testimony of a number of witnesses and, therefore, acquitting the Appellant, for example, of the massacre at Gishaka Catholic Parish[687]. In the Appellant's view, it should have done likewise with regard to the events at the Gikomero Parish Compound. In particular, he submits that the Trial Chamber assessed the witnesses' evidence from the time the witnesses arrived at the Gishaka Catholic Parish, and did not restrict itself only to the evaluation of the testimony about the attack proper, as it did for the witnesses testifying about the massacre at the Gikomero Parish Compound[688].

318. The Trial Chamber found that an analysis of the Prosecution witnesses' testimony "reveals irreconcilable differences in relation to the events at the Gishaka Parish Church"[689]. The differences the Trial Chamber quoted related to the central elements of the alleged attack, for example the fact whether the doors of the church were shut by the assailants or the refugees, or whether grenades were thrown through the windows into the church[690]. This reasoning does not support the Appellant's argument that the Trial Chamber changed its approach. In the case of the events at the Gikomero Parish Compound, the Trial Chamber was satisfied that the substance of the testimonies was consistent[691].

319. The Appellant specifies a number of alleged inconsistencies in the evidence relating to the events before and after the attack at the Gikomero Parish Compound :

- Only Witnesses GES and GEP mentioned that Hutus arrived prior to the attack; no other witness provided corroboration of this fact[692].
- Only Witnesses GAP and GEG testified that girls were chosen by the assailants and taken away to be raped. The Appellant points to the fact that Witness GEP testified that the Appellant did not leave until the girls were chosen, whereas according to Witness GAG, the girls were taken away only after the end of the massacre[693].
- Only Witness GEC testified that the locals continued to loot the refugees' property after the assailants left. In the Appellant's view, Witnesses GEE and GAG should have mentioned this fact also, because they left the compound only some time after the attack[694].
- Only Witness GEE testified that a second attack occurred in the following night[695].

[686] T. 7 February 2002, p. 43.
[687] Appeal Brief, paras. 430-432.
[688] Appeal Brief, paras. 432, 433.
[689] Trial Judgement, para. 565.
[690] Trial Judgement, para. 565.
[691] See Trial Judgement, para. 481.
[692] Appeal Brief, paras. 436, 437.
[693] Appeal Brief, paras. 439-441.
[694] Appeal Brief, para. 443.

The Appeals Chamber finds that these alleged inconsistencies do not affect the core of the evidence given by the witnesses. Regarding the looting of the refugees' property, the Appeals Chamber notes that Witness GAG testified that she fell unconscious after she had been attacked by two of the assailants with machetes, and that she regained consciousness only around 5.00 p.m.[696], therefore making it impossible for her to testify about the events in the afternoon. Regarding the second attack allegedly mentioned only by Witness GEE, the Appeals Chamber refers to the earlier discussion of this argument[697].

320. With regard to the alleged inconsistencies between Witness GAG's and Witness GEP's accounts of the selection of girls by the attackers, the Appeals Chamber notes that both witnesses were trying to hide in the classrooms during this particular phase of the attack[698], and were thus unable to observe the whole area. A reasonable trier of fact could therefore rely on the other parts of their evidence, notwithstanding any inconsistencies in this part of their testimony.

321. Accordingly, the Appeals Chamber dismisses the Appellant's submission that the Trial Chamber's approach as to the evidence regarding the Gikomero Parish Compound was unreasonable.

### L. *Alleged Errors in Conclusions in Respect of Defence Witnesses*

322. Under his fourteenth ground of appeal, the Appellant submits "that the Trial Chamber committed an error of fact occasioning a miscarriage of justice" when it dismissed Defence evidence which raised doubt about his guilt[699]. In support of this submission, the Appellant made several arguments which are summarized and considered in turn below.

#### 1. *Witness GPC*

323. The Appellant submits that the Trial Chamber erred in law and in fact because it rejected Witness GPC's testimony on the sole ground that the witness held the Appellant "in high esteem"[700]. Even if Witness GPC's testimony was interpreted in this way, the Appellant argues, the Trial Chamber should have given reasons why it found the testimony to be unreliable or incredible[701].

324. The relevant paragraph of the Trial Judgement reads as follows :

> Defence Witness GPC asserted that because he had not seen Kamuhanda in Gikomero between 6 April 1994 and 12 April 1994, Kamuhanda was not there. The Chamber finds his testimony to be unsubstantiated. The Witness holds the Accused in high esteem, and the objective of his testimony was to protect him[702].

[695] Appeal Brief, para. 444.
[696] T. 4 February 2002, pp. 63, 64.
[697] See Chapter XI.K.5.a.
[698] T. 7 February 2002, p. 37 (Witness GEP); T. 4 February 2002, p. 59 (Witness GAG).
[699] Appeal Brief, para. 448.
[700] Appeal Brief, paras. 44, 45, 450.
[701] Appeal Brief, paras. 44, 450.
[702] Trial Judgement, para. 474.

Witness GPC testified that the Appellant was well-known in the region, that he was useful for the region, for example because he worked for the improvement of education, and that he – Witness GPC – would have liked to be like the Appellant[703]. The Appeals Chamber finds that a reasonable trier of fact could conclude from this evidence that the witness held the Appellant in high esteem. In addition, having carefully reviewed the relevant parts of the trial transcript, the Appeals Chamber is satisfied that the Trial Chamber's conclusion that Witness GPC was biased in favour of the Appellant and tried to protect him was reasonable.

325. The Appeals Chamber finds that, contrary to the Appellant's assertion, the Trial Chamber did not dismiss Witness GPC's testimony on the sole ground that the witness held the Appellant in high esteem, but, in the first instance, because it found the testimony to be unsubstantiated. According to the Appellant, Witness GPC arrived fifteen minutes after the start of the massacre[704], whereas the Trial Chamber found that the Appellant left the compound a short time after the massacre began[705]. To support his conclusion about the Appellant's absence, the witness argued that "other people [would] have seen him", and they would have informed the witness about the Appellant's presence[706]. This is, of course, speculation on the part of the witness. In addition, Witness GPC relied on the fact that the attackers' vehicles were still there when he arrived; thus, the witness concluded, if the Appellant had arrived with one of these vehicles, he could not have left[707]. This conclusion, however, rests on the assumption that the vehicles the witness noted were the same which had been observed by the Prosecution witnesses fifteen minutes earlier – an assumption that is not secure, particularly because it is unclear how many vehicles arrived during the attack[708].

326. The Appeals Chamber therefore finds that the Appellant has not demonstrated an error on the part of the Trial Chamber with regard to Witness GPC.

2. *Witness GPB*

327. With regard to Witness GPB, the Appellant submits that the Trial Chamber "committed a manifest error of assessment"[709]. The Trial Chamber noted that Witness GPB was in the first group of attackers to arrive at the Gikomero Parish Compound, but that he had not seen Pastor Nkuranga. The Trial Chamber concluded that Witness GPB may have missed seeing both Pastor Nkuranga and the Appellant[710]. The Appellant argues that Witness GPB had seen the attackers' vehicles arrive and leave, and that the witness was present throughout the massacre[711].

[703] T. 22 January 2003, pp. 35, 36.
[704] Appeal Brief, para. 451. Witness GPC was about one kilometre away when he heard gunshots from the direction of the compound and went there to inquire. T. 22 January 2003, pp. 16, 17.
[705] Trial Judgement, para. 493.
[706] T. 22 January 2003, p. 50.
[707] T. 22 January 2003, p. 50.
[708] *Cf.* Chapter XI.K.3.
[709] Appeal Brief, para. 457.
[710] Trial Judgement, para. 471.
[711] Appeal Brief, para. 457.

328. In the view of the Appeals Chamber, this argument lacks merit. Given the fact that almost all Prosecution witnesses testified that the leader of the attackers had a short conversation with Pastor Nkuranga[712], a reasonable trier of fact could draw from Witness GPB's statement that he had not seen Pastor Nkuranga the conclusion that he may have missed the Appellant, who was present at the parish only for a short time.

3. *Witness GPT*

329. The Appellant submits that the Trial Chamber erred when it disregarded the testimony of Witness GPT, who had testified that he made a number of inquiries about the attack on the Gikomero Parish Compound and that the name of the Appellant was never mentioned during these inquiries[713]. In the Appellant's view, this testimony was corroborated by Witness GPC who had testified that one of the attackers did not name the Appellant as one of his accomplices[714]. Finally, the Appellant argues, the Trial Chamber failed to take into account Witness GPT's testimony that local persons did not take refuge in the Gikomero Parish Compound, so that no one in the compound would have been able to identify the leader of the attack as the Appellant[715].

330. The Appeals Chamber finds that the Appellant has not demonstrated an error on the part of the Trial Chamber in its assessment of Witness GPT's testimony. The witness was not present during the attack on the Gikomero Parish Compound, but recounted only the results of later investigations. Moreover, he admitted that he had not specifically asked those he interviewed whether the Appellant was present during the attack, but only supposed he would have been told if the Appellant had been present[716]. A reasonable trier of fact was entitled to attach little weight to this evidence. The same applies to the argument that there were no local persons present. The Appeals Chamber considers that it would have been impossible for Witness GPT to know exactly whether, among the "large number of men, women and children mainly of Tutsi origin"[717] who had taken refuge at the Gikomero Parish Compound on 12 April 1994, there were people from the Gikomero Commune or not.

4. *Witnesses GPE, GPF, and GPR*

331. The Appellant submits that the Trial Chamber erred in its assessment of Witnesses GPE's, GPF's, and GPR's testimonies[718]. The Trial Chamber found that these witnesses

> "may have arrived on the scene of the events after the man identified as Kamuhanda had already left. In such a case, even if the Chamber were to believe these Witnesses, it would not demonstrate that the Accused was not there"[719].

[712] The exceptions are Witnesses GAF and GEP.
[713] Appeal Brief, paras. 460-463.
[714] Appeal Brief, para. 464.
[715] Appeal Brief, paras. 465-467.
[716] Trial Judgement, para. 392; T. 14 January 2003, p. 31.
[717] Trial Judgement, para. 499.
[718] Appeal Brief, para. 470.
[719] Trial Judgement, para. 470, referring to Witnesses GPE, GPF, GPK, and GPB.

The Appellant argues that the witnesses lived close to the Gikomero Parish Compound and testified that they had never heard anyone say that the Appellant participated in the massacre[720]. In addition, the Appellant submits that Witness GPE testified about the circumstances of Pastor Nkuranga's arrest and subsequent release, and that Pastor Nkuranga stated clearly that the Appellant was not present during the attack[721]. With regard to Witness GPF, the Appellant submits that this witness testified that Witness GAG accused Pastor Nkuranga and Witness GPF to have taken her effects in order to obtain compensation[722].

332. In response, the Prosecution submits that Witness GPR arrived only after the end of the attack; Witness GPE did not see the attackers arrive; and Witness GPF, who was allegedly involved in the massacre himself and was biased towards the Appellant, fled when he heard the attackers arrive[723].

333. The Appeals Chamber notes that Witness GPR testified that when she arrived at the Gikomero Parish Compound on 12 April 1994, the refugees had already been killed, and the attackers were engaged in looting and slaughtering the cattle[724]. Witness GPE was inside a house when she heard the attackers' vehicles arrive and then fled[725]. Similarly, Witness GPF did not see the attackers, but fled immediately after he had been told that the attack had started[726]. The Appeals Chamber concludes that even if these witnesses testified that nobody accused the Appellant after the massacre of having participated in it, it was open for a reasonable trier of fact to attach more weight to the testimony of witnesses who had been present during the attack and had testified that they had seen the Appellant.

334. With regard to Witness GPF's testimony about the proceedings initiated by Witness GAG against Pastor Nkuranga and Witness GPF himself, the Appeals Chamber notes that, according to Witness GPF, Witness GAG claimed compensation for a suitcase which she had left at Pastor Nkuranga's house and which was pillaged by the attackers. Although her claim was rejected at first, later she received some compensation from Witness GPF[727]. Witness GPF indeed testified that Witness GAG accused Pastor Nkuranga of bringing the attackers to the Gikomero Parish Compound only after her initial claim against him had been rejected[728]. Witness GAG, on the other hand, confirmed that she had asked Pastor Nkuranga to give her back her belongings, but that he had refused to do so. Only then, she continued, was it necessary for her to bring the matter before the authorities, and there she was asked to testify about Pastor Nkuranga's involvement in the massacre at the Gikomero Parish Compound[729]. After reviewing the evidence of Witnesses GPF and GAG, the Appeals Chamber concludes that it was open to a reasonable trier of fact to find that Witness GPF's testimony did not raise sufficient doubt as to the credibility of Witness GAG.

[720] Appeal Brief, para. 470.
[721] Appeal Brief, para. 471.
[722] Appeal Brief, para. 472.
[723] Respondent's Brief, paras. 235, 236.
[724] T. 15 January 2003, p. 10.
[725] T. 15 January 2003, p. 57; T. 16 January 2003, p. 3.
[726] T. 20 January 2003, pp. 17, 18.
[727] T. 20 January 2003, pp. 10, 13, 14.
[728] T. 20 January 2003, pp. 10, 11.
[729] T. 6 February 2002, p. 26.

5. *Witness GPK*

335. The Appellant contends that the Trial Chamber's findings with regard to Witness GPK's testimony are "highly questionable"[730]. The relevant section of the Trial Judgement reads as follows :

> The Chamber finds Witness GPK to be entirely lacking in credibility on the material facts. The Chamber does not find it credible that GPK was unable to flee during the forty minutes from the time he was apprehended to the time he arrived at the Gikomero Parish Compound. The Chamber is not satisfied that GPK could observe the attack, without participating, but could not flee at any time during the attack, a period of approximately one and a half hours. Neither was he able to help the three young refugee children who he was asked to help after the attack, nor was he able to recognise most of the attackers. The Chamber is not satisfied that the Witness saw Karekezi, a cousin of Kamuhanda, arrive on the scene of the massacre after the attack. According to the Witness, Karekezi had come to find out what had happened. The Chamber found his demeanour in court to be evasive and finds that his aim in testifying was to protect the Accused. This was particularly evident by his insistence that as he did not see Kamuhanda in Gikomero at the relevant time, he could not have been there. Witness GPK did not give truthful testimony about the events of 12 April 1994, and the Chamber rejects his evidence[731].

The Appellant submits that the Trial Chamber's arguments regarding the unreliability of Witness GPK's evidence are unfounded. He argues that, contrary to the Trial Chamber's reasoning, Witness GPK was forced to accompany the *Interahamwe* to the Gikomero Parish Compound and did not participate himself in the attack, as the Trial Chamber had assumed[732]. In the Appellant's view, the fact that Witness GPK did not help three little children is not detrimental to his credibility; Witness GPK had decided correctly that the best he could do was to entrust the children to Pastor Nkuranga[733]. The Appellant challenges the Trial Chamber's observation that Witness GPK was unable to recognize the attackers; in fact, he argues, the witness facilitated the arrest of some of the attackers[734]. Finally, the Appellant argues that the Trial Chamber could not reject Witness GPK's testimony that a cousin of the Appellant, Karekezi, arrived at the scene after the massacre, when it accepted Witness GAF's testimony that Karekezi came to the compound[735].

336. The Prosecution responds that the Trial Chamber's assessment of Witness GPK's testimony was reasonable and supported by the whole of the evidence before it[736]. To support the Trial Chamber's conclusion, the Prosecution points out that Witness GPK admitted only during cross-examination that he had a family relationship with the Appellant, thus originally withholding information about a possible source of bias[737].

---

[730] Appeal Brief, para. 475.
[731] Trial Judgement, para. 473.
[732] Appeal Brief, paras. 478, 479.
[733] Appeal Brief, para. 481.
[734] Appeal Brief, paras. 482, 483.
[735] Appeal Brief, para. 484.
[736] Respondent's Brief, paras. 238-240.

337. The Appellant merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber, without showing that the Trial Chamber's findings were unreasonable or wholly erroneous. This cannot form the basis of an appeal. In addition, the Appeals Chamber observes that Witness GPK arrived at the scene of the massacre approximately forty minutes after he had heard the first gunshots from the direction of the Gikomero Parish Compound and acknowledged that it was possible that he arrived there after Augustin Bucundura was killed[738]. Witness GPK, therefore, could give no direct evidence about the Appellant's presence during the initial phase of the attack.

6. *Witness GER (Pastor Nkuranga)*

338. The Appellant submits that the Trial Chamber erred in not taking into proper account two written statements by Pastor Nkuranga[739]. The Trial Chamber did not accept this witness' s evidence and observed that he was under investigation for the crimes with which the Appellant is charged[740]. The Appellant argues that Pastor Nkuranga had already been released from custody and was no longer under investigation when he made the statements. Moreover, in the Appellant's view, the mere fact that the witness was under investigation did not render his evidence *per se* unreliable[741]. The Appellant submits that one of the statements was disclosed to the Defence by the Prosecution, and that the Defence did not challenge it, apparently arguing that the Trial Chamber was bound to accept it. In addition, the Appellant submits that neither the second statement, given by Pastor Nkuranga to the Rwandan authorities, nor Defence Exhibit D 39, containing a list of the presumed perpetrators of genocide, mentions the Appellant's name[742].

339. By decision of 20 May 2003, the Trial Chamber admitted two statements of the deceased Pastor Nkuranga into evidence[743]. He gave one of these statements to the Rwandan authorities in 1996 and another to investigators of the Prosecution on 15 March 2000[744]. In the Trial Judgement, the Trial Chamber found,

> [h]aving considered the evidence of all the other Witnesses who testified in relation to this event, the Chamber does not accept Pastor Nkuranga's evidence. Moreover, the Chamber finds the observations of Pastor Nkuranga to be unreli-

[737] Respondent's Brief, para. 238.

[738] T. 21 January 2003 p. 36; T. 22 January 2003 p. 5. Witness GPK observed only two vehicles used by the attackers (T. 22 January 2003 p. 8), leaving the possibility open that the Appellant had already left with another one.

[739] Appeal Brief, para. 488.

[740] Trial Judgement, para. 475.

[741] Appeal Brief, para. 490.

[742] Appeal Brief, paras. 492, 493.

[743] *Kamuhanda*, Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89 (C) and 92 *bis* of the Rules of Procedure and Evidence, 20 May 2003, filed 21 May 2003, ("Decision of 20 May 2003"); *Kamuhanda*, Corrigendum to the Decision on Kamuhanda's Motion to Admit into Evidence Two Statements by Witness GER in Accordance with Rules 89 (C) and 92 *bis* of the Rules of Procedure and Evidence, 22 May 2003.

[744] Decision of 20 May 2003, para. 1.

able, as he was under investigation for the crimes with which the Accused is charged[745].

340. The Trial Chamber had to assess the credibility and reliability of the two statements in the light of the entire evidence. The Appeals Chamber finds that the Appellant did not demonstrate an error on the part of the Trial Chamber. In particular, it has to be borne in mind that Pastor Nkuranga's statements were not tested through cross-examination. It was reasonable, therefore, for the Trial Chamber to prefer the testimony of witnesses who testified orally before the Trial Chamber.

### 7. *Witnesses NTD and GPG*

341. The Appellant relies on the testimonies of Witnesses NTD and GPG to show that the people who launched the attack on the Gikomero Parish Compound on 12 April 1994 came from Rubungo *commune*. He argues that both witnesses testified that they had met a policeman from Rubungo who had sworn to take revenge on the Tutsi refugees[746].

342. The Trial Chamber found that there was no conclusive evidence that the attackers came from Rubungo, and, moreover, that this issue was not material to the criminal responsibility of the Appellant[747]. The Appeals Chamber finds that the Appellant has not shown that this conclusion was erroneous.

## M. *Conclusion*

343. The Appellant concludes that the entire body of evidence presented by him raised reasonable doubt regarding the Prosecution's charges against him. The Trial Chamber emphasized repeatedly that it relied on the evidence in its entirety to support its finding that the Appellant was present at the Gikomero Parish Compound on 12 April 1994 and that he initiated the attack on the refugees assembled there[748]. These findings were supported by the evidence of a number of direct and corroborative witnesses, whereas none of the Defence witnesses was present during the initial phase of the attack[749]. The Appellant has not shown that the Trial Chamber committed an error occasioning a miscarriage of justice in its assessment of the evidence. The Appeals Chamber therefore rejects the submissions considered in this chapter.

## XII. SENTENCING (GROUND OF APPEAL 15)

344. The Appellant submits that should the Appeals Chamber decide not to overturn his conviction on the basis of the foregoing grounds of appeal, the Appeals Chamber should revise the sentences imposed by the Trial Chamber and sentence him to a term of imprisonment of five years[750]. The Appellant contends that the Trial Chamber, while it stated that it took into account his

[745] Trial Judgement, para. 475.
[746] Appeal Brief, para. 496.
[747] Trial Judgement, para. 67.
[748] Trial Judgement, paras. 476, 505.
[749] With the exception of Witness GER, who did not testify before the Trial Chamber. See Chapter XI.L.6.

> "individual circumstances, the aggravating and mitigating circumstances, its general sentencing practices and those of the Rwandan courts"[751],

neither "applied the applicable rules"[752] nor gave the "legal and factual reasons for the sentences imposed"[753], that is, it did not provide a "reasoned opinion"[754]. He specifically draws the attention of the Appeals Chamber to the qualification by the Trial Chamber of his high position as an aggravating circumstance[755], to the importance given by the Trial Chamber to national reconciliation and the restoration of peace[756], to the alleged failure of the Trial Chamber to take his "individual circumstances" into account[757], and to the alleged disregard by the Trial Chamber of the "individualisation and proportionality test"[758].

345. The Prosecution responds that the Appellant does not explain why the sentence of five years which he proposes would be appropriate and that, in any case, such sentence for the offences of genocide and extermination is

> "so absurdly lenient that it could not possibly be considered to amount to condign punishment"[759].

It contends that

> "[t]he Appellant's essential point appears to be centered on an alleged failure to balance the gravity of the offence with matters personal to [him]"

and that, in its view, "there was no error in the approach of the Trial Chamber"[760].

### A. *The Appellant's high Position as an aggravating Circumstance*

346. The Appellant argues that the Trial Chamber failed to provide a reasoned opinion in support of its conclusion that the high position he held as a civil servant was an aggravating circumstance[761].

347. The Trial Chamber, in the part of the Trial Judgement dealing with the aggravating circumstances, indeed found that the Appellant's "high position […] as a civil servant can be considered as an aggravating factor"[762]. The high position of an accused has previously been considered as an aggravating factor both before the ICTR and the ICTY. In *Kambanda*, for example, the Appeals Chamber found the fact that

[750] Appeal Brief, paras. 501, 526. This ground of appeal is proposed by the Appellant "as a further alternative" (in the original French text "*très subsidiairement*"), that is, "in the unlikely event that the Appeals Chamber should uphold the verdict".
[751] Appeal Brief, para. 503.
[752] Appeal Brief, para. 504.
[753] Appeal Brief, para. 505.
[754] Appeal Brief, paras. 504, 507.
[755] Appeal Brief, paras. 505, 507.
[756] Appeal Brief, paras. 503, 508, 509.
[757] Appeal Brief, para. 510.
[758] Appeal Brief, paras. 511, 515.
[759] Respondent's Brief, para. 276.
[760] Respondent's Brief, para. 278.
[761] Appeal Brief, para. 507.
[762] Trial Judgement, para. 764.

> "Jean Kambanda, as Prime Minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust",

to constitute an aggravating circumstance[763]. In *Aleksovski*, the ICTY Appeals Chamber maintained that the Appellant's

> "superior responsibility as a warden seriously aggravated the Appellant's offences, [and that] instead of preventing it, he involved himself in violence against those whom he should have been protecting…."[764].

The Appeals Chamber in *Kayishema and Ruzindana* further clarified that a position of authority by itself does not amount to an aggravating factor, but that the "the manner in which an accused exercises his command"[765] can justify a finding of a high position of authority as an aggravating circumstance. More recently, in *Ntakirutimana*, the Appeals Chamber affirmed the Trial Chamber's holding that the abuse of the Appellant's personal position in the community to commit the crimes was an aggravating circumstance[766].

348. In light of the above and contrary to the Appellant's submissions, the Appeals Chamber does not find that the finding of the Trial Chamber that his high position is an aggravating circumstance "lacks merit"[767]. Further, the Appeals Chamber does not consider that there is anything "disturbing"[768] or otherwise inadequate in the Trial Chamber's reasoning and does not find any element that would indicate that the Appellant was sentenced to life imprisonment solely on the basis of this aggravating factor[769].

349. For the foregoing reasons, this part of the Appellant's ground of appeal is dismissed.

### B. *National Reconciliation and Restoration of Peace*

350. The Appellant submits that the Trial Chamber, while it stated that it was "mindful" of the aims of the United Nations Security Council in creating the Tribunal, including national reconciliation and restoration of peace, as expressed in Resolution 955[770], nevertheless sentenced him to life imprisonment,

> "notwithstanding the Dissenting Opinion of Judge Maqutu, according to which the Accused should not have been given the heaviest sentence, precisely because the wisdom derived from his severe experience could benefit the aim of national reconciliation"[771].

---

[763] *Kambanda* Trial Judgement, paras. 61 (B) (vii), 62, quoted with approval in *Kambanda* Appeal Judgement, para. 119.

[764] *Aleksovski* Appeal Judgement, para. 183, quoted in *Kayishema and Ruzindana* Appeal Judgement, para. 357.

[765] *Kayishema and Ruzindana* Appeal Judgement, para. 358.

[766] *Ntakirutimana* Appeal Judgement, para. 563.

[767] Appeal Brief, para. 507.

[768] Appeal Brief, para. 506.

[769] Appeal Brief, paras. 506, 514. The Appellant was found guilty of genocide and extermination as a crime against humanity. It is only after considering each charge individually that the Trial Chamber reached such verdict.

[770] Appeal Brief, para. 502.

[771] Appeal Brief, para. 503. See also Appeal Brief, para. 508.

In his view, the Trial Chamber

> "ostentatiously first outlined the rules it purported to have applied. However, it did not apply those rules"[772].

In support of this assertion, the Appellant contends that the Trial Chamber

> "gave no explanation whatsoever as to what extent […] the sentence it imposed would help restore peace and national reconciliation"[773].

The Prosecution responds that

> "[i]t is unclear from the Appellant's argument how the Trial Chamber failed to assess this subject properly, or how a reconsideration of it would lead to the sentences being reduced to the level the Appellant now seeks"[774],

and therefore argues that this submission must fail[775].

351. The Appeals Chamber first notes that while national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals. Indeed, the Trial Chamber correctly referred to "deterrence, justice, reconciliation, and the restoration and maintenance of peace" as being among the goals consistent with Security Council Resolution 955 of 8 November 1994[776] which set up the Tribunal[777]. These goals cannot be separated but are intertwined, and, in any case, nothing in Resolution 955 indicates that the Security Council intended that one should prevail over another. The Appellant contends that sentencing him to life imprisonment would deprive "both his fellow Rwandans and their country of what they could learn from him upon his release"[778] and therefore not serve the goal of national reconciliation. The Appeals Chamber is not persuaded by this argument. The Trial Chamber was free to conclude that any advantage in terms of national reconciliation gained by the Appellant's eventual release was either minimal or was outweighed by the harms to both general deterrence and national reconciliation that would be created by a lenient sentence that was not perceived to reflect the gravity of the crimes committed. Moreover, too lenient a sentence might also undermine other fundamental principles of sentencing, in particular proportionality[779], by giving the impression that the punishment does not reflect the gravity of the crimes committed. In any case, it is not a matter – as the Appellant contends – of "the triumph of the law over the barbarous acts that were committed"[780] or of whether or not

> "sentencing [him] to life imprisonment [would] contribute, even momentarily, to the restoration of peace or national reconciliation, which is one of the Tribunal's goals"[781].

---

[772] Appeal Brief, para. 508. In the original French text : "[…] *c'est de pure forme que la Chambre avait au préalable indiqué les règles de droit sur lesquelles elle se serait fondée*".

[773] Appeal Brief, para. 508.

[774] Respondent's Brief, para. 282.

[775] Respondent's Brief, para. 283.

[776] S.C. Res. 955, U.N. Doc. S/RES/955 (1994) ("Resolution 955").

[777] Trial Judgement, para. 753, quoting, in part, Resolution 955, Preamble.

[778] Appeal Brief, para. 509.

[779] *Blagojevic et al.*, Decision on Dragan Obrenovic's Application for Provisional Release, para. 37.

[780] Appeal Brief, para. 508.

[781] Appeal Brief, para. 508.

It is settled case law before both the ICTR and the ICTY that the underlying principle is that Trial Chambers must tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime[782]. The Appellant has neither demonstrated that the Trial Chamber committed any error in its assessment of the goals behind the creation of the Tribunal, nor that the Trial Chamber improperly exercised its discretion in determining the appropriate sentence.

352. For the foregoing reasons, this part of the Appellant's fifteenth ground of appeal is dismissed.

### C. *The Appellant's "Individual Circumstances"*

353. The Appellant argues under this part of his ground of appeal that the Trial Chamber failed to fulfil its obligation, pursuant to Article 23 (2) of the Statute, to take into account his "individual circumstances"[783]. He points out, for example, that he is "relatively young in age" and is "the father of four young children"[784]. The Prosecution responds that the Trial Chamber did consider the Appellant's personal circumstances at paragraphs 756 to 758 of the Trial Judgement and, in particular, held that he had previously been of good character[785]. It further argues that the Appellant's personal circumstances are in any case "wholly unexceptional" in the sense that the fact that he has a young family and had been of a previous good character

> "could be said of many accused persons and could not be given significant weight in a case of this gravity"[786].

354. The Appeals Chamber recalls that Trial Chambers indeed have an obligation, pursuant to Article 23 (2) of the Statute, to take into account the individual circumstances of accused persons, as well as, pursuant to Rule 101 (B) (ii), mitigating circumstances. Despite the fact that the Defence did not address sentencing matters in its closing brief, and also expressed its reluctance to do so during the oral arguments[787], the Trial Chamber devoted paragraphs 756 and 757 to its determination of the mitigating circumstances. Left with the trial record as the sole basis for its reasoning, it did note that the Appellant was, prior to his involvement in the genocide, "widely regarded as a good man, who did a lot to help his *commune* and his country"[788]. The fact that it decided that there are insufficient reasons to conclude that there are any mitigating factors in this case was clearly within its discretion[789] and the Appellant does not attempt to challenge this specific issue. The Appellant merely attempts to bring on appeal arguments he failed to put forward at the trial stage. The

[782] See *Celebici* Case Appeal Judgement, para. 717; *Akayesu* Appeal Judgement, para. 407.
[783] Appeal Brief, para. 510.
[784] Appeal Brief, para. 510.
[785] Respondent's Brief, para. 280.
[786] Respondent's Brief, para. 281, referring to *Furundzija* Trial Judgement, para. 284.
[787] Trial Judgement, para. 756. The parties have an obligation, pursuant to Rule 85 (A) (vi), to put forward "[a]ny relevant information that may assist the Trial Chamber in determining an appropriate sentence." As stated by the ICTY Appeals Chamber, "[i]f an accused fails to put forward any relevant information, the Appeals Chamber does not consider that, as a general rule, a Trial Chamber is under an obligation to hunt for information that counsel does not see fit to put before it at the appropriate time." *Kupreskic et al.* Appeal Judgement, para. 414.
[788] Trial Judgement, para. 757.

Appeals Chamber recalls in that respect that the appeal process is not a trial *de novo*. As noted by the ICTY Appeals Chamber, an Appellant cannot expect the Appeals Chamber to consider new mitigating circumstances on appeal :

> As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised[790].

The Appeals Chamber need not therefore address the Appellant's contention that his young age and his family situation should have been taken into account by the Trial Chamber as a mitigating circumstance.

355. For the foregoing reasons, this part of the appeal is dismissed.

### D. *Individual and Proportional Sentencing*

356. The Appellant further alleges that the Trial Chamber

> "totally disregarded the individualisation and proportionality test that is paramount in determining sentences in criminal cases"[791].

He asserts that Judges, in imposing a sentence, "must be mindful of the need for the punishment to be proportional to the offence" and that the sentence "must be consistent with the basic principle of individualisation of the punishment"[792]. The Appellant then compares his sentence with that of other accused before the ICTR[793]. The Prosecution responds that the Trial Chamber

> "expressly took into account the applicable sentencing range [and that] there has been nothing advanced, which discloses an error in its approach"[794].

The Appeals Chamber will address the Appellant's arguments in turn.

#### 1. *The Trial Chamber's Duty to Individualize the Penalty*

357. The principle of individualization requires that each sentence be pronounced on the basis of the individual circumstances of the accused and the gravity of the crime[795]. The gravity of the crime is a key factor that the Trial Chamber considers in determining the sentence[796]. The Trial Chamber in this case was cognizant of this obligation :

> In sentencing Kamuhanda, the Chamber will take into account the gravity of the offences pursuant to Article 23 of the Statute and Rule 101 of the Rules,

[789] See *Niyitegeka* Appeal Judgement, para. 266; *Musema* Appeal Judgement, para. 396. See also *Kayishema and Ruzindana* Appeal Judgement, para. 366 ("Weighing and assessing aggravating and mitigating factors in sentencing lies primarily within the discretion of the Trial Chamber, and […] the Appellant bears the burden of demonstrating that the Trial Chamber abused its discretion.").

[790] *Kvocka et al.* Appeal Judgement, para. 674, referring to *Celebici Case* Appeal Judgement, para. 790.

[791] Appeal Brief, para. 511.

[792] Appeal Brief, para. 512.

[793] Appeal Brief, paras. 516-523.

[794] Respondent's Brief, para. 285.

[795] *Celebici Case* Appeal Judgement, para. 717. *Ntakirutimana* Appeal Judgement, para. 551.

[796] See *Musema* Appeal Judgement, para. 382; *Celebici Case* Appeal Judgement, para. 847.

the individual circumstances of Kamuhanda, aggravating and mitigating circumstances as well as the general sentencing practice of the Tribunal[797].

While arguing that the Trial Chamber "totally disregarded"[798] this obligation, the Appellant does not draw the attention of the Appeals Chamber to any specific error. He merely argues, without supporting his assertion, that a sentence of life in prison

> "may only be justified if the wrong occasioned by the crime is such that, in the interest of public law and order, the accused cannot be released even after several years"[799].

Domestic courts in some countries have held that an accused should be given the possibility of release, even if he is sentenced to imprisonment for the remainder of his life. As the German Federal Constitutional Court stated the argument :

> "One of the preconditions of a humane penal system is that, in principle, those convicted to life sentences stand a chance of being freed again"[800].

The Appeals Chamber considers that, whatever its merits in the context of domestic legal systems, where it may apply "in principle", this view is inapplicable in a case such as this one which involves extraordinarily egregious crimes. For instance, the Trial Chamber took into account the facts that the attack was directed against a place "universally recognized to be a sanctuary, the Compound of the Gikomero Parish Church", and that "many people were massacred"[801]. The Appeals Chamber therefore finds that the Appellant's contention that the sentence in the present case was "imposed in a purely perfunctory manner without taking account of the circumstances of the case […]" is without merit.

2. *The Principle of Proportionality*

358. The Appellant argues that

> "[a] case-law analysis reveals that such a sentence is entirely disproportionate to those imposed in other cases, where the crimes the accused were charged with have no comparison with those Jean de Dieu Kamuhanda was charged with"[802].

359. The Appeals Chamber notes that the Appellant's argument arises out of a misunderstanding of the principle of proportionality. The principle of proportionality

> "by no means encompasses proportionality between one's sentence and the sentence of other accused"[803].

Rather, it implies that sentences

> "must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender"[804].

---

[797] Trial Judgement, para. 755, in part (citations omitted).
[798] Appeal Brief, para. 511.
[799] Appeal Brief, para. 513. The original French text reads as follows : "[L'emprisonnement à vie] ne peut valablement se justifier que si le trouble inhérent au crime commis, rend à jamais incompatible avec les nécessités de l'ordre public, la libération de l'accusé même après plusieurs années".
[800] BVerfGE 45, 187 [228, 229].
[801] Trial Judgement, para. 764.
[802] Appeal Brief, para. 516.
[803] *Dragan Nikolic* Judgement on Sentencing Appeal, para. 21.
[804] *Akayesu* Appeal Judgement, para. 414.

360. Therefore, the Appeals Chamber finds that the Appellant's argument in this respect is misguided.

*3. Comparison with Other Cases*

361. The Appellant contends that his sentence is excessive when compared to that of other persons convicted by the Tribunal. The question of the guidance that may be provided by previous sentences rendered before the ICTR and the ICTY has been extensively dealt with by the ICTY Appeals Chamber in the *Dragan Nikolic* case :

> The guidance that may be provided by previous sentences rendered by the International Tribunal and the ICTR is not only "very limited" but is also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence. The reason for this is twofold. First, whereas such comparison with previous cases may only be undertaken where the offences are the same and were committed in substantially similar circumstances, when differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified. Second, Trial Chambers have an overriding obligation to tailor a penalty to fit the individual circumstances of the accused and the gravity of the crime, with due regard to the entirety of the case, as the triers of fact. The Appeals Chamber recalls that it does not operate as a second Trial Chamber conducting a trial *de novo*, and that it will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion[805].

362. The Appeals Chamber does not find the Appellant's attempts to compare his own case with others to be compelling. Some of the cases he mentions are too dissimilar from his to provide guidance : in *Ruggiu*, the accused was sentenced on the basis of a guilty plea, which was taken into account as a mitigating factor[806], while in the case of *Elizaphan Ntakirutimana*, the accused was convicted of genocide and extermination only as an aider and abetter, and his advanced age and poor health were taken into account in mitigation[807]. Moreover, a review of the ICTR's case law finds that those who, like the Appellant, have been convicted of genocide as a principal perpetrator have frequently been sentenced to life imprisonment[808]. In any case, the Trial Chamber is not bound by previous sentencing practices. Here, the Trial Chamber made clear in paragraph 765 of the Trial Judgement that it not only had "taken into consideration the sentencing practice in the ICTR and the ICTY", but also that it con-

[805] *Dragan Nikolic* Judgement on Sentencing Appeal, para. 19 (citations omitted).

[806] See *Ruggiu* Trial Judgement, paras. 53-55.

[807] See *Ntakirutimana* Appeal Judgement, para. 569 ; *Ntakirutimana* Trial Judgement, paras. 895-898.

[808] These include a number of persons whose life sentences for genocide have been affirmed by the Appeals Chamber (Jean-Paul Akayesu, Jean Kambanda, Clément Kayishema, Alfred Musema, Eliezer Niyitegeka, Georges Rutaganda) and others whose appeals have not yet been decided (Mikaeli Muhimana, Ferdinand Nahimana, Emanuel Ndindabahizi, Hassan Ngeze). In other cases, Chambers have found that the convicted person's conduct merited a sentence of life imprisonment, but that the sentence should be reduced on the basis of violations of his rights (Juvénal Kajelijeli and Jean-Bosco Barayagwiza ; Barayagwiza's appeal is pending). The Appeals Chamber of course expresses no view on cases presently under appeal.

sidered that "the penalty must first and foremost be commensurate to the gravity of the offence"[809]. A review of the Appellant's arguments does not show that the Trial Chamber committed a discernible error in the exercise of its sentencing discretion by wrongly assessing the particular circumstances of his case.

363. Finally, the Appeals Chamber has to determine whether vacating the Trial Chamber's findings concerning instigating and aiding and abetting genocide should have an impact on the Appellant's sentence. The Appeals Chamber finds that this is not the case. The Trial Chamber had the full picture of the case before it, and this picture, based on the trial evidence, remains unchanged. In fact, the Appellant remains liable under Article 6 (1) for both genocide and extermination. Life imprisonment is certainly a reasonable sentence for ordering genocide and extermination, and, specifically, for the Appellant's ordering of the massacre at Gikomero Parish Compound. The Trial Chamber would not have arrived at another sentence even if it had convicted the Appellant for ordering alone.

### E. *Conclusion*

364. In sum, the Appellant has failed to show that the Trial Chamber committed any error in sentencing him as it did. The Appeals Chamber's decision to vacate the findings that the Appellant instigated and aided and abetted genocide and extermination does not require the imposition of a lesser sentence. Accordingly, the Appeals Chamber dismisses in its entirety the appeal in respect of sentencing.

## XIII. DISPOSITION

365. For the foregoing reasons, THE APPEALS CHAMBER,

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 19 May 2005;

SITTING in open session;

VACATES the Appellant's convictions for instigating genocide and extermination under Counts 2 and 5, respectively;

VACATES, Judge Shahabuddeen dissenting, the Appellant's convictions for aiding and abetting genocide and extermination under Counts 2 and 5, respectively;

AFFIRMS, Judge Weinberg de Roca dissenting, the Appellant's convictions for genocide and extermination as a crime against humanity pursuant to Article 6(1) of the Statute;

DISMISSES, Judge Weinberg de Roca dissenting, the appeal in all other respects;

AFFIRMS, Judge Weinberg de Roca dissenting, the sentences imposed by the Trial Chamber;

ORDERS, pursuant to Rule 101 (D) of the Rules, that credit shall be given to the Appellant for the period already spent in detention from 26 November 1999;

[809] Trial Judgement, para. 765.

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules;

ORDERS, in accordance with Rules 103 (B) and 107 of the Rules, that Jean de Dieu Kamuhanda is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

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

Presiding Judge Meron appends a separate opinion.

Judge Schomburg appends a separate opinion.

Judge Shahabuddeen appends a separate and partially dissenting opinion.

Judge Weinberg de Roca appends separate and dissenting opinions.

Issued on the 19th day of September 2005 at The Hague, The Netherlands.

[Signed] : Theodor Meron; Mohamed Shahabuddeen; Florence Ndepele Mwachande; Mumba Wolfgang Schomburg; Inés Mónica Weinberg de Roca

## XIV. Separate Opinion of presiding Judge Theodor Meron

366. I regard our paragraph 77 as a determination relevant only to the factual findings of this particular case. As regards Judge Shahabuddeen's Separate and Partially Dissenting Opinion, it is not my view that paragraph 77 in anyway extends the reach of *Celebici*. In that respect, I agree with Judge Shahabuddeen that "there is no reason why a single crime cannot be perpetrated by multiple methods"[810]. On this basis I also do not consider that paragraph 77 has any relevance to the *Blaškic* holding which, as Judge Shahabuddeen notes[811], was based on the illogicality of holding in that case the Appellant responsible under Article 7 (1) for having ordered a subordinate to commit an illegal act and responsible as a superior under Article 7 (3) for failing to prevent or punish the subordinate for the commission of that illegal act. In short, paragraph 77 does not make any change to the law of the Tribunal concerning multiple modes of liability.

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

Dated this 19th day of September 2005,

At The Hague, The Netherlands

[810] Separate and Partially Dissenting Opinion of Judge Shahabuddeen, Judgement, para. 405.
[811] *Ibid*, para. 410.

[Signed] : Theodor Meron

## XV. Separate Opinion of Judge Wolfgang Schomburg

367. While I agree with the decision of the majority of the Appeals Chamber to uphold the verdict for ordering genocide[812] and extermination in general, I respectfully disagree with the decision of the majority to quash the Trial Chamber's finding that the Appellant also physically and psychologically substantially assisted in the massacre at Gikomero Parish Compound on 12 April 1994 through the distribution of weapons. I am convinced that a reasonable trier of fact could have come to this conclusion as the Trial Chamber in my view correctly did.

### A. *Aiding and Abetting Through the Distribution of Weapons*

368. In paragraph 68 of the Judgement, the Appeals Chamber agrees with the Appellant that the evidence does not support any connection between the distribution of weapons and the subsequent attack on the Gikomero Parish Compound. It was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack, nor that the weapons he distributed were used at all. The Appeals Chamber recalls again that the Trial Chamber did not rule out the possibility that the attackers did not come from Gikomero, but from another location[813].

369. I disagree with the finding

> "that the evidence does not support any connection between the distribution of weapons and the subsequent attack".

[812] There is no need to discuss "ordering" as a mode of responsibility relating to genocide in this case. However, as a matter of principle it should not be forgotten that Article 2 of the Statute as such does not penalize "ordering genocide". This Article incorporates *verbatim* Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, describing exhaustively the punishable acts and modes of liability, thus containing its own exclusive "general part". With a view to the fundamental principle of substantive criminal law not to penalize a conduct retroactively (*nullum crimen, nulla poena sine praevia lege poenali*) in my understanding Article 2 of the Statute provides a closed system, and it has to be noted that "ordering" is not listed as a separate mode of liability. However, this question has not been appealed by either party. Also, the Appeals Chamber, unanimously, did not see any reason to decide on this issue *proprio motu*. It was not decisive for the assessment of the totality of the criminal conduct of the Appellant, and, more importantly, there is no prejudice to the Appellant, whose criminal conduct amounts in any event to genocide, punishable pursuant to Article 2 (3) (a) of the Statute (see already *Semanza* Appeal Judgement, Disposition in relation to the genocidal events at Musha Church, and para. 364). The picture of the criminal conduct remains the same as it was before the Trial Chamber. Therefore, there is no need to discuss in this case a requalification of the conviction for genocide without any reference to Article 6 (1) of the Statute.

[813] Trial Judgement, para. 67.

On the contrary, I believe that the Trial Chamber indeed accepted evidence which reasonably proves such a connection, and that the Trial Chamber did not err when it found that the Appellant aided and abetted the killings at Gikomero Parish Compound on 12 April 1994 through the distribution of weapons at the meeting which took place between 6 and 10 April 1994 at the home of two of the Appellant's cousins in Gikomero.

370. The Trial Chamber made a finding on the nexus between the distribution of the weapons and the massacre based on the entirety of the evidence which was before it.

371. This can be particularly demonstrated in paragraph 648 of the Trial Judgement, where the Trial Chamber held

> On the basis of its factual findings and legal findings above, that the Accused participated in the killings in Gikomero Parish Compound in Gikomero *commune* by aiding and abetting in the commission of the crime through the distribution of weapons and by leading the attackers to the Gikomero Parish Compound. (emphasis added)

In this paragraph, the Trial Chamber explicitly referred to its findings made earlier in the Trial Judgement. Thus, the necessary nexus between the distribution of weapons and the massacre has to be seen in the Trial Chamber's words "On the basis of its factual findings and legal findings above" which form an introduction to the Trial Chamber's finding that the distribution of weapons aided and abetted the massacre.

372. What are these factual findings? For instance, under the heading "Distribution of Weapons at the Homes of the Accused's Cousins" the Trial Chamber had come to the conclusion that the Appellant distributed grenades, guns and machetes to people present at the meeting that occurred sometime between 6 April and 10 April 1994 at the home of two of his cousins in Gikomero[814].

373. The Trial Chamber described these weapons in detail and mentioned the people to whom they were distributed :

> Prosecution Witness GEK testified that there were four people in the room with the Accused and her husband. She identified those people as Ngiruwonsanga, Kamanzi, Karakezi and Ngarambe, who was just a neighbour. She testified that the Accused told Kamanzi that the killing had not yet started in Gikomero *commune* and went on to say that "…those who were to assist him to start had married Tutsi women…". She said that the Accused went on, saying that he would bring equipment for them to start, and that if their women were in the way they should first eliminate them[815].
>
> Prosecution Witness GEK, when asked if she knew whether any weapon or item was handed over in that room, testified, "When I went outside I was able to see firearms, grenades, and machetes, which they distributed when he went outside the house." She said that the Accused distributed firearms and grenades inside the house before they went outside and she saw her husband carrying "four grenades that resembled a hammer"[816]. The Chamber has found that at a meeting occurring sometime between 6 April 1994 and 10 April 1994, at the

[814] Trial Judgement, para. 273. See also *ibid*., para. 637.
[815] Trial Judgement, para. 253 (footnotes omitted).
[816] Trial Judgement, para. 255 (footnotes omitted).

> home of his cousins in Gikomero *commune*, the Accused addressed those present, incited them to start killing Tutsi, and distributed grenades, machetes and guns to them to use and to further distribute. He also told the participants that he would return to see if they had started the killings, or so that the killings could start[817].

374. Also, the Trial Chamber held that the Appellant had told those present that the killings in Gikomero *commune* had not yet started and that "those who were to assist him to start had married Tutsi women". He told them that they should distribute those weapons and that he would return to assist them. He also said that he would return to see if they had begun the killings, or so that the killings could start[818].

375. The Trial Chamber mentions on numerous occasions the same sort of weapons as the one being used during the massacre :

> As to the attack itself, the Chamber notes the evidence that after the killing of Bucundura, the people who came with the Accused attacked the refugees using rifles, grenades and traditional weapons. The Chamber is further satisfied that this was carried out by attackers brought by and led by the Accused, though the Accused left as the attack had just started[819].
>
> The Chamber finds that the Accused arrived on 12 April 1994 at the Gikomero Parish Compound with a group of *Interahamwe*, soldiers, policemen and local population armed with firearms, grenades and other weapons and that he led them in the Gikomero Parish Compound, Kigali-Rural *préfecture*, to initiate the attack. The Chamber finds on the basis of the totality of the evidence that the Accused initiated the attack and the Majority further finds that the Accused said the word "work" to give an order to the attackers to start the killings[820].
>
> The Chamber finds that at the Gikomero Parish Compound on 12 April 1994, the attackers used traditional weapons, guns and grenades to kill and injure a large number of Tutsi refugees. The killings were committed by armed *Interahamwe*, soldiers, policemen and the local population, and were committed in the Compound, Church and classrooms[821].
>
> The Chamber has found on the basis of the totality of the evidence that the Accused initiated the attack. The Chamber has found that the Accused arrived at the school with a group of individuals, soldiers, policemen and *Interahamwe* armed with firearms, grenades and other weapons and that he led them in the Gikomero Parish Compound and gave them the order to attack[822].

376. The Trial Chamber also made it clear that it was indeed those weapons that were used during the massacre at Gikomero Parish Compound. It stated that Witness GEK said that she saw *what happened to the weapons* when the Accused returned to arrange for the killing to start[823].

---

[817] Trial Judgement, para. 637 (footnote omitted).
[818] Trial Judgement, para. 273. See also Trial Judgement, para. 637.
[819] Trial Judgement, para. 493.
[820] Trial Judgement, para. 505.
[821] Trial Judgement, para. 506.
[822] Trial Judgement, para. 643.
[823] Trial Judgement, para. 256 (emphasis added; footnote omitted).

377. It is important to note in this context that the Trial Chamber found that "Witness GEK is highly credible"[824]. Thus, the fact that the Trial Chamber mentioned this part of her testimony demonstrates the Trial Chamber's view that the distribution of weapons amounted to aiding and abetting the massacre at Gikomero Parish Compound.

378. This finding must also be seen in light of the Indictment. With regard to the massacre at Gikomero Parish Compound on 12 April 1994, the Indictment alleged :

> Kamuhanda had family ties to Gikomero commune, Kigali-Rural préfecture. During the month of April 1994, he *supervised the killings in the area*. On several occasions he personally distributed firearms, grenades and machettes to civilian militia in Kigali-Rural *for the purpose of* "killing all the Tutsi"[825].
>
> Furthermore, Kamuhanda personally led attacks of soldiers and *Interahamwe* against Tutsi refugees in Kigali-Rural préfecture, notably on or about April 12th at the parish church and adjoining school in Gikomero. On that occasion Jean de Dieu Kamuhanda arrived at the school with a group of soldiers and *Interahamwe* armed with firearms and grenades. He directed the militia into the courtyard of the school compound and gave them the order to attack. The soldiers and *Interahamwe* attacked the refugees. Several thousand persons were killed[826].

In particular, paragraph 6.44 shows that the Trial Chamber was called upon to decide, *inter alia*, on the alleged distribution of weapons by the Appellant, not as an independent or self-contained incident, but in light of the allegation that the Appellant intended and organized the genocide and the extermination of the Tutsi population in at least the area under his influence. As the Trial Judgement must be seen as a "response" to the Indictment, it becomes clear that the Trial Chamber made its findings on the distribution of the weapons in the context of the massacre at Gikomero Parish Compound, a context which is clearly set out in the Indictment's words that "firearms, grenades and machettes were distributed to civilian militia in Kigali-Rural for the purpose of "killing all the Tutsi". This allegation was not refuted by the Trial Chamber. Instead, the quotes mentioned above demonstrate that the Trial Chamber was convinced beyond a reasonable doubt that the allegations in paragraph 6.44 of the Indictment were proven.

379. As to the persons who participated in the massacre at Gikomero Parish Compound, the majority of the Appeals Chamber held that

> "It was neither established that the persons present during the meeting in the house of the Appellant's cousin took part in the attack",

and

> "the Trial Chamber did not rule out the possibility that the attackers did not come from Gikomero, but from another location"[827].

I do not agree with these findings.

---

[824] Trial Judgement, para. 272.
[825] See Indictment, para. 6.44 (emphasis added).
[826] See Indictment, para. 6.45.
[827] Appeal Judgement, para. 68.

380. The Trial Chamber held "that there is no conclusive evidence that the attackers came from Rubungo"[828]. This finding, however, was not made in order to indicate that the attackers may have come from another location than Gikomero. Rather, it was made when deciding on the Defence submission that the attackers came from Rubungo and that, consequently, the Appellant was not in any way connected to the massacre[829]. The fact that the Trial Chamber refuted this Defence submission is fully in line with the numerous other findings in which the Trial Chamber established a link between the persons to whom the Appellant distributed weapons and the participation of these persons in the massacre :

> Prosecution Witness GEK testified that the Accused distributed the weapons to Karekezi, Kamanzi, Njiriwonga and Ngarambe. She testified on cross-examination that Ngiruwonsanga was a well-known *Interahamwe* and when the Appellant came to distribute arms Ngiruwonsanga was present. She said that Ngiruwonsanga was present at all the locations where attacks were carried out. Witness GEK testified that she personally saw Ngarambe and Ngiruwonsanga cutting up people at the trade center[830].

This evidence shows that, *inter alia*, Ngarambe and Ngiruwonsanga were among the perpetrators of the massacre at Gikomero Parish Compound. As the Trial Chamber deemed Witness GEK's testimony to be highly credible, this part of her testimony must also be seen as having been accepted by the Trial Chamber.

381. In relation to the role of Karakezi, Witness GEK testified that she saw the Appellant again when he came on the day of the massacre, "to arrange for the killings to start at the primary school"[831]. She stated :

> "I saw him arrive, but he did not come to our house. He went to the house of a neighbour named Karakezi."

The Prosecution then asked : "Is that the same Karakezi that you have seen on the weapon distribution day ?" In her answer, witness GEK explicitly acknowledged this :

---

[828] Trial Judgement, para. 67.

[829] Trial Judgement, para. 66.

[830] Trial Judgement, para. 257 (emphasis added ; footnotes omitted). See also T. 4 September 2001, pp. 50, 51 (ICS) (GEK).

*Q.* : Did you at any time see people being actually killed or attacked in the village ?

*A.* : Yes, I saw some people being taken to the centre where we lived, for the purpose of killing them.

*Q.* : And how many days after the shooting at the school did you see that occur ?

*A.* : On that day, when they came back from the killings, they killed the survivors at that very place and even the next day and the following day, they continued to execute people at the trade centre where we lived.

(T. 4 September 2001, pp. 9, 10 ICS-GEK)

*Q.* : You mentioned in your evidence that you saw Mr. Kamuhanda and that there were four names of people that he was with. There was a man called Ngarambe, Karakezi, Ngiruwonsanga and Kamanzi ; is that right or not ?

*A.* : Yes, that is correct I saw them together.

*Q.* : Did you see at any time any of those four men attack or kill individuals either at the trade centre or around the school area ?

*A.* : Yes, I saw them. I personally saw "Ngarambe" and "Ngiruwonsanga" that were cutting up people at the trade centre. (T. 4 September 2001, pp. 12, 13 ICS-GEK).

[831] T. 3 September 2001, p. 180 (ICS) (GEK). See also Trial Judgement, para. 439.

"Yes, it's the same Karakezi"[832]. Witness GEK further testified that the Appellant then went in the direction of the primary school (part of Gikomero Parish Compound)[833]. The Prosecution then asked Witness GEK whether the Appellant was alone or with other persons at that time. Witness GEK answered :

> "Well, in fact everybody jumped into a vehicle when he was heading for the school. When he was heading for the school, Karekezi went on board"[834].

Again, read in the overall context of the evidence and all the findings set out above, it becomes clear that the Trial Chamber relied on this part of Witness GEK's evidence when it found that the Appellant aided and abetted the massacre when he distributed weapons to the persons at the home of his two cousins.

382. Based on the entirety of the aforementioned evidence, it becomes clear that Witness GEK's testimony did not solely concern the distribution of weapons by the Appellant in her house days before the massacre. Rather, Witness GEK testified about the distribution of weapons by the Appellant as part of his role in the preparation and execution of the massacre at Gikomero Parish Compound. It was also in this context that Witness GEK was examined by the Prosecution. In particular, the Prosecution asked questions concerning the connection between the meeting of the Appellant and others in GEK's house between 6 April and 10 April 1994 and the massacre at Gikomero Parish Compound on 12 April 1994. The Trial Chamber took all this into account and held that there was a substantial connection between these two incidents. In the light of the above-mentioned evidence and findings, and read together with the relevant allegations in the Indictment, it was not necessary for the Trial Chamber to make any further explicit finding as to the connection between the distribution of weapons and the massacre. This is also supported by the fact that Judge Maqutu did not dissent on this issue, although he dissented on other parts of the Trial Judgement[835].

383. These factual findings, on the basis of which the Trial Chamber accepted a connection between the distribution of weapons and the massacre, were reasonable ones. They are supported by factual findings made in other parts of the Trial Judgement[836] :

- The Trial Chamber held that the meeting at the home of the Appellant's cousins took place in Gikomero, *i.e.* in the close vicinity of Gikomero Parish Compound;
- The massacre at Gikomero Parish Compound took place on 12 April 1994, *i.e.* only a few days after the meeting;
- "The Accused told those present that he would bring 'equipment' for them to start, that they should distribute those weapons and that he would return to see if they had begun the killings, or so that the killings could start"[837].

The Appellant's words, when considered in the close temporal and geographical context of the massacre at Gikomero Parish Compound, allow a reasonable trier of

[832] T. 3 September 2001, p. 180 (ICS) (GEK). See also Trial Judgement, para. 439, and Judge Maqutu's Separate and Concurring Opinion on the Verdict, para. 31.
[833] T. 3 September 2001, p. 180 (ICS) (GEK).
[834] T. 3 September 2001, p. 182 (ICS) (GEK).
[835] T. 3 September 2001, p. 183 (ICS) (GEK).
[836] *Cf.* Judge Maqutu's Separate and Concurring Opinion on the Verdict, paras. 24-39.
[837] Trial Judgement, para. 273.

fact to find that the distribution of weapons substantially contributed – both physically and psychologically – to the massacre, a finding the Trial Chamber did indeed make.

384. As to the legal findings of the Trial Chamber, it is clear that the Trial Chamber was aware of the nexus requirement for criminal liability as an aider and abetter[838]. The Trial Chamber correctly held that while "'aiding' signifies providing assistance to another in the commission of the crime", " 'abetting' signifies facilitating, encouraging, advising or instigating the commission of a crime"[839]. It further found that

> The contribution of an aider and abetter before or during the fact may take the form of practical assistance, encouragement or moral support, which has a substantial effect on the accomplishment of the substantive offence. Such acts of assistance before or during the fact need not have actually caused the consummation of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator[840].

Thus, even if the weapons that were distributed by the Appellant had not been used at all, their mere distribution amounts to psychological assistance, as it was an act of encouragement that contributed substantially to the massacre, thus amounting to abetting if not aiding.

385. It is evident from the legal findings that the Trial Chamber considered the nexus requirement for "aiding and abetting" in evaluating the evidence, and that, as a result, it found the Appellant guilty of aiding and abetting in the massacre through the distribution of weapons. This is also shown by the Trial Chamber's reliance on Witness GEK's credibility. The Trial Chamber did not reject any part of her testimony. Neither did it reject the connection between the distribution of weapons and the massacre, a connection provided by Witness GEK. Thus, although it would have been preferable if the Trial Chamber had made more explicit findings on the nexus requirement, it must be emphasized once more that a Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching a finding[841], in particular when this nexus is self-evident.

### B. *Cumulative Convictions*

386. The Appeals Chamber has unanimously held that

> [t]he factual findings of the Trial Chamber support the Appellant's conviction for aiding and abetting as well as for ordering the crimes[842].

---

[838] According to Black's Law Dictionary, aiding and abetting means "to assist or facilitate the commission of a crime", 8th ed. (St. Paul, West Group), p. 76. Black's also clarifies the difference between physical assistance ("to aid") and psychological assistance ("to abet"). In German law, a similar distinction is made between physical and psychological assistance (*physische* and *psychologische Beihilfe*), *cf.* Cramer/Heine in Schönke/Schröder, Strafgesetzbuch Kommentar, 26th ed. 2001, §27, mn 12.

[839] Trial Judgement, para. 596 (footnotes omitted; emphasis added). This is an almost *verbatim* quotation from Charles E. Torcia, Wharton's Criminal Law, §29, p. 181 (15th ed. 1993), cited in Black's Law Dictionary, *supra* note 838, p. 76.

[840] Trial Judgement, para. 597 (footnotes omitted).

[841] *Celebici* Appeal Judgement, para. 481; see also *Musema* Appeal Judgement, paras. 18-19.

[842] Appeal Judgement, para. 77.

These factual findings refer to five of the six findings enumerated in paragraph 71 of the Appeal Judgement. The first of these enumerated findings, referring to the distribution of weapons, was disregarded by the majority as an act of aiding and abetting[843]. As described above, I disagree with this finding of the majority.

387. The majority of the Appeals Chamber upheld the conviction for ordering on the basis of the aforementioned five factual findings, but not the conviction for aiding and abetting, because this would be impermissibly cumulative. This finding of the majority, which is limited solely to the abovementioned five factual findings, raises the question of whether the conviction for the distribution of weapons is also based on the same facts, thus rendering also this sixth part of the conviction impermissibly cumulative. In my opinion, the Appellant can be convicted solely for ordering, encompassing exhaustively all the acts qualified by the Trial Chamber as aiding and abetting.

388. The acts of the Appellant, both at the meeting in the home of his cousins and concluding with the massacre of Tutsi a few days later, form a natural unity of action consisting of a series of individual acts. This is particularly demonstrated by the finding of the Trial Chamber that at the meeting, the Accused addressed those present, incited them to start killing Tutsi, and distributed grenades, machetes and guns to them to use and to further distribute. He also told the participants that he would return to see if they had started the killings, or so that the killings could start[844].

This finding shows that the Appellant's acts at the meeting and subsequently at Gikomero Parish Compound are inextricably intertwined. It would amount to an undue splitting of this natural unity of action to distinguish between these acts underlying the conviction for both aiding and abetting and ordering. Thus, the conviction for aiding and abetting, which is based, *inter alia*, on the Appellant's distribution of weapons, is based on acts which are not different from those underlying the conviction for ordering. As the latter is the more specific mode of liability, only the Appellant's conviction for ordering genocide and extermination has been correctly upheld. In my view this includes the distribution of weapons, this being the fundamental prerequisite for these acts of genocide and extermination.

389. In this context, it is important to note that this outcome has nothing to do with the fact that there is only one conviction for multiple modes of liability under Article 6 (1) of the Statute. On the one hand, a conviction for several modes of liability has to reflect the entirety of the criminal conduct. On the other hand, a conviction must not give even the impression of punishing an accused twice for the same conduct under two heads of liability. Thus, it would be both a violation of this latter fundamental principle of criminal law and a violation of the principle of logic to punish a person for having ordered and aided and abetted at the same time and in relation to the same offence, if ordering and aiding and abetting are based on the same criminal conduct.

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

[843] *Cf.* Appeal Judgement, para. 72.
[844] Trial Judgement, para. 637.

Dated this nineteenth day of September 2005, At The Hague, The Netherlands.

[Signed] : Wolfgang Schomburg

## XVI. Separate and partially dissenting Opinion of Judge Mohamed Shahabuddeen

390. I support the judgement of the Appeals Chamber generally, save for one point. I state my views on that point and take the opportunity to give a concurring opinion on another, beginning with the latter.

### A. *The Extent to Which There was Aiding and Abetting*

391. In respect of paragraph 68 of today's judgement, was the Appeals Chamber correct in agreeing with the appellant that the evidence did not support any connection between the distribution of weapons in the house of the appellant's cousin and the subsequent attack on Gikomero Parish Compound? In particular, was the Appeals Chamber also correct in holding that the Trial Chamber did not find that the appellant's interlocutors in that house were among the assailants at the subsequent genocide and that those weapons were used at that genocide?

392. The Trial Chamber found that, at a meeting at the home of his cousin in Gikomero between 6 and 10 April 1994, the appellant distributed weapons to some people. More particularly,

> "[t]he Accused told those present that he would bring 'equipment' for them to start [...] that they should distribute those weapons […] that he would return to see if they had begun the killings, or so that the killings could start"[845].

393. On these findings, the Trial Chamber found that the appellant aided and abetted the genocide which later took place at Gikomero Parish Compound on 12 April 1994. However, the Trial Chamber did not find that any member of the meeting at the home of the cousin (excluding the appellant) was present at the massacre; also the Trial Chamber did not find that any of the weapons distributed by the appellant to the gathering at that meeting had been used at the massacre. In the light of these circumstances, the Appeals Chamber is reversing Trial Chamber's finding that the appellant aided and abetted the genocide by distributing the weapons and by using the words at the meeting at the home of the cousin.

394. Leaving aside the strict question of causality, the law, as understood in various jurisdictions, seems to be uniformly to the effect that aiding and abetting requires proof that the act of aiding and abetting substantially contributed to the eventual crime ("nexus"). No doubt, in this case, such a nexus could be proved if members of the gathering at the home of the appellant's cousin had participated in the massacre and/

[845] *Kamuhanda* Trial Judgement, ICTR-99-54A-T, of 22 January 2003, para. 273.

or if the weapons distributed to them had been used in the massacre. But, as has been noted, the Trial Chamber made no findings to either effect.

395. An attractive argument is that it is reasonable to infer a nexus between the meeting at the cousin's house and the subsequent massacre : the meeting occurred in Gikomero, very near the massacre site and just a few days before the massacre occurred. The argument is worthy of consideration. However, I am not persuaded. I agree that it would have been reasonable for the Trial Chamber to find that, based on this circumstantial evidence, the required nexus had been proved. But, my opinion being that the Trial Chamber did not make that finding, I am not able to support the view that the Appeals Chamber should itself make it and should proceed, on that basis, to affirm the Trial Chamber's conclusion.

396. The problem is that, there being an obligation on the part of the prosecution to prove all elements of its case beyond reasonable doubt, the expectation is that relevant findings of fact would be made clearly by the Trial Chamber. It is not sufficient, in my view, that evidence supporting such a nexus be found in the transcripts. It is true that the Trial Chamber need not articulate every step of its reasoning, but, when it comes to an element of the offence, a clear finding is necessary.

397. Here, it is possible that the Trial Chamber would have made the relevant findings, but it is also possible that it would not have done so. The Trial Chamber might not have been satisfied that the evidence before it established the matters in question beyond reasonable doubt (that is, either that the distributed weapons were used at the massacre or that the interlocutors at the home of the cousin were among the attackers at the massacre), especially because there was a suggestion that the attackers had come from a different part of the country. If the Trial Chamber was not so satisfied, then its finding of aiding and abetting would have been based on the mere distribution of weapons and on the words used by the appellant at the cousin's home. These circumstances by themselves are not enough to support a finding of aiding and abetting the perpetration of the subsequent crime of genocide, and about this there appears to be no divergence of views within the Appeals Chamber.

398. The Trial Chamber having, in my view, made no findings one way or another on the question of nexus, there is no basis for the Appeals Chamber to assume which way the Trial Chamber would have gone. Principles of deference do not require the Appeals Chamber to uphold a judgement on the basis that the Trial Chamber *could* reasonably have made the necessary factual findings when, as it seems to me, the Trial Chamber did not in fact do so. If a Trial Chamber is relying on circumstantial evidence to support a finding against the accused, it is only fair to expect it to outline its reasoning so as to afford the accused a fair chance to appeal. Findings of such critical importance as those relating to nexus must be made by the Trial Chamber; it is not for the Appeals Chamber to fill in that lacuna in the trial judgement.

399. An argument is that the material shows that the Trial Chamber in fact made a determination that the appellant's interlocutors at the home of his cousin were among the assailants at the subsequent genocide and that the weapons which he distributed at the home of his cousin were used at the genocide. In my respectful view, the material relied upon for this view is altogether too thin to support such an argument.

400. For these reasons, I agree with the judgement of the Appeals Chamber on the point in issue. This does not mean that the appellant cannot be found to have aided and abetted in other respects.

### B. *Whether a Finding of Ordering excludes a Finding of Aiding and Abetting*

401. I must begin by regretting my failure to grasp the intended meaning of paragraph 77 of the judgement. The Appeals Chamber states that, having vacated the finding that the weapons distribution constituted aiding and abetting, it

> "does not find the remaining facts sufficiently compelling to maintain the conviction for aiding and abetting".

This statement seems to reverse the Appeals Chamber's own holding, in paragraphs 67 through 72 of the judgement and in the first sentence of paragraph 77 itself, to the effect that the Trial Chamber was right to hold that the appellant's actions at Gikomero Parish (but not at the earlier meeting) did constitute aiding and abetting. In light of this contradiction, for which no explanation is given, I conclude that it cannot be that the Appeals Chamber is holding that, on the facts, the Trial Chamber was in error in finding that there was aiding and abetting.

402. The only other possible reading of paragraph 77 of the Appeals Chamber's judgement is that there was indeed aiding and abetting but that, where findings of responsibility for aiding and abetting and for ordering the same substantive crime are based on the same underlying facts, both findings cannot stand. The Appeals Chamber seems to be holding that the less specific finding (here, the holding concerning aiding and abetting) must be vacated, on the basis that the more specific finding (concerning ordering) subsumes the other. This is not a factual holding, despite the language of the Appeals Chamber suggesting that it is. It seems, instead, to be putting forward a new legal principle – a significant extension of the Appeals Chamber's previous holdings concerning concurrent convictions. I cannot agree with this extension.

403. In the first place, I note there were no arguments on the question of specificity by the parties; there were no arguments on the question because the question was not raised in the appeal. The Appeals Chamber can consider a matter *proprio motu,* but obviously only in clear cases calling for exceptional treatment. In this case, the argument in question would extend the law to a situation to which it did not previously apply. I know of no reason for setting aside the powerful restraint exerted by the fact that the point has not been taken in the appeal and by the resulting absence of argument. The Appeals Chamber is deciding without the valuable benefit of the views either of the Trial Chamber or of the parties.

404. In the second place, assuming that the question is open, I consider that the Trial Chamber's judgement should be upheld.

405. The rule requiring conviction only for the more specific offence operates as between crimes. This is illustrated by *Celebici*. In that case, the ICTY Appeals Chamber established a principle that an accused may not be convicted simultaneously, based on the same underlying conduct, of two crimes unless each possesses an element not possessed by the other. For instance, the Appeals Chamber found that this was not the case with the crime of wilful killing and that of murder, and that it was thus appropriate to convict only for wilful killing, the more specific crime[846]. No similar

issue is presented here. As referred to in article 6 (1) of the Statute, ordering and aiding and abetting (like the other acts mentioned in that provision) are merely modes of liability in the sense of methods of engaging individual responsibility for a crime referred to in articles 2 to 4 of the Statute; it is the latter which is the crime. There is no reason why a single crime cannot be perpetrated by multiple methods.

406. That does not mean that account does not have to be taken of the law relating to those methods, or that in fixing sentence regard should not be had to the extent to which they contributed to the crime referred to in those articles of the Statute. But their relevance remains that of methods of establishing whether the accused has engaged individual responsibility for such a crime. This is borne out by the text of article 6 (1) of the Statute, which reads thus :

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

407. This signifies that an accused is "individually responsible for the crime" referred to in articles 2 to 4 of the Statute if he does any of the acts mentioned in article 6 (1). Thus, the prescribed acts (though of a criminal nature) are merely the methods through which the accused engages responsibility for a "crime referred to in articles 2 to 4 of the present Statute", these being genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II. Obviously, that responsibility can result from the doing of one or more of the prescribed acts.

408. That the accused does several such acts may affect the appropriate penalty, but does not have the effect of multiplying his conviction for responsibility for the crime referred to in the Statute; his conviction for this remains one and singular. The fact that more than one method is employed does not mean that there is more than one conviction for the crime. No doubt, language is sometimes used which conveys the impression that each method employed[847] constitutes a separate crime. Such instances can be construed in keeping with the view now advanced, i.e., the conviction is really for responsibility for the crime referred to in articles 2 to 4 of the Statute by the particular method employed (e.g., planning).

409. In this case, there was only one conviction in respect of each relevant count of the indictment (genocide and extermination). The Trial Chamber merely made legal findings explaining that each of these convictions could be supported by multiple legal theories corresponding to the various methods or modes of liability prescribed by article 6 (1). These findings were appropriate.

410. Nor is the Trial Chamber's approach inconsistent with *Blaškic*[848]. The *Blaškic* rule is based on the illogicality of holding, under article 7 (1) of the ICTY Statute, that the crime committed by a subordinate was in the first instance ordered by the accused himself, and of at the same time holding, under article 7 (3), that the accused,

[846] IT-96-21-A, 20 February 2001, para. 423.

[847] The Trial Chamber in *Kordic and Cerkez* seemed to be of the view that the various modalities prescribed by article 7 (1) [ICTY] created discrete crimes. See *Kordic and Cerkez* Trial Judgement, para. 386. With respect, I do not think so.

[848] IT-95-14-A, of 29 July 2004, paras. 91-92.

as the superior, failed to prevent the commission of the crime by the subordinate or failed to punish the subordinate for committing it. The assumption of the ordering situation under the article 7 (1) is that the accused actively advanced the commission of the crime; the assumption of the command responsibility situation under article 7 (3) is that he did not. The Appeals Chamber, in effect, held that instead of entering simultaneous convictions (under both provisions) based on such assumptions, the superior/subordinate relationship should be considered as an aggravating factor in sentencing the accused for ordering, for which alone he should be convicted.

411. Here, in contrast, there is no illogicality arising from contradictory assumptions of fact in holding that the accused can both aid and abet another to commit a crime and can order that other to commit that crime. On the facts of this case, the accused, a man of influence in the community, may be understood to have ordered others to commit genocide. In addition, however, he led others to the massacre site and himself participated in the acts of genocide. In these ways, he gave encouragement – vivid and practical encouragement – to others to kill. This constitutes aiding and abetting. No known principle of law exempts him, just because it has been found that he ordered them, from a formal finding that he also aided and abetted them.

412. The matter may be illustrated further by *Kordic and Cerkez*. In that case, the Trial Chamber found that Kordic had planned, instigated, and ordered a crime against humanity[849], but only one conviction was entered under the relevant count. In its turn, the Appeals Chamber did not suggest that this finding (that multiple methods had been employed in perpetrating the crime) implied that several convictions had been made, and this despite the fact that it expressly applied the *Blaškic* rule with respect to simultaneous convictions under article 7 (1) and article 7 (3)[850].

413. Thus, a finding that multiple methods had been used by the accused does not signify that he has been subjected to separate convictions for multiple crimes. A Trial Chamber is free to find that the accused engaged responsibility for a crime referred to in the Statute by doing several of the acts mentioned in article 6 (1). Were it otherwise, there would be failure to define the true measure of the criminal conduct of the accused. To the extent that the same conduct is covered by the various methods used, this should not result in any duplication of penalty, the conviction being one and singular; if there is any difficulty, this can be taken into account in sentencing.

414. In short, there being only one conviction, there is no basis on which to apply the law relating to the subsuming of a conviction for one crime by a conviction for another crime which rests on a more specific provision. Cases in which there were multiple convictions can be set aside as not being pertinent.

415. A final point. If the opposing argument has merit, then there is little, if any, prospect of a conviction for a crime referred to in articles 2 to 4 of the Statute resting on more than one of the various methods prescribed by article 6 (1). In practically all cases, if not all, recourse to any one method would exclude parallel recourse to another. Thus, a conviction for ordering genocide would exclude a conviction that the accused

[849] See, *e.g.*, *Kordic and Cerkez* Trial Judgement, para. 834 ("His role was as a political leader and his responsibility under Article 7 (1) was to plan, instigate and order the crimes").

[850] *Kordic and Cerkez* Appeal Judgement, paras. 33-35.

also instigated that genocide. So amputated an approach is not mandated by considerations of fairness or by anything in the Statute.

416. For these reasons, I regret my inability, under either possible interpretation of the Appeal Chamber's judgement, to agree with its decision not to maintain both the finding of ordering and the finding of aiding and abetting. In my opinion, the Trial Chamber's judgement on the point should be upheld.

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

Dated 19 September 2005 At The Hague The Netherlands

[Signed] : Mohamed Shahabuddeen

## XVII. Separate Opinion of Judge Inés Mónica Weinberg de Roca on Paragraph 77 of the Judgement

417. I agree with Judge Shahabuddeen that a conviction based on more than one of the modes of responsibility enumerated at Article 6 (1) of the Statute is not impermissibly cumulative.

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

Dated this 19th day of September 2005,

At The Hague, The Netherlands

[Signed] : Inés Mónica Weinberg de Roca

## XVIII. Dissenting Opinion of Judge Inés Mónica Weinberg de Roca

418. The Appeals Chamber finds that although the Trial Chamber committed some errors in assessing the alibi evidence[851], this did not amount to a miscarriage of justice. The Appeals Chamber affirms the Trial Chamber's conclusion that the alibi evidence did not raise a reasonable doubt as to the Appellant's presence in Gikomero in April 1994[852].

419. I would not have affirmed that conclusion.

[851] See, for instance, paras. 177 and 185 of the Judgement.
[852] Judgement, paras. 166-210.

### A. *The Trial Chamber's Assessment of the Alibi*

420. In my opinion, the Trial Chamber committed several errors in its assessment of the alibi, which cast doubt on the reliability of its conclusion concerning the alibi.

#### 1. *There were no Contradictions between the Testimony of the Appellant and those of Witness ALS and Mrs. Kamuhanda*

421. The Appeals Chamber finds that the Trial Chamber did not commit any error in summarizing Witness ALS's testimony[853]. It finds that the use of the term "practically" in paragraph 169 of the Trial Judgement ("she testified that she saw the Accused practically 24 hours a day") shows that Witness ALS's evidence was correctly assessed[854].

422. Leaving aside the question of the meaning of the qualifier "practically" (used by the Trial Chamber and approved by the Appeals Chamber), the important point (which was not addressed by the Appeals Chamber) is that the Trial Chamber erred in concluding that Witness ALS's testimony was at odds with that of the Appellant. Indeed, Witness ALS testified that the Appellant was always within calling distance, and that she saw him often because they shared meals together[855]. The Appellant said that he would only come inside and see the women two or three times a day, when he was not on the road nearby with the other men[856]. No reasonable trier of fact would have found that these testimonies were contradictory.

423. The same error was made when considering the testimony of Mrs. Kamuhanda. Mrs. Kamuhanda did not claim that she "never [took] her eyes off"[857] the Appellant : she only said that she saw the Appellant when he came in to eat, take a blanket, or when the shelling was very intense[858]. The testimony of Mrs. Kamuhanda is therefore consistent with that of the Appellant, and no reasonable trier of fact would have concluded otherwise[859].

---

[853] Trial Judgement, para. 169 : The Chamber particularly notes the testimony of Witness ALS. She testified that the Accused never left her house except on 8 April 1994 when the Accused attempted twice to retrieve his son René from Kimihurura, succeeding only on the second attempt. She testified that she saw the Accused *practically* 24 hours a day and that the Accused never left the house again until 18 April 1994. She testified that it was impossible for the Accused to have left the house without her knowledge, considering especially that she was always in the company of the Accused's wife. [Emphasis added]

[854] Judgement, para. 174.

[855] T. 29 August 2002, pp. 47-48 (closed session) :

*A*. No, he didn't go away, apart from that trip when he went to get his son. We were always together, he was either in front of the house or by the house, so that one could call him – a very short distance from which one could call him.

*Q*. That means that you saw him, that you talked to him; How frequently; once a day, twice a day?

*A*. I couldn't tell you exactly the number of occasions, but on the whole we were together all the time because we shared meals in the morning, we shared meals in afternoon and even in evening he was there. And when he was not with us he was either resting or he was walking around in front of the compound. He was always around.

See also T. 29 August 2002, p. 49 (closed session) ("I saw him very often and at no occasion [...] was there a period of two hours during which I did not see him, even one hour. I know that he was always on the road, that is, in the street or in the surrounding areas").

2. *Witness ALR and Witness ALB did not claim to have been together 24 Hours a Day nor did they contradict each other*

424. I agree with the Appeals Chamber that the Trial Chamber erred in finding that Witnesses ALR and ALB claimed to have been together twenty-four hours a day[860].

425. Regarding the absence of contradictions between the accounts of Witnesses ALB and ALR, the Appeals Chamber considers that the Appellant's argument has not been developed sufficiently in the Appeal Brief[861]. In any case, the Appeals Chamber refers to excerpts in the record to say that there were differences and that it was there-

[856] T. 21 August 2002, pp. 25-26 (closed session). The relevant part of the Appellant's testimony is as follows :

*Q*. How often did you see your wife and [name deleted], that is, Witness ALS ?

*A*. My wife and [Witness ALS] and the wife of [Witness ALR], I saw them on very short occasions during some of the meals that we had.

*Q*. So, you saw them just once a day ?

*A*. In the morning for a cup of coffee – cup of coffee or cup of tea. At noon or thereabouts for lunch, and occasionally in the evening for dinner or de supper to use a Belgian word.

*Q*. So, when you were not with the men you were in the house, is that what I am supposed to understand ?

*A*. Yes, when I was not on the road with the men I referred to here I was with those three women and their kids.

[857] See Trial Judgement, para. 170.

[858] T. 9 September 2002, pp. 163, 164 (cited in Appeal Brief, para. 254) :

*Q*. What about your husband, specifically, did he participate on a regular basis in these patrols ?

*A*. Yes, he was never absent. All the time he was with the others, they regrouped together. And like I said, he would come to eat something, take a blanket, and then go and join the others. All the time he was with the others, like I said. So, he stayed with us in the house when the shells were very, very intense.

*Q*. When he was not with you where was he ?

*A*. He was with the others. However, he did not go very far. I must say they stayed around our house […] we could even call them because they were walking in the street, and so we could call them. Even in turn something could happen to us inside, they could come to our rescue.

[859] In this connection, the Appeals Chamber recognizes the "imprecision" of the Trial Chamber in recalling the testimony of Mrs. Kamuhanda (*see* Judgement, para. 177). Nonetheless, the Appeals Chamber considers that, even if there were errors, these errors did not occasion a miscarriage of justice as "the Trial Chamber found the alibi evidence in general not credible because it 'appeared designed for a purpose.'" (Judgement, para. 177, citing Trial Judgement, para. 176). This argument will be addressed *infra*, section XVIII. A. 6.

[860] Judgement, para. 185, referring to Trial Judgement, para. 173. Despite finding that neither the testimony of Witness ALB nor that of Witness ALR could reasonably be construed as affirming that the two were together all the time, the Appeals Chamber concludes that this mischaracterization of the evidence did not occasion a miscarriage of justice because in the end, "[w]hat is significant is that the Trial Chamber found, after hearing the alibi witnesses testifying before it and considering their testimonies in light of all the evidence, that the witnesses 'ended up relating stories that appeared designed for a purpose.'" (Judgement, para. 186, referring to Trial Judgement, para. 176). This argument will be addressed *infra*, section XVIII. A. 6.

[861] Judgement, para. 187. In paras. 263-264 of the Appeal Brief, the Appellant refers to the relevant paragraph of the Trial Judgement (para. 173), and points out that "the Chamber merely found that there were contradictions in the witnesses testimonies without pointing out the contradictions in question." He then suggests what the Appeals Chamber ought to do (Appeal Brief, para. 265).

fore reasonable for the Trial Chamber to conclude that there were contradictions between the accounts of Witnesses ALB and ALR[862].

426. I have some problems with this. At the outset, it is unclear how the Appellant should have developed his argument further : it is not the Appellant's responsibility to identify and refute contradictions that the trial judges possibly had in mind. Secondly, the excerpts referred to by the Appeals Chamber do not support its finding that the testimonies of Witnesses ALR and ALB did differ in certain respects.

427. The Appeals Chamber first refers to Witness ALR's testimony that "[t]he men would *stay together* at night when they were patrolling"[863] and to Witness ALB's testimony that "after midnight, to allow one and all to rest, we *subdivided ourselves into two groups*"[864]. When looking more closely at the transcripts, however, it appears that both Witnesses ALR and ALB said that some of the men went to sleep (or rest) while the others continued to patrol[865]. The alleged contradiction thus disappears and, in fact, the two accounts seem extremely consistent.

428. The Appeals Chamber also refers to the following excerpts : Witness ALR testified that the men regrouped on the road after their rest around 3 p.m., and added that "when I say that we met on the road [after our rest around three], I do not mean in the middle of the road"[866]; Witness ALB testified that "at around 10 O'clock, 10 a.m. to midday, we once again got together in the neighborhood and generally at the middle of the road between the houses in the neighborhood and we walked around together among our houses"[867]. Considering that the two excerpts do not refer to the same period of the day (after 3 p.m. for Witness ALR, after 10 a.m. for Witness ALB), however, there is no contradiction here either[868].

[862] Judgement, para. 187, more particularly footnote 439.

[863] T. 3 September 2002, p. 69 (closed session, emphasis added).

[864] T. 5 September 2002, p. 111 (emphasis added).

[865] Both witnesses say that some of the men would sleep while the others stayed awake, and that they changed roles more or less every hour : Witness ALB (T. 5 September 2002, p. 111) : Now, after midnight, to allow one and all to rest, we subdivided ourselves into two groups. There was a group that stayed under a tree to rest, and our group continued to patrol the neighbourhood around our various houses. [...]We changed every one or two hours, *practically each hour we changed roles*; in other words, the group that came around came to rest, and the other that rested went around. (Emphasis added) Witness ALR (T. 3 September 2002, p. 69 (Closed session)) : The men would stay together at night when they were patrolling. They slept together, *except that some would sleep and some would stay awake*. […] [I]t was organized in such a manner that some would sleep *for about an hour* and they would only pretend to sleep, really, and during that time others would remain awake so that if something were to happen those who were meant to be awake would have the opportunity to wake up those who were trying to sleep. (Emphasis added)

[866] T. 3 September 2002, p. 66 (closed session).

[867] T. 5 September 2002, p. 118.

[868] Witness ALR did not say anything as to where the men met after 10 a.m. Witness ALB testified that, when the men met after having had lunch, it was not at any specific point in the street. T. 5 September 2002, p. 121 : During the day, we got together usually in the street and we walked around our houses. It was somewhere on the road, it was not a special spot, generally in the street.

3. *The Appellant's Account of the Routine during the Alibi Period was Detailed*

429. The Appeals Chamber finds that, even though the Appellant did provide an account of the routine followed during the relevant period, it was open to the Trial Chamber to find that the Appellant's account of the routine was not particularly detailed[869].

430. I am not persuaded by this assessment. During his testimony, the Appellant began by giving an overview of life at Witness ALS's house[870] and of the organization of the patrols[871]. He then provided a wealth of details as to (i) whether the patrollers were armed[872]; (ii) the purpose of the patrols[873]; (iii) the rotation among the

[869] Judgement, para. 192, referring to Trial Judgement, para. 173.

[870] T. 21 August 2002 (closed session), pp. 22-23 (who stayed in Witness ALS's house, where they slept, what they ate) and 25-26 (contacts with the women).

[871] T. 21 August 2002, pp. 24-25 (closed session) : Yes, because as from the 7th, fighting having started there were robbers, all types of delinquents were spreading chaos. So we stood together to protect ourselves against those bandits. We were making sure our families were protected and we were by the roadside whether it be during the day or at night. […] In fact there is no typical day because all days were all the same. During the day we were on the road. We might go off, well, to go and take a cup of coffee or tea, or go for a meal quickly, and then go back to the road then spend the night together. So that was our whole day, and so on and so forth. The only day that just might be different was that of the 8th of April when I went to fetch my kid at Kmimihurura [*sic*]. Otherwise all the days were the same. 872 T. 21 August 2002, p. 26 (closed session) : I was not armed. I have never had a weapon and no one was armed in my area. No one had a weapon.

[872] T. 21 August 2002, p. 26 (closed session) : I was not armed. I have never had a weapon and no one was armed in my area. No one had a weapon.

[873] T. 21 August 2002, p. 26 (closed session) : Our surveillance system was to enable us [to]feel a bit secure – make our families feel secure. If there was an attack by the robbers – I dare not talk about a military attack or an armed attack, we could not do anything about that. But if, for instance, there were bandits who came, we could try to stand up to them. Of course, if they were armed – if they were not armed then there was something else. There could be – sound an alert in the area and every one would be required to take some steps.

patrollers[874]; and (iv) where precisely the men patrolled[875]. The Appellant also provided further explanations in cross-examination[876].

4. *Incorrect Application of the Burden of Proof*

431. In the Judgement, the Appeals Chamber discusses whether the Trial Chamber applied an incorrect burden of proof when it found that the evidence of Witnesses ALB and ALM did not "exonerate", "foreclose" or "exclude" the possibility that the Appellant was at Gikomero[877]. The Appeals Chamber finds that, at paragraphs 83 to 85 of the Trial Judgement, the Trial Chamber correctly formulated the burden of proof regarding the alibi, and that read against this background, the Trial Chamber's use of terms such as that certain testimony did not "exonerate" the Appellant from being at a crime site, or that certain testimony "cannot foreclose" the possibility that the Appellant was at a crime site, or that certain testimony does not "exclude" the possibility that the Appellant went to the crime site, does not indicate a reversal of the burden of proof. Rather, when considered in the proper context of the entire discussion of such evidence, the Appeals Chamber understands these terms to mean that even if fully accepted as true, such evidence, in the view of the Trial Chamber, would be insufficient to cast a reasonable doubt on the evidence showing that the Appellant was at the crime site[878].

[874] T. 21 August 2002, p. 27 (closed session) : Well, rotation [of the patrols], except at night or when we were going to eat because it was never – the road was never abandoned. When some were going for their meals, others continued to stand guard. And at night when there were some who were asleep there, others were awake.

[875] T. 21 August 2002, pp. 27-28 (closed session) : I am talking about the road, or the street, actually, it is not a road, it was not highly frequented. We are talking about the street between my house, that of [Witness ALS]and that of [name deleted], as well as that of [Witness ALR]and [Witness ALB]. So it was a road that separated our houses, and that is the road on which we were moving, as it were, up and down. It was not a roadblock, it was just to be on that road so as to be, as it were, to monitor movements there. We did not mount a roadblock on the road. So, we were strolling up and down for surveillance purposes.

*Q*. Some other clarification. On that road, were there some specific spot where you stood or not?

*A*. No, there was no particular spot where we were, where we stood.

*Q*. You were just -- moved top to bottom, up and down?

*A*. We stalled on that road. So, between the house of Witness ALR and further on, close to name deleted's house, it was on that road, so we were moving up and down, like this.

[876] T. 27 August 2002, pp. 87-89 (closed session) : We were not warred to the street you can go back to the house, drink a little bit of water. I don't know, probably shave. We were not wearied to the street. […] During the day one went and one came back. You can go in and come out but during the night we were out. […] If you are talking about the 8th to the 12th, the monotony was the same. The system so to speak was the same. If you are talking about the period or another period I can give you the answers. […] The system that we instituted – I explained to you. It was thus, during the day we were on the street that you saw. That didn't prevent us from being able to go into the houses for certain needs and in the night we stayed outside not on the street but on the sides of the street, to watch the street. […] We slept outside and during the day we were on that street or we would go and come back to the house and I was at Witness ALS's house.

[877] Judgement, para. 198, referring to paras. 174-175 of the Trial Judgement.

[878] Judgement, para. 198 (references omitted).

432. I find, however, that although the Trial Chamber properly outlined the law on the question of alibi[879], it then used language which is prima facie inconsistent with the correct legal test for assessing alibi ("does not exonerate", "cannot foreclose" and "could not afford an alibi which would exclude the possibility")[880]. The repetitive use of such terms (there are many similar examples throughout the judgement[881]) raises the possibility that, even though the Trial Chamber properly outlined the applicable law at the beginning of its discussion, its subsequent application thereof is not beyond reproach.

5. *The problematic Finding that it was incredible that Patrols were mounted just to protect the Families from Looters*

433. I agree with the Appeals Chamber that the Trial Chamber was legally entitled to find that it was incredible that the patrols were mounted just to protect the families from looters[882]. However, I regret the Appeals Chamber's refusal to assess the merits of the Appellant's contention that the Trial Chamber erred in fact when it made this finding[883].

434. It is true that, in order to facilitate the review of the Appellant's arguments here, it would have been preferable if the Appellant had provided precise references to the record in relation to the testimony of Witness ALM and to that of his Expert Witness. Nevertheless, a failure to do so does not constitute an absolute bar to the examination of the arguments of the Appellant[884]. The Appeals Chamber's reluctance to do so is especially troubling given that, in assessing whether the Trial Chamber erred in concluding that Witnesses ALR and ALB contradicted each other, it did not hesitate to comb through the transcripts as demonstrated by the fact that it identified a "contradiction" that had not been raised by either party or by the Trial Chamber[885].

[879] At paragraphs 83 to 85 of the Trial Judgement.

[880] At paragraphs 174-175 of the Trial Judgement.

[881] Other examples of language in the Trial Judgement which suggest a shift in the burden of proof : paras. 167 ("this did not *preclude* him from travelling to the Gikomero commune"), 271 ("the Chamber notes that the testimonies of these two Witnesses, that they did not see the Accused in Gikomero, *does not exclude* that he could have been there"), 470 ("the Chamber notes that the Defence Witnesses may have arrived on the scene of the events after the man identified as Kamuhanda had already left. [..][I]t would not *demonstrate* that the Accused was not there"), 472 ("it *does not rule out the possibility* that a man identified as Kamuhanda had been at the Gikomero Parish Compound") and 476 ("it would *not provide a sufficient basis to rule out the possibility* that the Accused was present at the Gikomero Parish Compound").

[882] See Judgement, paras. 204-205.

[883] See Judgement, para. 206.

[884] As stated by the Appeals Chamber at para. 10 of the *Niyitegeka* Appeal Judgement and para. 7 of the *Kajelijeli* Appeal Judgement (To the same effect, *see also Kayishema and Ruzindana* Appeal Judgement, para. 137; *Rutaganda* Appeal Judgement, para. 19) : In order for the Appeals Chamber to assess the appealing party's arguments on appeal, the appealing party *is expected* to provide precise references to relevant transcript pages or paragraphs in the Judgement to which the challenge is being made. [Emphasis added] Failure to do so "makes it difficult for the Appeals Chamber to assess fully the party's arguments on appeal" (*Ntakirutimana* Appeal Judgement, para. 14; *Semanza* Appeal Judgement, para. 10) but does not prohibit the Appeals Chamber from assessing the arguments.

435. Having examined the record, I have concerns about the Trial Chamber's conclusion. It appears that Witness ALR's house was invaded and robbed twice on the same day that the patrols started and that the families moved in Witness ALS's house[886]. The Appellant[887] and Witnesses ALR[888], ALM[889], ALS[890] and ALF[891] testified that the patrols were needed to (i) protect the families, (ii) protect their property, and (iii) create a feeling of togetherness. Further, the Expert Witness called by the Defence at trial, Mr. Nkiko Nsengimana, also described the terror in Rwanda during that period and the initiative of citizens to ensure security in their neighborhoods[892]. Therefore, it seems that the Trial Chamber might have underestimated the insecurity and chaos prevalent at that time in Rwanda, belittling the perceived need to set up such mechanisms of protection as that discussed by the alibi witnesses.

---

[885] See *supra* section XVIII. A. 2. At para. 83 of the Respondent's Brief, the Prosecution submitted that the evidence of Witnesses ALR and ALB was contradictory in two respects, but it did not allege that their evidence was inconsistent as to whether the patrollers subdivided into smaller groups at night.

[886] T. 3 September 2002, pp. 45-49 (closed session, Witness ALR); T. 29 August 2002, pp. 23-24 (closed session, Witness ALS).

[887] T. 27 August 2002, p. 58 (closed session) : [Their] presence in the street was dissuasive. When people see you during the day and even if they are bandits – the bandits see you, they become more careful, so that it was a deterrent and even if there was a problem there would be a general alert and everybody would know what the problem was at the same time. And T. 21 August 2002, p. 26 : Our surveillance system was to enable us feel a bit secure – make our families feel secure. If there was an attack by the robbers -- I dare not talk about a military attack or an armed attack, we could not do anything about that. But if, for instance, there were bandits who came, we could try to stand up to them. Of course, if they were armed – if they were not armed then there was something else. There could be – sound an alert in the area and every one would be required to take some steps.

[888] T. 3 September 2002, pp. 73 (closed session) ("These patrols, we wanted to have a feeling of togetherness, of being together so that we would be able to support ourselves morally, and during this period you always had criminals who would exploit the situation. So given that we were there, if, for instance, something abnormal happens we would then be able, for example, to shout.") and 88 ("moral support").

[889] T. 4 September 2002, pp. 80-81 : Now, those patrols, as I pointed out, was made up of people of the area, the immediate neighbours, not people from very far. We are in our houses facing each other. People in the neighbourhood who knew each other very well, who pooled their efforts, who came together to protect the neighbourhood, and we were there. In the event there was an attack or people who came to steal, if we were in a group it was our hope that we would act as a deterrent to prevent anyone from coming to do anything whatsoever, and it is in that framework that we organized patrols. Nothing else beyond that could be done. Just come together. As they say, "United we stand" or "Our strength is in unity"; protect houses, particularly of those who had been killed, because there were things and there were people who had not been killed. So we tried to see, make sure that their property was not stolen by people who could come from outside.

[890] T. 29 August 2002, p. 40 (closed session) : Given the insecurity atmosphere which prevailed, you had young men – the young men and the men agreed on a manner of protecting their houses, and they formed patrol groups.

[891] T. 9 September 2002, p. 160 : No, the men slept outside. […] for purposes of protection – their own protection, protection of the families. They wanted to be on the alert at any point in time so that our families are not attacked by anyone whomsoever. I would say it was a system of protection. They slept not too far from home but outside. […] It was called patrols. The men stayed outside the whole night, came back in the morning or at daylight.

6. *The Trial Chamber's Conclusion on the Alibi*

436. As noted above[893], the Appeals Chamber finds that, even if the Trial Chamber did err in assessing some of the alibi evidence, this did not result in a miscarriage of justice because the Trial Chamber concluded that "in an attempt to provide an alibi for the Accused, the Witnesses ended up relating stories that appeared designed for a purpose and therefore not credible"[894].

437. In the end, however, I believe that the Trial Chamber concluded that the "Witnesses ended up relating stories that appeared designed for a purpose" based on what it perceived to be problems with the alibi evidence[895]. But, as shown above, the Trial Chamber committed several errors in assessing the alibi. Some of the premises underpinning the Trial Chamber's conclusion were thus wrong, and there is therefore a real risk of miscarriage of justice in this case[896]. The Appeals Chamber should not have endorsed the conclusion of the Trial Chamber on the alibi as it was unsafe.

B. *Conclusion*

438. Pursuant to Rule 118 (C) of the Rules of Procedure and Evidence, I would order a retrial.

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

Dated this 19th day of September 2005,

At The Hague, The Netherlands

[Signed] : Inés Mónica Weinberg de Roca

## XIX. Annex A – Procedural Background

439. The main aspects of the appellate proceedings in this case are summarized below.

[892] See "Few Elements of Political Expert Analysis on the Rwandan Massacre of 1994, Expert Report for the International Criminal Tribunal for Rwanda in the Case : The Prosecutor Versus Jean De Dieu Kamuhanda", report by Niko Nsengimana, filed on 8 May 2003 as Defence Exhibit 87 (B), pp. 39-41 (at p. 41, it is stated : "Like in the period preceding 6 April, people ensured their own security in residential areas. In the beginning, [in] areas not dominated by the *'Interahamwe'*, Tutsis and Hutus could be seen together, day and night, like in the preceding period, ensuring the tranquillity of the residential area.").

[893] See *supra* footnotes 859 and 860.

[894] See, *e.g.*, paras. 177 and 186 of the Judgement, referring to para. 176 of the Trial Judgement.

[895] Indeed, it would be odd if the Trial Chamber had arrived at this conclusion completely independently of its earlier findings.

[896] The fact that some of the premises of the argument were false does not necessarily imply that the conclusion was also false. Nonetheless, it makes the conclusion unsafe.

### A. *Notice of Appeal and Briefs*

440. The Trial Judgement was delivered in English on 22 January 2004. On 3 February 2004,the Appellant filed a motion seeking an extension of time for filing his Notice of Appeal, Appellant's Brief and any motion for admission of additional evidence under Rule 115 on the ground that the French text of the Trial Judgement was not yet available[897]. On 8 March 2004, the Pre-Appeal Judge granted the requested extension and ordered the Appellant to file his Notice of Appeal no later than thirty days from the date of filing of the French translation of the Judgement; the Appellant's Brief, within seventy-five days from the date of filing of the Notice of Appeal; and to file the motion for Additional Evidence before the Appeals Chamber, no later than seventy-five days from the date of filing of the French translation of the Judgement[898]. The Pre-Appeal Judge also directed the Registrar to serve on the Appellant and his Counsel the French translation of the Judgement as soon as practicable[899]. On 12 May 2004, because of the continued unavailability of the French version of the Trial Judgement, the Pre-Appeal Judge, requested the Registrar, through a scheduling order, to indicate a date for the filing of the French version of the Judgement[900]. Subsequent to a Report from the Registrar[901] indicating the date of filing of the French version of the Trial Judgement which was filed on 6 July 2004, the Appellant filed his Notice of Appeal and Appeal Brief on 5 August 2004 and 19 October 2004, respectively[902]. The Prosecution filed its Respondent's Brief[903] on 29 November 2004 and the Appellant filed his Brief in Reply on 27 April 2005[904].

### B. *Assignment of Judges*

441. On 9 February 2004, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal : Judge Theodor Meron, Judge Mohamed Shahabuddeen, Judge Florence Ndepele Mwachande Mumba, Judge Wolfgang Schomburg, and Judge Inés Mónica Weinberg de Roca[905]. Judge Mumba was designated the Pre-Appeal Judge[906].

---

[897] *Requête aux fins de prorogation de délai pour le dépôt de l'acte d'appel et du mémoire en appel en application des articles 108, 111, 115 et 116 du règlement de Procédure et de Preuve*, 3 February 2004. See also *Erratum – Rectification d'Erreur Matérielle*, filed 9 February 2004.

[898] 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, p. 4.

[899] *Ibid*.

[900] Scheduling Order, 12 May 2004, p. 2.

[901] Report of the Registrar in Compliance With the Orders of the Pre-Appeal Judge Dated 12 May 2004, filed 25 May 2004, p. 2.

[902] These were filed in French and were entitled "*Acte d'appel du jugement du 22 janvier 2004" and "Mémoire en appel – en Application de l'Article 111 du RPP*" (Confidential).

[903] Respondent's Brief, 29 November 2004.

[904] Duplique au Mémoire en Appel, 27 April 2005. See also Decision on Jean de Dieu Kamuhanda's Motion for an Extension of Time, 19 April 2005, granting an extension to file a Brief in Reply until 27 April 2005.

[905] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 9 February 2004.

### C. *Additional Evidence*

442. On 20 September 2004, the Appellant filed a motion for the admission of additional evidence[907]. The Appeals Chamber granted the motion in part, admitting new statements of Witnesses GAA and GEX and ordering that these witnesses be heard together with any rebuttal evidence submitted by the Prosecution[908]. On 18 May 2005, Witnesses GAA and GEX were heard together with Witnesses GEK and GAG called by the Prosecution in rebuttal[909]. In an oral decision rendered at the close of the hearing of the additional evidence on 19 May 2005, the Appeals Chamber directed the Prosecutor, pursuant to Rule 77 (C) (i) of the Rules, to investigate allegations made during the hearing that Tribunal employees have attempted to interfere with witnesses, and, pursuant to Rule 91 (B) of the Rules, to investigate discrepancies emanating from testimony given during the hearing and the consequent possibility of false testimony[910].

### D. *Hearing of the Appeal*

443. The hearing of the appeal took place on 19 May 2005 in Arusha, Tanzania[911]. At the close of the hearing, the Appellant made use of the opportunity to address the Appeals Chamber himself.

### E. *Delivery of the Judgement*

444. The Judgement was delivered on 19 September 2005 at the Seat of the ICTY at The Hague, The Netherlands as authorized, pursuant to Rule 4 of the Rules, by the President of the Tribunal[912].

***

[906] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 9 February 2004, p. 2.

[907] *Requête aux fins d'admission de moyens de preuve supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve*, Confidential, 20 September 2004. See also Prosecutor's Response to *Requête aux fins d'admission de moyens de preuves supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve,* 30 September 2004; and *Duplique de la Défense aux fins de présentation de moyen de preuve supplémentaires en application de l'article 115 du règlement de Procédure et de Preuve*, 1 February 2005.

[908] Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005, paras. 50 and 74.

[909] Scheduling Order, 18 April 2005; Order for the Transfer of Detained Witness GEK, 13 May 2005.

[910] Oral Decision on Rule 115 and Contempt of False Testimony, 19 May 2005.

[911] Scheduling Order, 18 April 2005.

[912] See The President's Authorisation to Hold Appeals Hearing Away From the Seat of the Tribunal, 5 September 2005; Variation of Scheduling Order, 19 August 2005.

# *The Prosecutor v. Joseph KANYABASHI, Elie NDAYAMBAJE, Sylvain NSABIMANA, Alphonse NTEZIRYAYO, Arsène Shalom NTAHOBALI and Pauline NYIRAMASUHUKO*

## Case N° ICTR-98-42 (Cases N° ICTR-96-15, ICTR-96-8, ICTR-97-21 and ICTR-97-29)

***Case History : Joseph Kanyabashi***

- Name : KANYABASHI
- First name : Joseph
- Date of birth : 1937
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Mayor of Ngoma
- Date of Indictment's Confirmation : 15 July 1996 [1]
- Counts : Genocide, Conspiracy to Commit Genocide, Complicity in Genocide, Direct and Public Incitement to Commit Genocide Serious Violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of Indictment's Amendments : 12 August 1999 and 11 May 2000

- Date of the decision to joint Trials : 5 October 1999 – Ndayambaje, Nsabimana, Ntahobali, Nteziryayo and Nyiramasuhuko
- Date and Place of Arrest : 28 June 1995, in Belgium
- Date of Transfer : 8 November 1996
- Date of Initial Appearance : 29 November 1996
- Pleading : Not guilty
- Date Trial Began : 12 June 2001

***

[1] The text of the indictment is reproduced in the *1995-1997 Report*, p. 218. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 222.

# *Le Procureur c. Joseph KANYABASHI, Elie NDAYAMBAJE, Sylvain NSABIMANA, Alphonse NTEZIRYAYO, Arsène Shalom NTAHOBALI, et Pauline NYIRAMASUHUKO*

## Affaire N° ICTR-98-42 (affaires N° ICTR-96-15, ICTR-96-8, ICTR-97-21 et ICTR-97-29)

***Fiche technique : Joseph Kanyabashi***

- Nom : KANYABASHI
- Prénom : Joseph
- Date de naissance : 1937
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Bourgmestre de Ngoma
- Date de la confirmation de l'acte d'accusation : 15 juillet 1996 [1]
- Chefs d'accusation : Génocide, entente en vue de commettre le génocide, complicité dans le génocide, incitation publique et directe à commettre le génocide 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 des modifications subséquentes portées à l'acte d'accusation : 12 août 1999 et 11 mai 2000
- Date de jonction d'instance : 5 octobre 1999 – Ndayambaje, Nsabimana, Ntahobali, Nteziryayo et Nyiramasuhuko
- Date et lieu de l'arrestation : 28 juin 1995, en Belgique
- Date du transfert : 8 novembre 1996
- Date de la comparution initiale : 29 novembre 1996
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 12 juin 2001

***

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 218. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 222.

***Case History : Elie Ndayambaje***

- Name : NDAYAMBAJE
- First Name : Elie
- Date of Birth : 8 March 1958
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Mayor of Muganza
- Date of Indictment's Confirmation : 21 June 1996 [2]
- Counts : Genocide, Crimes against Humanity and Serious Violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of the decision to joint Trials : 5 October 1999 – Kanyabashi, Nsabimana, Ntahobali, Nteziryayo and Nyiramasuhuko
- Date and Place of Arrest : 28 June 1995, in Belgium
- Date of Transfer : 8 November 1996
- Date of Initial Appearance : 29 November 1996
- Pleading : Not guilty
- Date Trial Began : 12 June 2001

***

***Case History : Sylvain Nsabimana***

- Name : NSABIMANA
- First Name : Sylvain
- Date of Birth : 29 July 1953
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Prefect in Butare
- Date of indictment's confirmation : 16 October 1997 [3]
- Counts : Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Genocide, Complicity in Genocide, Crimes against Humanity and Serious Violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of Indictment's Amendments : 24 June 1999

[2] The text of the indictment is reproduced in the *1995-1997 Report*, p. 462. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 470.

[3] The text of the indictment is reproduced in the *1995-1997 Report*, p. 550. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 554.

***Fiche technique : Elie Ndayambaje***

- Nom : NDAYAMBAJE
- Prénom : Elie
- Date de naissance : 8 mars 1958
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Bourgmestre de Muganza
- Date de la confirmation de l'acte d'accusation : 21 juin 1996 [2]
- 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 de jonction d'instance : 5 octobre 1999 – Kanyabashi, Nsabimana, Ntahobali, Nteziryayo, Nyiramasuhuko
- Date et lieu de l'arrestation : 28 juin 1995, en Belgique
- Date du transfert : 8 novembre 1996
- Date de la comparution initiale : 29 novembre 1996
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 12 juin 2001

***

***Fiche technique : Sylvain Nsabimana***

- Nom : NSABIMANA
- Prénom : Sylvain
- Date de naissance : 29 juillet 1953
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Préfet à Butare
- Date de la confirmation de l'acte d'accusation : 16 octobre 1997 [3]
- Chefs d'accusation : Génocide, entente en vue de commettre le génocide, incitation publique et directe 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 des modifications subséquentes portées à l'acte d'accusation : 24 juin 1999

[2] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 462. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le Recueil 1995-1997, p. 471.

[3] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 550. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le Recueil 1995-1997, p. 554.

- Date of the decision to joint Trials : 5 October 1999 – Kanyabashi, Ndayambaje, Ntahobali, Nteziryayo and Nyiramasuhuko
- Date and Place of Arrest : 18 July 1997, in Kenya
- Date of transfer : 18 July 1997
- Date of initial appearance : 24 October 1997
- Pleading : Not guilty
- Date Trial Began : 12 June 2001

***

***Case History : Alphonse Nteziryayo***

- Name : NTEZIRYAYO
- First Name : Alphonse
- Date of Birth : Unknown
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Commanding Officer of the Military Police, then Prefect of Butare
- Date of Indictment's Confirmation : 16 October 1997 [4]
- Counts : Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Genocide, Complicity in Genocide, Crimes against Humanity and Serious Violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of Indictment's Amendments : 24 June 1999
- Date of the decision to joint Trials : 5 October 1999 – Kanyabashi, Ndayambaje, Nsabimana, Ntahobali and Nyiramasuhuko
- Date and Place of Arrest : 24 April 1998, in Burkina Faso
- Date of Transfer : 21 May 1998
- Date of Initial Appearance : 17 August 1998
- Pleading : Not guilty
- Date Trial Began : 12 June 2001

***

***Case History : Arsène Shalom Ntahobali***

- Name : NTAHOBALI
- First Name : Arsène Shalom
- Date of Birth : 1970

[4] The text of the indictment is reproduced in the *1995-1997 Report*, p. 550. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 554.

- Date de jonction dinstance : 5 octobre 1999 – Kanyabashi, Ndayambaje, Ntahobali, Nteziryayo et Nyiramasuhuko
- Date et lieu de l'arrestation : 18 juillet 1997, au Kenya
- Date du transfert : 18 juillet 1997
- Date de la comparution initiale : 24 octobre 1997
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 12 juin 2001

***

***Fiche technique : Alphonse Nteziryayo***

- Nom : NTEZIRYAYO
- Prénom : Alphonse
- Date de naissance : Inconnue
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Commandant de la police militaire puis préfet de Butare
- Date de la confirmation de l'acte d'accusation : 16 octobre 1997 [4]
- Chefs d'accusation : Génocide, entente en vue de commettre le génocide, incitation publique et directe au génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date des modifications subséquentes portées à l'acte d'accusation : 24 juin 1999
- Date de jonction d'instance : 5 octobre 1999 – Kanyabashi, Ndayambaje, Nsabimana, Ntahobali et Nyiramasuhuko
- Date et lieu de l'arrestation : 24 avril 1998, au Burkina Faso
- Date du transfert : 21 mai 1998
- Date de la comparution initiale : 17 août 1998
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 12 juin 2001

***

***Fiche technique : Arsène Shalom Ntahobali***

- Nom : NTAHOBALI
- Prénoms : Arsène Shalom
- Date de naissance : 1970

[4] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p 550. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 554.

- Sex : Male
- Nationality : Rwandan
- Former Official Function : Student and a leader of MRND militiamen (*Interahamwe*)
- Date of Indictment's Confirmation : 29 May 1997 [5]
- Counts : Conspiracy to Commit Genocide, Genocide, Complicity in Genocide, Direct and Public Incitement to Commit Genocide, Crimes against Humanity and Serious Violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date of the decision to joint Trials : 5 October 1999 – Kanyabashi, Ndayambaje, Nsabimana, Nteziryayo and Nyiramasuhuko
- Date of Indictment's Amendments : 17 June 1997

- Date and Place of Arrest : 24 July 1997, in Kenya
- Date of Transfer : 24 July 1997
- Date of Initial Appearance : 17 October 1997
- Pleading : Not guilty
- Date Trial Began : 12 June 2001

***

***Case History : Pauline Nyiramasuhuko***

- Name : NYIRAMASUHUKO
- First Name : Pauline
- Date of Birth : 1946
- Sex : Female
- Nationality : Rwandan
- Former Official Function : Minister of family and Women Affairs

- Date of Indictment's Confirmation : 29 May 1997 [6]
- Counts : Conspiracy to Commit Genocide, Genocide, Complicity in Genocide, Crimes against Humanity and Serious violaTions of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date of the decision to joint Trials : 5 October 1999 – Kanyabashi, Ndayambaje, Nsabimana, Ntahobali and Nteziryayo

[5] The text of the indictment is reproduced in the *1995-1997 Report*, p. 696. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 700.

[6] The text of the indictment is reproduced in the *1995-1997 Report*, p. 696. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 700.

- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Étudiant et dirigeant d'un groupe de miliciens du MRND (*Interahamwe*)
- Date de la confirmation de l'acte d'accusation : 29 mai 1997 [5]
- Chefs d'accusation : Entente en vue de commettre le génocide, génocide, complicité dans le génocide, incitation publique et directe à commettre le génocide, crimes contre l'humanité violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de jonction d'instance : 5 octobre 1999 – Kanyabashi, Ndayambaje, Nsabimana, Nteziryayo et Nyiramasuhuko
- Date des modifications subséquentes portées à l'acte d'accusation : 17 juin 1997
- Date et lieu de l'arrestation : 24 juillet 1997, au Kenya
- Date du transfert : 24 juillet 1997
- Date de la comparution initiale : 17 octobre 1997
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 12 juin 2001

***

***Fiche technique : Pauline Nyiramasuhuko***

- Nom : NYIRAMASUHUKO
- Prénom : Pauline
- Date de naissance : 1946
- Sexe : Féminin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Ministre de la famille et des affaires féminines
- Date de la confirmation de l'acte d'accusation : 29 mai 1997 [6]
- Chefs d'accusation : Entente en vue de commettre le génocide, génocide, complicité dans le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II aux dites Conventions de 1977
- Date de jonction d'instance : 5 octobre 1999 – Kanyabashi, Ndayambaje, Nsabimana, Ntahobali et Nteziryayo

[5] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 696. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 701.

[6] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 696. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 701.

- Date and Place of Arrest : 18 July 1997, in Kenya
- Date of Transfer : 18 July 1997
- Date of Initial Appearance : 3 September 1997
- Pleading : Not guilty
- Date Trial Began : 12 June 2001

- Date et lieu de l'arrestation : 18 juillet 1997, au Kenya
- Date du transfert : 18 juillet 1997
- Date de la comparution initiale : 3 septembre 1997
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 12 juin 2001

## *Decision on Ntahonali's Motion for separate Trial 2 February 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Arsène Shalom Ntahobali – Severance, Discretionary power of the Chamber to order a separate trial, Existence of a conflict of interests, Interests of Justice, Prejudice to an accused – Motion dismissed*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (B), 82 (A) and 82 (B)*

*International and national Case cited :*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Radoslav Brđanin, *Decision on Motions by Momir Talic for separate Trial and for Leave to file a Reply, 9 March 2000 (IT-99-36); Appeals Chamber,* The Prosecutor v. Radoslav Brđanin*, Decision on Request to Appeal, 16 May 2000 (IT-99-36)*

*Canada :* Supreme Court of Canada, R. v. Crawford*, 30 March 1995, [1995] 1 S.C.R. 858*

*United States of America :* Court of Appeals for the US First Circuit, United States v. Talavera*, 15 April 1992, 668 F.2d 625*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 Ntahobali's Motion for Separate Trial, filed on 18 January 2005 (the "Motion")[1],

CONSIDERING :

i. The Prosecutor's Response to Arsène Shalom Ntahobali's Request for a Separate Trial, filed on 24 January 2005 (the "Prosecutor's Response");

ii. Kanyabashi's Response to Arsène Shalom Ntahobali's Motion for Separate Trial, filed on 24 January 2005 ("Kanyabashi's Response")[2];

[1] The Motion was filed in French and entitled "*Requête de Arsène Shalom Ntahobali en Séparation de Procès*".

[2] Kanyabashi's Response was filed in French and entitled "*Réponse de Joseph Kanyabashi à la 'Requête de Arsène Shalom Ntahobali en séparation de procès*'".

## *Décision relative à la requête de Ntahobali en séparation de procès 2 février 2005 (ICTR-98-42-T)*

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de Chambre ; Arlette Ramaroson ; Solomy Balungi Bossa

*Arsène Shalom Ntahobali – Disjonction, Pouvoir discrétionnaire de la Chambre d'ordonner un procès séparé, Existence d'un conflit d'intérêts, Intérêts de la justice, Préjudice à un accusé – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73 (B), 82 (A) et 82 (B)*

*Jurisprudence internationale et nationale citée :*

*T.P.I.Y. : Chambre de première instance,* Le Procureur c. Radoslav Brđanin, *Décision relative à la requête de Momir Talić aux fins de la disjonction d'instances et aux fins de dépôt d'une réplique, 9 mars 2000 (IT-99-36); Chambre d'appel,* Le Procureur c. Radoslav Brđanin, *Décision relative à la demande d'interjeter appel, 16 mai 2000 (IT-99-36)*

*Canada : Cour Suprême du Canada,* R. v. Crawford, *30 mars 1995, [1995] 1 S.C.R. 858*

*Etats-Unis d'Amérique : Cour d'appel de la première circonscription,* Etats-Unis c. Talavera, *15 avril 1992, 960 F.2d 153*

LE 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 Balungi Bossa (la Chambre),

SAISI de la requête de Ntahobali en séparation de procès, déposée le 18 janvier 2005 (la «requête»)[1],

VU

i. La réponse du Procureur à la requête d'Arsène Shalom Ntahobali en séparation de procès, déposée le 24 janvier 2005 (la réponse du Procureur) ;

ii. La réponse de Kanyabashi à la requête d'Arsène Shalom Ntahobali en séparation de procès, déposée le 24 janvier 2005 (la réponse de Kanyabashi)[2] ;

[1] La requête a été déposée en français sous le titre «Requête d'Arsène Shalom Ntahobali en séparation de Procès».

[2] La réponse de Kanyabashi a été déposée en français sous le titre «Réponse de Joseph Kanyabashi à la requête d'Arsène Shalom Ntahobali en séparation de procès».

iii. Nsabimana's Response to Arsène Shalom Ntahobali's Motion for Separate Trial, filed on 26 January 2005 ("Nsabimana's Response")[3];

iv. Ntahobali's Reply to the Prosecutor's Response to Arsène Shalom Ntahobali's Request for a Separate Trial, filed on 31 January 2005 ("Ntahobali's Reply to the Prosecution")[4];

v. Ntahobali's Reply to Kanyabashi's and Nsabimana's Responses to Arsène Shalom Ntahobali's Motion for Separate Trial, filed on 31 January 2005 ("Ntahobali's Reply to Kanyabashi's and Nsabimana's Responses")[5];

NOTING the "Decision on Prosecutor's Motion for Joinder of Trials" rendered on 5 October 1999 in the present case (the "Joinder Decision");

NOTING FURTHER the Oral Ruling of 18 October 2004 on the order of presentation of the Defence cases (the "Oral Ruling of 18 October 2004")[6];

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the written submissions of the Parties.

## Submissions of the Parties

*Ntahobali's Motion*

1. The Defence for Ntahobali reminds the Chamber that the order of presentation of the Defence case was decided on 18 October 2004 and that it was ruled that the Defence for Ntahobali should present its case in the second place, after the presentation of Nyiramasuhuko's Defence.

2. The Defence submits that the Pre-Defence Briefs filed by the various Defence teams reveal a conflict of interests which is a new fact that substantially prejudices the Accused Ntahobali's right.

3. The Defence submits that pursuant to Rule 82 (A), in joint trials, each accused shall be accorded the same rights as if he were being tried separately and that, in accordance with Rule 82 (B), the Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

4. The Defence submits that the Motion is not grounded on the risk of contamination of evidence, because the bench is composed of professional judges who can deal

[3] Nsabimana's Response was filed in French and entitled "*Réponse de Sylvain Nsabimana à la Requête d'Arsène Shalom Ntahobali en séparation de procès*".

[4] Ntahobali's Response to the Prosecution was filed in French and entitled "*Réplique à la* 'Prosecutor's Response to Arsène Shalom Ntahobali's Request for a Separate Trial'".

[5] Ntahobali's Reply to Kanyabashi's and Nsabimana's Responses was filed in French and entitled "Réplique aux Réponses de Joseph Kanyabashi et Sylvain Nsabimana à la Requête de Arsène Shalom Ntahobali en separation de procès".

[6] T. 18 October 2004, p. 16 (ICS).

iii. La réponse de Nsabimana a la requête d'Arséne Shalom Ntahobali en séparation de procès, déposée le 26 janvier 2005 (la réponse de Nsabimana)[3];

iv. La réplique de Ntahobali à la réponse d'Arsène Shalom en séparation de procès, déposée le 31 janvier 2005 (la réplique de Ntahobali au Procureur[4]);

v. La réplique de Ntahobali aux réponses de Kanyabashi et de Nsabimana à la requête d'Arsène Shalom Ntahobali en séparation de procès (la réplique de Ntahobali aux réponses de Kanyabashi et de Nsabimana)[5];

VU la décision relative à la requête du Procureur en jonction d'instances rendue le 5 octobre 1999 en la présente espèce (la décision de jonction);

Vu en outre la décision orale du 18 octobre 2004 relative à l'ordre de présentation des moyens de la Défense (la décision orale du 18 octobre 2004)[6];

Vu le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»);

STATUANT sur la seule base des mémoires des parties, conformément à l'article 73 *bis,*

**Mémoires des parties**

*La requête de Ntahobali*

1. La Défense de Ntahobali rappelle à la Chambre que l'ordre de présentation des moyens de la défense a été arrêté le 18 octobre 2004 et qu'il avait été décidé que la Défense de Ntahobali présenterait ses moyens de preuve en deuxième position, soit après la Défense de Nyirarnasuhuko.

2. La Défense fait valoir que les mémoires préalables, déposés par les différentes équipes de Défense font apparaître un conflit d'intérêts, ce qui constitue un nouvel élément susceptible de porter gravement atteinte aux droits de Ntahobali.

3. Conformément à l'article 82 (A), en cas d'instances jointes, chaque accusé a les mêmes droits que s'il était jugé séparément; la Chambre de première instance peut, conformément A l'article 82 (B) ordonner un procès séparé pour des accusés dont les instances ont été jointes en application de l'article 48, pour éviter tout conflit d'intérêts de nature à causer un préjudice grave à un accusé, ou pour sauvegarder l'intérêt de la justice.

4. Affirmant que sa requête n'est pas fondée sur le risque d'altération de témoignages, le collège de juges étant composé de professionnels capables de faire la part

[3] La réponse de Nsabimana a été déposée en français sous le titre «Réponse de Sylvain Nsabimana à la requête d'Arsène Shalom Ntahobali en séparation de procès».

[4] La réplique de Ntahobali au Procureur a été déposée en français sous le titre «Réplique à la *Prosecutor's Respome to Arsène Shalom Ntahobali's Request for a Separate Trial*».

[5] La réplique de Ntahobali aux réponses de Kanyabashi et de Nsabimana a été déposée en français sous le titre «Réplique aux réponses de Joseph Kanyabashi et de Sylvain Nsabimana à la requête d'Arsène Shalom Ntahobali en séparation de procès».

[6] Compte-rendu de l'audience à huis clos du 18 octobre 2004, p. 17.

with such a risk. The Defence further submits that motions for severance of trial may be filed at any time, when one of the criteria for severance has been met.

5. The Defence relies on the jurisprudence to submit that the advantages of a joint trial must be balanced against the rights of the accused to a trial without undue delay and any other prejudice to the accused that may be caused by joinder.

6. According to that jurisprudence, the Defence submits that it is sufficient to demonstrate either the existence of a conflict of interests that might cause a serious prejudice to the Accused, or that the interest of justice requires a separate trial. The Defence submits that during the presentation of the Prosecution Case, it became obvious that the Defence strategy of some Accused was contradictory to that of Ntahobali : their Defence strategy was reproving the *Interahamwe* and, consequently, Ntahobali. The Pre-Defence Briefs filed by Kanyabashi and Nsabimana confirmed this orientation :

- Kanyabashi lists Defence Witness SW, who was formerly on the Prosecution list of Witnesses, before the Prosecution dropped him from their list. It appears from the statement of SW of 15-17 November 1995 that his testimony incriminates Ntahobali.
- Kanyabashi is also planning to call agents of African Rights to testify on words they heard about some Prosecution Witnesses. According to publications by African Rights, the appearance of those agents may be the occasion of new allegations against Ntahobali. This would cause a serious prejudice to Ntahobali who will have ended the presentation of his case by the time Kanyabashi presents his case. That means that Ntahobali will be obliged to request leave to call additional Defence witnesses in rebuttal.
- Kanyabashi intends to call several witnesses implicating the *Interahamwe* in massacres in Butare.
- There is a high probability that Kanyabashi and Nsabimana will call previous Prosecution Witnesses who were withdrawn from its list. The Defence for Ntahobali will only be informed that they were previously on the Prosecution list when they testify.
- Nsabimana Defence Witnesses IBO, LALA and BUBU will also testify on the responsibility of the *Interahamwe*.
- Accused Nsabimana himself will testify on his relationship with the *Interahamwe*.
- Defence for Nsabimana have also indicated their intention to rely on documentary evidence that would incriminate Ntahobali : those documents were known previously but were not filed as evidence.

7. The Defence for Ntahobali submits that, as opposed to the Defence for the other accused, it will neither be aware of the totality of the acts he is charged with, nor have the facilities to prepare its case and to conduct investigations in order to rebut the allegations against the Accused. Therefore, the Defence submits that a conflict of interests has arisen in the strategy of the various Defence teams, which may cause a serious prejudice to the Accused. This situation is similar to the situation where Ntahobali would have been obliged to present his case in the middle of the Prosecution Case and compromises the right of the Accused to have a full defence, his right to equality before the Tribunal, his right to be informed of the charges against him and his right to have sufficient time and facilities for the presentation of his case.

des choses; la Défense fait valoir qu'une requête en disjonction d'instances peut être déposée dès lors qu'une des conditions requises est remplie.

5. La Défense se fonde sur la jurisprudence pour soutenir que les avantages d'une jonction d'instances doivent être mesurés au regard du droit de l'accusé à être jugé sans retard excessif et de tout autre préjudice qui pourrait en résulter pour l'accusé.

6. Il ressort de ladite jurisprudence qu'il suffit de démontrer qu'il existe un conflit d'intérêts de nature à causer un grave préjudice à l'accusé, ou que l'intérêt de la justice commande la disjonction. Lors de la présentation de la preuve par le Procureur, il est devenu manifeste que la stratégie de certains accusés contredit celle de Ntahobali : cette stratégie consiste à charger les *Interahamwe* et donc Ntahobali : les mémoires préalables déposés par Kanyabashi et Nsabimana ont confirmé cette orientation :

- Kanyabashi cite le témoin à décharge SW, qui avait figuré sur la liste des témoins à charge, avant d'en être écarté par le Procureur. Il appert de la déclaration de SW datée des 15 à 17 novembre 1995 que son témoignage incrimine Ntahobali.

- Kanyabashi entend également citer des employés d'African Rights pour qu'ils témoignent sur des propos qu'ils auraient entendus concernant certains témoins à charge. Selon les publications d'African Rights, la comparution de ces employés pourraient être l'occasion porter de nouvelles allégations contre Ntahobali. Cela causerait un immense préjudice à Ntahobali, dont la présentation des moyens de défense sera terminée lorsque Kanyabashi aura à présenter les siens. Autrement dit, Ntahobali sera obligé de demander l'autorisation d'appeler de nouveaux témoins à décharge en duplique.
- Kanyabashi entend citer plusieurs témoins qui impliqueront les *Interahamwe* dans les massacres de Butare.
- Il y a de fortes chances que Kanyabashi et Nsabimana citent des témoins qui ont été écartés de la liste du Procureur. La Défense de Ntahobali n'en sera informée qu'au moment de leur comparution.
- Les témoins à décharge de Nsabimana, soit les témoins IBO, LALA et BUBU, témoigneront également au sujet de la responsabilité des *Interahamwe*.
- L'accusé Nsabimana témoignera lui-même sur ses relations avec les *Interahamwe*.
- La Défense de Nsabimana a également indiqué son intention d'exploiter des preuves documentaires qui incriminent Ntahobali. Ces documents étaient connus, sans avoir été admis en preuve.

7. Contrairement aux autres accusés, Ntahobali ne sera pas informé de la totalité des infractions qui lui sont reprochées et n'aura pas la possibilité de bien préparer sa défense et de mener des enquêtes visant à réfuter les allégations retenues contre lui. Aussi, sa Défense soutient-elle qu'un conflit d'intérêts est apparu dans la stratégie des diverses équipes de défense, qui pourrait causer un préjudice grave à l'accusé. C'est un peu comme si Ntahobali était obligé de présenter ses moyens de défense à michemin de la présentation des moyens du Procureur. Une telle situation compromet le droit de l'accusé à une défense pleine et entière, son droit à l'égalité des armes devant le Tribunal, son droit à être informé des charges retenues contre lui et son droit à disposer du temps et des moyens nécessaires pour présenter ses moyens.

8. The Defence submits that, even if Ntahobali is allowed to rebut new evidence against him, this would not cure the prejudice : Ntahobali would have prepared his Defence Case and designed his strategy without being informed of the totality of the charges against him. This situation would also lengthen the duration of the trial.

9. The Defence submits that this situation would also violate the equality between co-accused enshrined in Rule 82 (A). If the Accused was tried alone, he would be completely informed of the evidence against him. Additional evidence, such as the evidence brought by Kanyabashi and Nsabimana, would not be brought against Ntahobali if he was tried alone.

10. The Defence also submits that the requested severance would be in the interests of justice. The conflict of interests jeopardizes the right of Ntahobali to have a fair trial. Moreover, the joinder has considerably lengthened the duration of the Trial and aggravated the complexity of the case. In the current situation, Ntahobali will have to present his case twice, once after the Prosecution Case and a second time after the Kanyabashi and Nsabimana Defence cases.

11. The Defence submits that, if the severance is granted, Ntahobali accepts to have his trial continued at the current stage. He also accepts that his separate trial be resumed at any time the judges will find appropriate.

12. The Defence concludes that two solutions are possible to avoid the prejudice that is described :

- To put off the presentation of Ntahobali's case to follow the presentation of Nsabimana's and Kanyabashi's cases. However, this solution would not solve the problems of the duration of trial and it would still cause prejudice to the Defence. But this prejudice would be less serious. Ntahobali's Defence does not lay accusations at Kanyabashi and Nsabimana : therefore, those co-accused would suffer no prejudice.
- To order the severance and the continuation of Ntahobali's trial as soon as possible.

*Prosecutor's Response*

13. The Prosecution submits that the Defence does not provide sufficient legal basis for severance. The Pre-Defence Briefs of the co-accused do not contain substantially new information or evidence that should not have been anticipated by the Defence of Ntahobali prior to the close of the Prosecution case.

14. The Prosecution submits that the alleged criminal acts, including the Conspiracy to commit genocide, were undertaken in furtherance of a single and common enterprise. It is still in the public interest for the six accused to be tried jointly. The Prosecution reiterates the submissions it made in its initial application for joinder of the accused on 17 August 1998 which was granted by the Trial Chamber on 5 October 1999.

15. The Prosecution submits that a severance at this stage of the proceedings is likely to result in delay. The issue of the right to be tried without undue delay, as mentioned by the Defence, is inapplicable here since the Prosecution has closed its case and the time table for the presentation of the Defence case has been set. The Pros-

8. La Défense soutient que, même si Ntahobali était autorisé à réfuter les nouvelles allégations portées contre lui, le préjudice ne s'en trouverait pas réparé, puisqu'il aurait eu à préparer sa défense et sa stratégie sans avoir été informé de tous les faits qui lui sont reprochés. Le procès risquerait de s'en trouver prolongé.

9. La Défense fait valoir que cette situation porte également atteinte au principe de l'égalité entre coaccusés tel qu'il est énoncé à l'article 82 (A). Si l'accusé avait été jugé seul, il aurait été informé de toutes les charges retenues contre lui. De nouveaux éléments à charge, comme ceux apportés par Kanyabashi et Nsabimana, n'auraient pas été produits contre Ntahobali s'il avait été jugé seul.

10. La Défense soutient par ailleurs que la disjonction sollicitée servirait l'intérêt de la justice. Le conflit d'intérêts compromet le droit de Ntahobali à un procès équitable. De plus, la jonction a considérablement rallongé le procès et ajouté à la complexité de l'affaire. Dans la situation actuelle, Ntahobali devra présenter sa défense à deux reprises, une première fois après que le Procureur aura présenté ses moyens et une seconde après que Kanyabashi et Nsabimana auront présenté les leurs.

11. Au cas où la disjonction serait ordonnée, Ntahobali accepterait que son procès se poursuive à partir du stade où il se trouve actuellement. Il accepterait également que son procès séparé reprenne au moment où en décideraient les juges.

12. Selon la Défense, deux solutions sont possibles pour éviter le préjudice :

– différer la présentation des moyens de Ntahobali de manière qu'elle ait lieu après la présentation des moyens de Nsabimana et de Kanyabashi. Toutefois, cette solution ne réglera pas le problème de l'allégement du procès et causera toujours un préjudice à l'accusé, quoique moins grave. Comme la Défense de Ntahobali ne porte pas d'accusations contre Kanyabashi et Nsabimana, les coaccusés ne subiraient aucun préjudice.
– ordonner la disjonction d'instances et la continuation du procès de Ntahobali dans les meilleurs délais.

*Réponse du Procureur*

13. Le Procureur soutient que la Défense n'a pas fourni une base légale suffisante pour justifier la disjonction. Les mémoires préalables de la défense des coaccusés ne contiennent aucune information ou preuve essentiellement nouvelle qui n'aurait pu être anticipée par la Défense de Ntahobali avant la fin de la présentation de la thèse du Procureur.

14. Les actes criminels, dont l'entente en vue de commettre le génocide, ont été perpétrés dans le cadre d'une entreprise unique et commune. L'intérêt public veut que les Six accusés soient jugés conjointement. Le Procureur réitère les observations qu'il a faites le 17 août 1998, dans sa requête initiale aux fins de la jonction d'instances à laquelle la Chambre de première instance a fait droit le 5 octobre 1999.

15. Une disjonction d'instances à ce stade de la procédure serait susceptible d'entraîner des retards. La question du droit à être jugé sans retard excessif, que mentionne la Défense, ne se pose pas en l'espèce, puisque le Procureur a terminé la présentation de sa preuve et que l'ordre de présentation de la preuve de la Défense a été arrêté. La

ecution submits that the *Kovacevic* Decision on which the Defence relies[7] was rendered before the end of the Prosecution case and that this distinction is fundamental.

16. The Prosecution relies on several decisions rendered by the ICTY and domestic courts to sustain that the arguments advanced by the Defence for Ntahobali do not render the severance necessary. The Prosecution submits that Counsel for Ntahobali will be given full opportunity to cross-examine the witnesses called by his co-accused.

17. As regards the option to reorder the sequence of the Defence so that Ntahobali presents his Defence after the Defence for Kanyabashi and Nsabimana, the Prosecution admits that it is at the Chamber's discretion, but submits that there is no compelling reason to alter the established sequence.

18. The Prosecution therefore prays the Chamber to dismiss the Motion.

*Kanyabashi's Response*

19. The Defence for Kanyabashi leaves the issue of severance at the Chamber's discretion but submits that the Motion itself recognises that this issue is not new and that the Chamber was therefore aware of that problem when ruling on 18 October 2004 on the order of presentation of the Defence cases. The Defence for Kanyabashi submits that this Motion is an attempt to relitigate the Oral ruling of 18 October 2004.

20. Therefore, the Defence for Kanyabashi prays the Chamber to dismiss the request that Kanyabashi present his case before Ntahobali.

*Nsabimana's Response*

21. The Defence for Nsabimana leaves the issue of severance at the Chamber's discretion.

22. As regards the order of presentation of the Defence cases, the Defence for Nsabimana submits that the Motion is an attempt to relitigate the Oral ruling of 18 October 2004. The Defence for Nsabimana submits that the allegation that its witnesses may reprove Ntahobali is not founded. Defence for Ntahobali cannot make presumptions about Nsabimana's Defence strategy solely on the basis of his Pre-Defence Brief. Nsabimana's case has not started yet and it is too early to say that Ntahobali will be prejudiced as a result of how Nsabimana conducts his case. The Defence for Nsabimana submits that the Motion is therefore premature.

23. Consequently, the Defence for Nsabimana prays the Chamber to dismiss the request to alter the order of presentation of the Defence cases.

*Ntahobali's Reply to the Prosecution*

24. The Defence reiterates the prejudices caused to Ntahobali by the joinder and submits that, pursuant to Rule 82 (B), the onus is limited to the demonstration that he may be prejudiced.

[7] ICTY, *Prosecutor v. Kovacevic and Drljaca*, Case N° IT-97-24-I, Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998.

décision *Kovacevic* qu'invoque la Défense[7] a été rendue avant la fin de la preuve du Procureur, ce qui constitue une différence fondamentale avec le présent cas.

16. Le Procureur invoque plusieurs décisions du TPIY et de certaines juridictions nationales pour infirmer les arguments développés par la Défense de Ntahobali. Il soutient que le conseil de Ntahobali aura la possibilité de contre-interroger les témoins cités par ses coaccusés.

17. En ce qui concerne la modification de l'ordre de présentation des moyens à décharge pour que Ntahobali présente sa défense après Kanyabashi et Nsabimana, le Procureur reconnaît que cette décision relève de la seule discrétion de la Chambre, mais estime qu'il n'existe aucune raison impérieuse justifiant une telle modification.

18. En conséquence, le Procureur prie la Chambre de rejeter la requête.

*Réponse de Kanyabashi*

19. Le conseil de Kanyabashi s'en remet à la discrétion de la Chambre pour ce qui est de la disjonction d'instances, mais fait observer que le conseil de Ntahobali reconnaît lui-même que ce problème ne date pas d'aujourd'hui et que la Chambre en était déjà informée lorsqu'elle a rendu sa décision du 18 octobre 2004 concernant l'ordre de présentation des moyens de preuve à décharge. Il soutient que cette requête est une tentative de contester à nouveau la décision orale du 18 octobre 2004.

20. En conséquence, le conseil de Kanyabashi prie la Chambre de rejeter la demande tendant à ce que Kanyabashi présente ses moyens de défense avant Ntahobali

*Réponse de Nsabimana*

21. Le conseil de Nsabimana s'en remet à la discrétion de la Chambre pour ce qui est de la disjonction d'instances.

22. S'agissant de l'ordre de présentation des moyens a décharge, il soutient que la requête est une tentative de contester à nouveau la décision orale du 18 octobre 2004. Les allégations selon lesquelles ses témoins pourraient incriminer Ntahobali ne sont pas fondées. Le conseil de Ntahobali ne saurait préjuger de la stratégie de défense de Nsabimana sur la seule base du mémoire préalable de ce dernier. La présentation des moyens de Nsabimana n'a pas encore commencé et il serait prématuré d'affirmer que Ntahobali subirait un préjudice du fait de la manière dont ces moyens seront présentés. La requête de Ntahobali est donc prématurée.

23. En conséquence, le conseil de Nsabimana prie la Chambre de rejeter la requête aux fins de modifier l'ordre de présentation des moyens à décharge.

*Réplique de Ntahobali au Procureur*

24. La Défense réitère les préjudices causés à Ntahobali du fait de la jonction d'instances et soutient que, conformément à l'article 82 (B), il lui incombe seulement de démontrer qu'il pourrait subir un préjudice.

[7] TPIY, le *Procureur c. Kovacevic et Drljaca,* affaire n° IT-97-24-1, Décision relative à la requête de jonction d'instances et à la présentation simultanée des éléments de preuve, 14 mai 1998.

25. The Defence repeats that the recall of witnesses after the presentation of Nsabimana's and Kanyabashi's cases will automatically cause new delays that could be avoided by a severance. On the other hand, the Defence does not understand how the severance of the case could cause additional delays, the time of presentation of the Defence case remaining the same.

26. The Defence submits that the stage at which the Motion for severance is made does not change the applicable law. Rule 82 (B) does not specify when such a motion can be made.

27. The Defence submits that the severance will minimize hardship caused to the witnesses and is in the interest of judicial economy, by avoiding the recall of Ntahobali Defence witnesses in rebuttal after the close of the Nsabimana's and Kanyabashi's cases.

28. The Defence submits that the opportunity to cross-examine the witnesses called by its co-accused does not counterbalance the prejudice resulting to Ntahobali's right to have a full defence. Ntahobali must be given the opportunity to be informed in advance of the evidence against him and to call witnesses to challenge the allegations of Nsabimana and Kanyabashi witnesses.

*Ntahobali's Reply to Nsabimana and Kanyabashi*

29. The Defence for Ntahobali submits that the issue of conflict of interests was raised prior to the 18 October 2004 Oral ruling, by Counsel for Nyiramasuhuko only and did not concern Ntahobali. This Motion was therefore never ruled upon by the Chamber. The Defence for Ntahobali further recalls that the Chamber decided that in the event of any difficulties in the course of the proceedings, appropriate measures would be taken to deal with such difficulties.

30. The Defence for Ntahobali submits that the right to cross-examine Nsabimana and Kanyabashi witnesses can in no way remedy the prejudice caused to him if he is not given the opportunity to call witnesses in rebuttal.

## Deliberations

*On the Issue of Severance*

31. In accordance with Rule 82 (B), a

> "Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice".

32. The Chamber recalls that the jurisprudence on Rule 82 (B) shows that the Chamber has a discretionary power to order a separate trial. The Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY) ruled in its Decision on Request to Appeal rendered in *Prosecutor v. Brdanin and Talic*, on 16 May 2000 that[8] :

[8] ICTY, *Prosecutor v. Brdanin and Talic*, Case N° IT-99-36-I, Decision on Request to Appeal (AC), 16 May 2000.

25. Elle réaffirme que le rappel de témoins après la présentation des moyens de Nsabirnana et de Kanyabashi entraînerait forcément de nouveaux retards qui pourraient être évités si les instances étaient disjointes. De plus, elle comprend mal que la disjonction puisse occasionner d'autres retards, le temps imparti pour la présentation des moyens à décharge restant inchangé.

26. La Défense soutient que le moment où la requête aux fins de disjonction est formée ne change pas le droit applicable. L'article 82 (B) ne précise pas quand une telle requête peut être introduite.

27. La Défense soutient qu'une disjonction d'instances causerait moins de désagréments aux témoins et favoriserait l'économie judiciaire, puisqu'elle permettrait d'éviter le rappel des témoins à décharge de Ntahobali en réplique après la présentation des moyens de Nsabimana et de Kanyabashi.

28. La Défense soutient que la possibilité de contre-interroger les témoins cités par ses coaccusés ne contrebalancerait pas le préjudice subi par Ntahobali s'agissant de son droit à une défense pleine et entière. Ntahobali doit être informé à l'avance des charges qui pèsent sur lui et être en mesure de citer des témoins pour réfuter les allégations des témoins de Nsabimana et de Kanyabashi.

*Réplique de Ntahobali à Nsabimana et Kanyabashi*

29. Le conseil de Ntahobali rappelle que la question du conflit d'intérêts a été soulevée par le conseil de Nyiramasuhuko avant la décision orale du 18 octobre 2004 et ne concernait pas Ntahobali; sa requête n'a donc jamais été examinée par la Chambre. Il rappelle en outre que la Chambre avait décidé qu'au cas où des difficultés surgiraient au cours de la procédure, les mesures voulues seraient prises pour y remédier.

30. Le conseil de Ntahobali fait valoir que le droit de contre-interroger les témoins de Nsabimana et de Kanyabashi ne saurait en aucune manière réparer le préjudice causé s'il n'était pas autorisé à appeler des témoins en duplique.

## Délibération

*Sur la question de la disjonction*

31. Aux termes de l'article 82 (B), une

> «Chambre de première instance peut ordonner un procès séparé pour des accusés dont les instances avaient été jointes en application de l'article 48, pour éviter tout conflit d'intérêts de nature à causer un préjudice grave à un accusé, ou pour sauvegarder l'intérêt de la justice».

32. La Chambre rappelle que la jurisprudence relative à l'article 82 (B) montre bien qu'elle use de son pouvoir discrétionnaire pour ordonner un procès séparé. La Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a estimé, dans sa décision du 16 mai 2000 sur la demande d'interjeter appel dans l'affaire *Le Procureur c. Brdanin et Talić,* que[8] :

[8] TPIY, *Le Procureur c. Brdanin et Talić,* affaire n° IT-99-36-1, Décision relative à la demande d'interjeter appel (Chambre d'appel), 16 mai 2000.

> [S]ub-Rule 82 (B) is permissive rather than obligatory, thus leaving to the relevant Trial Chamber the power to determine the matter of separate trials in the circumstances of the case before it.

33. It results from Rule 82 (B) that the moving Party requesting the severance has to demonstrate the existence of a conflict of interests of such a nature as might cause serious prejudice to an accused or that the interests of justice are compromised.

34. The Chamber notes the Defence submission that it appears from the Pre-Defence Briefs filed by co-accused Joseph Kanyabashi and Sylvain Nsabimana that their defence strategies would implicate Arsène Shalom Ntahobali, as member of the *Interahamwe*. Consequently, the Defence submits that there is a conflict of interests between Arsène Shalom Ntahobali and his co-accused, which may cause a serious prejudice to its defence. According to the order of presentation of the Defence cases as decided in the Oral Ruling of 18 October 2004, Arsène Shalom Ntahobali is to present his case before Joseph Kanyabashi and Sylvain Nsabimana and will not be aware of the incriminating evidence that Kanyabashi and Nsabimana may bring against him. According to the Defence, this situation prejudices Ntahobali's right to a fair trial and to be informed of the evidence against him before the presentation of his case.

35. The Chamber notes the ICTY Trial Chamber's ruling in *Prosecutor v. Brdanin and Talic* in the "Decision on Motions by Momir Talic for Separate Trial and for Leave to File a Reply" of 9 March 2000[9] :

> Nor does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdanin may give evidence which incriminates Talic or that Talic will be unable, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed. A joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the "personal interest" which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the "right" asserted by Talic here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which Rule 82 (C) is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary.

36. It is the Chamber's view that this decision, which was upheld by the ICTY Appeals Chamber[10], is consistent with the jurisprudence of some domestic courts in relevant respects. In *R. v. Crawford*, for instance, the Supreme Court of Canada held that the use of an antagonistic defence is not sufficient to compel the severance of a joint trial[11] :

---

[9] ICTY, *Prosecutor v. Brdanin and Talic,* Case N° IT-99-36-I, Decision on Motions by Momir Talic for separate Trial and for Leave to file a Reply (TC), 9 March 2000, para. 29.

[10] ICTY, *Prosecutor v. Brdanin and Talic*, Case N° IT-99-36-I, Decision on Request to Appeal (AC), 16 May 2000, *op. cit.*

[11] Canada, *R. v. Crawford*, 1995 Can. Sup. Ct. LEXIS 8.

> «L'article 82 (B) a valeur facultative plutôt que contraignante et laisse donc à la Chambre de première instance concernée le pouvoir de statuer sur la question des disjonctions d'instance en fonction des circonstances particulières de chaque affaire.»

33. Il découle de l'article 82 (B) que la partie qui sollicite la disjonction doit apporter la preuve qu'il existe un conflit d'intérêts de nature à causer un préjudice grave à un accusé ou que l'intérêt de la justice est compromis.

34. La Chambre note l'argument de la Défense selon lequel il ressort des mémoires préalables déposés par les coaccusés Joseph Kanyabashi et Sylvain Nsabimana que leur stratégie de défense impliqueraient Arsène Shalom Ntahobali en tant que membre des *Interahamwe*. De ce fait, il y avait entre Arsène Shalom Ntahobali et ses coaccusés un conflit d'intérêts susceptible de lui causer un préjudice grave. Selon l'ordre de présentation des moyens de preuve à décharge fixé dans la décision orale du 18 octobre 2004, Arsène Shalom Ntahobali doit présenter ses moyens avant Joseph Kanyabashi et Sylvain Nsabimana et ne sera pas informé des éléments à charge que Kanyabashi et Nsabimana pourraient apporter contre lui. Selon la Défense, cette situation porte atteinte au droit de Ntahobali à un procès équitable et à son droit d'être informé de tous les éléments qui l'incriminent avant la présentation de ses moyens.

35. La Chambre prend note de la décision de la Chambre de première instance du TPIY dans l'affaire *le Procureur c. Brdanin et Talić* concernant la «Requête de Momir Talić aux fins de la disjonction d'instances et aux fins d'autorisation de dépôt d'une réplique» en date du 9 mars 2000[9].

> La Chambre de première instance ne pense pas non plus qu'un préjudice grave puisse découler de l'éventualité que Brdanin incrimine Talić ou que Talić ne puisse, sans crainte d'être contredit, blâmer Brdanin ou d'autres pour les ordres dont l'accusation pourrait établir qu'il les a suivis. Une jonction d'instances ne signifie pas nécessairement une défense conjointe et, bien entendu, il est toujours possible que chaque accusé cherche à reporter le blâme sur l'autre. Dans ce cas, la Chambre de première instance reste très consciente de «l'intérêt» personnel de chacun des accusés. Tout préjudice qui découlerait pour l'un des accusés de la privation du «droit» auquel prétend Talić, en l'espèce, à être jugé sans que son coaccusé témoigne contre lui ne fait pas partie de la catégorie des préjudices graves visés par l'article 82 (C). Selon la Chambre, on peut certes imaginer que, dans certains cas, le conflit soit tel qu'une instance jointe serait injuste pour l'un des accusés, mais il faudrait pour cela réunir des circonstances extraordinaires.

36. La Chambre estime que cette décision, confirmée par la Chambre d'appel du TPIY[10], est conforme à la jurisprudence de certains tribunaux nationaux dans des affaires similaires. Dans l'affaire *R. c. Crawford,* par exemple, la Cour suprême du Canada a estimé que le recours à une défense antagoniste ne suffit pas pour que la disjonction d'instances soit ordonnée[11] :

---

[9] TPIY, *Le Procureur c. Brdanin et Talić,* affaire n° IT-99-36-1, Décision relative à la requête de Momir Talić aux fins de la disjonction d'instances et aux fins de dépôt d'une réplique (Chambre de première instance), 9 mars 2000, para. 29.

[10] TPIY, *Le Procureur c. Brdanin et Talić,* affaire n° IT-99-364, Décision relative à la demande d'interjeter appel (Chambre d'appel), 16 mai 2000, *op. cit.*

[11] Canada, *R. c. Crawford,* 1995 Can. Sup. Ct Lexis 8.

> There exist […] strong policy reasons for accused persons charged with offences arising out of the same event or series of events to be tried jointly. The policy reasons apply with equal or greater force when each accused blames the other or others, a situation which is graphically labelled a "cut-throat defence". Separate trials in these situations create a risk of inconsistent verdicts […]
>
> Although the trial judge has a discretion to order separate trials, that discretion must be exercised on the basis of principles of law which include the instruction that severance is not to be ordered unless it is established that a joint trial will work an injustice to the accused. The mere fact that a co-accused is waging a "cut-throat" defence is not in itself sufficient.

37. Similarly, in *R. v. Cairns, Zaidi and Chaudhary*, the Court of Appeal of England wrote[12] :

> Of course the trial court has a discretion to be exercised in the interests of justice. But the fact that one defendant is likely to give evidence adverse to a co-defendant, after that co-defendant has given evidence, will not of itself normally require separate trials. It is, after all, a feature of trials where cut-throat defences are being run, a common enough experience of the courts.

38. Furthermore, it has been observed in the decision of the Court of Appeals for the US First Circuit in *United States v. Talavera*, that severance is envisaged only to avoid a situation where the conflict of interests leaves a risk that a jury may confuse the responsibility of one co-accused with that of the other[13] :

> It is well settled that "antagonistic defences do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other". Severance is required only where the conflict is so prejudicial and the defences are so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

39. In consequence of the observation noted in the preceding paragraph, this Chamber observes as follows : First, the Chamber is composed of professional judges, who are aware that, pursuant to Rule 82 (A), each accused in a joint trial shall be accorded the same rights as if he or she were being tried separately. Second, as mentioned in the Oral Ruling of 18 October 2004, the Rules of Procedure and Evidence provide for several remedies, which are always available should any prejudice arise within the course of the trial[14]. In particular, the Defence has a full opportunity to cross-examine the witnesses called by other co-accused. And, where necessary and the legal requirements have been met, it may be open to a party to apply for leave to call additional evidence in rebuttal. Above all, the Chamber will always remain alive to the need for a fair trial with due considerations given to the rights of the accused within a

[12] United Kingdom, *R. v. Cairns, Zaidi and Chaudhary* [2003] 1 Cr.App.R. 38, CA.

[13] United States of America, Court of Appeals for the First Circuit, *United States v. Talavera*, 668 F.2d 625.

[14] T. 18 October 2004, p. 16 (ICS).

> Il existe cependant de solides raisons pour que les mêmes personnes accusées d'infractions qui découlent d'un même événement ou d'une série d'événements subissent leur procès conjointement. Ces raisons valent autant, sinon plus, lorsque chacun des coaccusés rejette le blâme sur l'autre, situation qualifiée de «défense traîtresse». La tenue de procès distincts en pareil cas fait couru le risque de verdicts contradictoires (…)
>
> Même si le juge du procès a le pouvoir discrétionnaire d'ordonner la tenue de procès distincts, il doit exercer ce pouvoir en tenant compte de principes juridiques, y compris celui voulant que la tenue de procès distincts ne soit ordonnée que s'il a établi qu'un procès conjoint causerait une injustice à l'accusé. Le seul fait qu'un coaccusé a recours à une défense «traîtresse» n'est pas suffisant pour cela.

37. De même, en l'affaire *R. c. Cairns, Zaidi et Chaudhary,* la Cour d'appel d'Angleterre a affirmé ce qui suit[12] :

> Le Tribunal de première instance doit bien entendu exercer son pouvoir discrétionnaire dans l'intérêt de la justice. Toutefois, le fait qu'il y a de fortes chances qu'un accusé cherche à incriminer son coaccusé après que celui-ci a déposé ne suffit pas en règle générale pour justifier une disjonction d'instances. Il s'agit, après tout, d'une caractéristique des procès où les accusés ont recours à une «défense traîtresse», cas de figure somme toute assez courant. [traduction]

38. De plus, dans l'affaire *Etats-Unis c. Talavera,* la Cour d'appel de la première circonscription a indiqué que la disjonction n'est envisagée que pour éviter que le conflit d'intérêts crée le risque de voir un jury confondre la responsabilité d'un coaccusé avec celle de l'autre[13] :

> Il est bien établi que «des défenses antagonistes ne suffisent pas en soi pour justifier une disjonction d'instances, même si les coaccusés sont hostiles et cherchent à se rejeter mutuellement la faute». La disjonction d'instances ne s'impose que lorsque le conflit d'intérêts est si préjudiciable et les lignes de défense si irréconciliables que le jury en conclura à tort que le conflit d'intérêts suffit pour prouver la culpabilité des deux coaccusés [traduction].

39. Étant donné le paragraphe précédent, la Chambre fait observer ce qui suit : tout d'abord, la Chambre est composée de juges professionnels, qui sont conscients de ce que, conformément à l'article 82 (A), en cas d'instances jointes, chaque accusé a les mêmes droits que s'il était jugé séparément. Ensuite, comme elle l'a indiqué dans sa décision du 18 octobre 2004, le Règlement de procédure et de preuve prévoit plusieurs recours, toujours disponibles en cas de préjudice causé à un accusé pendant le déroulement du procès[14]. En particulier, la Défense est en droit de contre-interroger les témoins cités par les coaccusés. Le cas échéant, et lorsque les conditions requises sont réunies, toute partie a la latitude de présenter des moyens de preuve supplémentaires en duplique. Enfin et surtout, la Chambre veillera toujours à ce que le procès soit équitable et respectueux des droits de chacun des accusés dans une instance

[12] Royaume-Uni, *R. c. Cairns, Zaidi et Chaudhary* [2003] 1 CR.App.R. 38, CA. [traduction]
[13] Etats-Unis d'Amérique, Cour d'appel de la première circonscription, *Etats-Unis c. Talavera,* 668 F.2d 625.
[14] Compte-rendu de l'audience à huis clos du 18 octobre 2004, p. 15.

joint trial, in order to ensure that he or she would not lose the rights that he or she would have if he or she was tried alone.

40. In view of all the foregoing, the Chamber is not satisfied that the Defence has demonstrated that there is a conflict of interests of such a nature as may cause serious prejudice to the Accused, or that it is otherwise in the interests of justice to order a severance.

*On the Issue of Re-Ordering the Sequence of Presentation of the Defence Case*

41. The Chamber reminds the Defence that this issue was previously raised and ruled upon orally during the Status Conference of 18 October 2004. The Chamber recalls that after hearing the submissions made by Counsel for Pauline Nyiramasuhuko on that issue[15], the Chamber heard additional submissions from Counsel for Arsène Shalom Ntahobali, who expressly mentioned the fear that the order of presentation of the Defence cases may cause a prejudice to the Accused[16]. The decision to maintain the order of presentation of Defence was rendered in this context.

42. The Chamber finds no compelling reason to vary the order of presentation of the cases for the Defence. It is therefore the view of the Chamber that the prayer to re-order the presentation of the defence case has already been ruled upon and may not now be reopened.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 2 February 2005.

[Signed] : William H. Sekule; Arlette Ramaroson ; Solomy Balungi Bossa

***

[15] T. 18 October 2004, pp. 13-14 (ICS).
[16] T. 18 October 2004, p. 15 (ICS).

jointe, de manière qu'aucun des coaccusés ne perde des droits qui lui auraient été garantis s'il avait été jugé séparément.

40. Au regard de ce qui précède, la Chambre n'est pas convaincue que la Défense a démontré l'existence d'un conflit d'intérêts susceptible de causer un préjudice grave à l'accusé ou que l'intérêt de la justice commande une disjonction d'instances.

*Sur la question de la fixation d'un nouvel ordre de présentation de moyens de preuve à décharge*

41. La Chambre rappelle à la Défense que la question a déjà été soulevée et qu'une décision orale a été rendue lors de la conférence de mise en état le 18 octobre 2004. Elle rappelle aussi qu'après avoir examiné les conclusions du conseil de Pauline Nyiramasuhuko sur la question[15], elle a entendu les conclusions supplémentaires du conseil d'Arsène Shalom Ntahobali, qui a expressément indiqué qu'il craignait de voir l'ordre de présentation des moyens de la Défense causer un préjudice à l'accusé[16]. C'est dans ce contexte que la décision de maintenir l'ordre de présentation des moyens à décharge de la Défense a été rendue.

42. La Chambre ne voit aucune raison impérieuse de modifier l'ordre de présentation des moyens à décharge. En conséquence, elle estime qu'une décision a été déjà rendue concernant la demande tendant à faire modifier l'ordre de présentation des moyens à décharge et que cette demande est donc sans objet.

Par ces motifs,

Rejette la requête dans son intégralité.

Arusha, le 2 février 2005.

[Signé] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

[15] *Ibid.*, pp. 14 et 15.
[16] *Ibid.*, p. 16.

## *Decision on Alphonse Nteziryayo's Request to meet witness FAT in the absence of the Prosecution 4 February 2005 (ICTR-97-29-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Alphonse Nteziryayo – Protection of witnesses, Meeting of witnesses in absence of the Prosecutor – Motion partially granted*

*International Instrument 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 William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa, (the "Chamber");

BEING SEIZED of the "*Requête afin d'être autorisé à recontrer le Témoin "FAT" hors la présence du Procureur"* filed on 2 December 2004[1];

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion solely on the basis of the written brief filed by the Defence pursuant to Rule 73 (A) of the Rules;

### Relief Sought

1. The Defence requests the Chamber to authorise it or one member of its team to meet Witness FAT in the absence of the Prosecution, subject to FAT's consent, and to the condition that the Defence shall respect all the measures of protection that may be in place for the witness.

2. The Defence further requests the Chamber to grant authorisation for it to meet other Prosecution witnesses in the absence of the Prosecution when the following conditions have been met :

1) The Prosecution specifically consents in writing to such a meeting;

2) The witness concerned has given his/her consent to meet with the Defence; and

[1] Attached to the Motion are two letters; the first from the Defence of Nteziryayo dated 24 November 2004 to the Prosecution on the subject of meeting Witness FAT and the second a Response to that Defence letter from the Prosecution dated 29 November 2004.

3) The Defence team undertakes to respect all the measures in place for the protection of the witness concerned.

**Submissions of the Defence**

3. The Defence argues that the Prosecution has agreed in writing in a letter dated 29 November 2004 (attached to the Motion), that the Defence may meet Witness FAT in the absence of the Prosecution provided that the witness agrees to such a meeting and that the Defence respect all the protective measures in place for the witness;

HAVING DELIBERATED

4. The Chamber recalls its "Decision on Joseph Kanyabashi's Request to Meet SW and FAT and All Other Persons Whose Identities Were Not Disclosed to the Defence", of 23 November 2004 (the "Kanyabashi Decision to Meet SW and FAT").

5. The Chamber notes that the Prosecution does not object to the Defence request to meet Witness FAT in the absence of the Prosecution and the Defence's undertaking to respect the orders for protection of witnesses.

6. Therefore, the Chamber grants the Defence request in part and authorises it to meet Witness FAT in the absence of the Prosecution provided that Witness FAT agrees to such a meeting and that the Defence undertakes to respect all protective measures in place for Witness FAT.

8*. Provided Witness FAT agrees to meet with the Defence, the Chamber instructs WVSS to make the necessary arrangements to facilitate such a meeting.

9. The Chamber denies the Defence's request for authorisation to meet other Prosecution witnesses in the absence of the Prosecution when the enumerated conditions have been met because such a request is speculative at this juncture.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Defence request in part and authorises it to meet with Witness FAT in the absence of the Prosecution provided that;

1. Witness FAT agrees to such a meeting; and

2. The Defence abides by its undertaking to respect the protective measures in place for witness FAT.

DIRECTS the WVSS to contact Witness FAT and determine whether he/she wishes to meet with the Defence, and, if so, to facilitate such a meeting.

DENIES the Defence Motion in all other respects.

Arusha, 4 February 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

* The wrong numbering of the paragraphs is due to an error of the Tribunal.

## *Decision on Prosecutor's Motion for certification to appeal the decision of the Trial Chamber dated 30 November 2004 on the Prosecution Motion for disclosure of Evidence of the Defence 4 February 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Certification to appeal a decision of the Trial Chamber, Motions without interlocutory appeal, Chamber's discretion to grant certification to appeal, Conditions to grant certification to appeal, Affect the fair and expeditious conduct of the proceeding, Affect the outcome of the trial, Condition of "immediate resolution by the Appeals Chamber as materially advance to the proceedings" – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 69, 73, 73 (A), 73 (B) and 75*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Ntahobali's and Nyiramasuhuko's Motion for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible', 18 March 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004 (ICTR-98-42)*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence" filed on 7 December 2004 (the "Motion");

CONSIDERING the

(i) "*Réponse à la Requête du Procureur intitulée* "Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence"' filed by Kanyabashi on 13 December 2004 ("Kanyabashi's Response");

(ii) "*Réponse de Sylvain Nsabimana à la Requête du Procureur en certification d'appel de la Décision de la Chambre II datée du 30 Novembre 2004*" filed by Nsabimana on 15 December 2004 ("Nsabimana's Response");

(iii) "Prosecutor's Reply to Defence Responses on Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence for the Defence" filed on 20 December 2004 (the "Prosecutor's Reply")

NOTING the Chamber's "Decision on the Prosecutor's Motion for Disclosure of Evidence for the Defence and Harmonization of Protective Measures for Victims and Witnesses" of 30 November 2004 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 69, 73 and 75 of the Rules;

CONSIDERING that pursuant to Rule 73 (A) of the Rules, the Motion will be decided on the basis of the written briefs only, as filed by the Parties.

## SUBMISSIONS OF THE PARTIES

*The Prosecutor's Submissions*

1. The Prosecutor moves under Rule 73 (B) for certification to appeal the Impugned Decision arguing that it involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

2. The Prosecution submits that it would be in the interests of judicial economy and for a smooth, fair and expeditious trial if the timeframes for disclosure of the identities of Defence witnesses would be modified to be 21 days before the commencement of the Defence case or any timeframe prior to the commencement of the Defence case rather than 21 days before the witness testifies. The Prosecution argues that because each trial session would involve the calling of various witnesses and because the Prosecution team would be fully engaged, it would not have adequate time and facilities to prepare for cross-examination. The Prosecution further argues that if disclosure of the identities of Defence witnesses is made before the Defence case, it would prevent a stalemate, incessant adjournments and a delay in the proceedings in the instances where particular witnesses are delayed because of illness, indisposition, unwillingness or reluctance to testify or unavailability.

*Kanyabashi's Response*

3. The Defence for Kanyabashi objects to the Motion on the basis that it does note meet the conditions required for certification under Rule 73 (B) as it was filed outside of the timeframes prescribed under the Rule.

4. Alternatively, the Defence argues that in its Motion, the Prosecution pleads fresh facts that were not invoked before the Chamber rendered the Impugned Decision. Moreover, the Defence argues that in its response to Nyiramasuhuko's Motion for Protective Measures, the Prosecution had requested that disclosures of the identities of witnesses be made at least 21 days before testimony. Consequently, the Prosecution cannot be heard to ask that the disclosure deadline be changed after having requested it. Finally, the Defence argues that the 18 October 2004 Oral Ruling is in conformity with previous Decisions on harmonization of protective measures rendered by the Chamber.

*Nsabimana's Response*

5. The Defence for Nsabimana submits that the Motion must fail because it does meet the criteria that would amount to an exception that would warrant certification rather the Motion amounts to a review of the Impugned Decision. Moreover, if the Chamber awaits the Appeals Chamber ruling, it would delay the trial against the Accused who has been in detention since July 1997.

6. The Defence further submits that the issue canvassed in the Motion was already decided upon on 18 October 2004 and that the Prosecution was reminded of this fact in the Impugned Decision. In rendering the Impugned Decision, the Chamber had considered the Parties' arguments before reaching the conclusion that there was no fresh circumstance that would warrant a revision of its Oral Ruling of 18 October 2004.

7. The Defence argues that reversing the Impugned Decision would adversely affect the preparation of the Defence, particularly as it would not have had the time to diligently disclose the said identities before commencement of the Defence case on 31 January 2005.

*Prosecution's Reply to Kanyabashi and Nsabimana*

8. The Prosecution submits that the Defence of Kanyabashi is mistaken in arguing that the instant Motion is filed out of time because it was filed within the prescribed seven day timeframe for filing Motions under Rule 73 (B). The Prosecution further argues that contrary to the Defence arguments, it has a right to submit fresh facts in support of its Motion in order to assist the Chamber in its consideration of the matters before it.

9. In reply to Nsabimana's submissions, the Prosecution argues that in the Motion that gave rise to the Impugned Decision, it had requested a review of the Chamber's Oral Ruling of 18 October 2004 and that in the instant Motion, it has satisfied the certification criteria. Contrary to the Defence arguments, the Prosecution argues that the requests will not violate the rights of the Defence since the Defence was directed in the Chamber's Oral Ruling of 18 October to file their Pre-Defence Briefs before the commencement of the Defence case and therefore, the Defence could similarly file the identities of their witnesses before the commencement of the Defence case.

HAVING DELIBERATED

10. The Chamber recalls Rule 73 (B), which stipulates :

> 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 trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. The Chamber notes that decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if

both conditions of Rule 73 (B) are satisfied. Under the first limb of Rule 73 (B), the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the Impugned Decision was rendered[1].

12. Having reviewed the submissions of the Parties, the Chamber is of the opinion that in its Motion, the Prosecution generally revisited the thrust of its previous arguments which led to the Impugned Decision rather than demonstrating the conditions required for the Chamber to grant certification to appeal the Impugned Decision. The Prosecution has therefore failed to satisfy the criteria for the grant of certification under Rule 73 (B).

13. The Chamber further notes that the Prosecution observed in their Reply that

> "[t]he purport of their motion was not to re-litigate issues already decided upon but to assert that the Trial Chamber's 18 October ruling gave the parties a window of opportunity to raise related disclosure issues subsequently for review and this is the opportunity the Prosecution is raising to have these disclosure dates harmonized"[2].

The Chamber finds that this Prosecution observation cannot be entertained as a subject matter for motions brought under Rule 73 (B). In any case, the Chamber notes that, as it indicated on 18 October 2004[3], the decision that the Defence discloses the identities of its witnesses to the Prosecution at least 21 days before they testify is a direction, which the Chamber may revisit on application from the Prosecution or any party after a showing of good cause.

14. Accordingly, the Chamber denies the Prosecution Motion for certification to appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for the Disclosure of Evidence for the Defence.

FOR THE ABOVE REASONS, THE TRIBUNAL,

DENIES the Motion.

Arusha, 4 February 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

[1] *The Prosecutor v. Nyiramasuhuko,* Case n° ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 paras. 12–16; *Prosecutor v. Ntahobali and Nyiramasuhuko,* Case n° ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004, paras. 14–17.

[2] See Reply at para. 15.

[3] T. 18 October 2004 pg. 20.

## *Decision on the Prosecutor's Motion for Exclusion of Witnesses Whose Identity Has Been Disclosed Out of Time Pursuant to Rules 54, 73, 73 ter, and TC II's Order of 18th of October 2004*
## *18 February 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Defence disclosure obligation, Communication of the identities of the witnesses, Disclosure of the summary of the testimony of witnesses, Disclosure of witness' identifying information, Breach of the Defence to its Disclosure Obligation, Absence of obstacle to the hearing of the testimony by the Chamber, Harmonization of the disclosure deadlines – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 54, 73, 73 (A), 73* ter*, 73* ter *(B), 73* ter *(B) (iii) (b), 73* ter *(C) and 73* ter *(D)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 the "Prosecutor's Motion for Exclusion of Witnesses Whose Identity Has Been Disclosed Out of Time Pursuant to Rules 54, 73, 73 *ter* and TC II's Order of l5th October 2004" filed on 28 January 2005 (the "Motion");

CONSIDERING the "*Réponse de Pauline Nyiramasuhuko à la* "Prosecutor's Motion for Exclusion of Witnesses whose Identity has been Disclosed Out of Time Pursuant to Rules 54, 73, *73 ter* and TC II's Order of l5th October 2004'" filed on 31 January 2005 ("Nyiramasuhuko's Response");

NOTING the Chamber's Oral Ruling of 18 October 2004[1] that the Defence teams were ordered to :

(A) File their Pre-Defence Briefs under the terms of Rule *73 ter* by 31 December 2004; and

(B) In a bid to harmonize the time-frames within which each Defence team is to disclose to the Prosecution the full identities of the witnesses they intend to call to testify, the Defence should, for the meantime, make the required disclosures to the Prosecution at least twenty-one (21) days before the witness is called to testify.

[1] T. of 18 October 2004 (TC), pg. 20

## *Décision relative à la Requête intitulée Prosecutor's Motion for Exclusion of Witnesses whose Identity has been disclosed out of Time Pursuant to Rules 54, 73, 73* ter*, and TC II's Order of 18th of October 2004 18 février 2005 (ICTR-98-42-T)*

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de Chambre; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Obligation de communication de la défense, Communication de l'identité des témoins, Communication des résumés des dépositions des témoins, Communication des renseignements sur l'identité d'un témoin, Manquement de la Défense à son obligation de communication, Absence d'obstacle au témoignage devant la Chambre, Harmonisation des délais de communication – Requête partiellement acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 54, 73, 73 (A), 73* ter*, 73* ter *(B), 73* ter *(B) (iii) (b), 73* ter *(C) et 73* ter *(D)*

LE 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 Balungi Bossa (la «Chambre»),

SAISI de la requête intitulée *Prosecutor's Motion for Exclusion of Witnesses whose Identity has been Disclosed Out of Time Pursuant to Rules 54, 73, 73* ter *and TC II's Order of 18th october 2004* (la «Requête»),

VU la Réponse de Pauline Nyiramasuhuko à la «*Prosecutor's Motion for Exclusion of Witnesses Whose Identity has been Disclosed Out of Time Pursuant to Rules 54, 73, 73* ter *and TC II's Order of 18th October 2004*», déposée le 31 janvier 2005 (la «Réponse de Nyiramasuhuko»),

VU la décision orale de la Chambre du 18 octobre 2004[1] prescrivant aux équipes de la Défense :

A) de déposer leurs mémoires préalables à la présentation des moyens à décharge conformément à l'article 73 *ter* du Règlement de procédure et de preuve (le «Règlement») au plus tard le 31 décembre 2004;

B) dans le but d'harmoniser les délais de communication de l'identité complète des témoins à décharge au Procureur, de communiquer, pour le moment, l'identité du témoin 21 jours avant sa comparution.

[1] Compte rendu de l'audience du 18 octobre 2004 (Chambre de première instance), pp. 24 et 25.

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 54, 73 and 73 *ter* of the Rules;

NOW DECIDES the Motion pursuant to Rule 73 (A) on the basis of the written submissions filed by the Parties.

**Submissions of the Parties**

*Submissions of the Prosecution*

1. The Prosecution submits that despite the Chamber's Oral Ruling of 18 October 2004 requiring the Defence to disclose to the Prosecution the identities of its witnesses at least 21 days before testimony, the Defence for Nyiramasuhuko has failed to do so.

2. The Prosecution submits that the majority of the 21 witnesses that Nyiramasuhuko intends to call between 31 January and 18 February 2005 do not meet the 21 day disclosure order. The Prosecution submits that disclosure was made as follows :

On 11 January 2005, the identity of Witnesses WFGS and WMCZ was disclosed for the first time;

On 12 January 2005, the identity of Witness CHD was disclosed for the first time;

On 19 January 2005, the identity of Witnesses, CEM, LHC, MNW, WHNC, WKKTD, WKNNC1, WTMP, WZJM and WZNJC was disclosed for the first time[2];

On 25 January 2005, the identity of Witnesses WBKPP, KNNC1, WKNK1, WKNN1, WNKPP, WTRT, WZAN, WZMR and WZNA was disclosed for the first time. The Defence also disclosed the will-say statement of WBND for the first time and for the second time, it disclosed the identity of Witness CHD.

3. Apart from three witnesses - WFGS, WMCZ and CHD – who meet the 21 day disclosure deadline, the rest of the witnesses may only testify from the weeks starting 8 and 14 February 2005 respectively.

4. The Prosecution brings to the attention of the Chamber that from a correspondence dated 27 January 2005, the Defence for Nyiramasuhuko continues to modify the order of appearance of its witnesses. Furthermore, in violation of its obligations under Rule 73 *ter* (b), (c) and (d), the Defence of Nyiramasuhuko has indicated in its Pre-Defence Brief that it cannot provide summaries of the intended testimonies of Witnesses BH, BK, BN, DN, NEM, WBKP, WBNC, WBNM, WBND, WBNM, WBUC, WFMG, WHNC, WJN, WLMF and WLNA's testimonies for fear of compromising their identities. The Prosecution argues that since the Defence has disclosed "will-say" statements for Witnesses WBND and WHNC, the Defence should be equally capable of disclosing summaries of said witnesses' proposed testimonies without compromising their identity.

5. The Prosecution submits that due to the late disclosure to the Prosecution of the identities of Defence witnesses, the Prosecution has been deprived of adequate time

[2] The identity of Witnesses WFGS and WMCZ was disclosed for the second time on 19 January 2005.

VU le Statut du Tribunal (le «Statut») et le Règlement, en particulier ses articles 54, 73 et 73 *ter,*

STATUANT sur la requête sur la base des mémoires des parties conformément à l'article 73 (A) du Règlement.

**Arguments des parties**

*Arguments du Procureur*

1. Le Procureur fait valoir que la Défense de Nyiramasuhuko ne lui a pas communiqué l'identité de ses témoins au moins 21 jours avant leur comparution malgré la décision orale de la Chambre du 18 octobre 2004 imposant cette obligation aux équipes de la défense.

2. Le Procureur affirme que l'identité de la majorité des 21 témoins que Nyiramasuhuko a l'intention de citer entre le 31 janvier et le 18 février 2005 n'a pas été communiquée 21 jours avant leur comparution comme l'exigeait la décision de la Chambre. La communication de ces informations s'est en effet faite de la façon suivante :

L'identité des témoins WFGS et WMCZ a été communiquée pour la première fois le 11 janvier 2005,

L'identité du témoin CHD a été communiquée pour la première fois le 12 janvier 2005,

L'identité des témoins CEM, LHC, MNW, WHNC, WKKTD, WKNNC1, WTMP, WZJM et WZNJC a été communiquée pour la première fois le 19 janvier 2005[2],

L'identité des témoins WBKPP, KNNCI, WKNKI, WKNN1, WNKPP, WTRT, WZAN, WZMR et WZNA a été communiquée pour la première fois le 25 janvier 2005. Le même jour, la Défense a communiqué pour la première fois la déposition envisagée du témoin WBND et l'identité du témoin CHD pour la deuxième fois.

3. A part trois témoins, WFGS, WMCZ et CHD, dont l'identité a été communiquée dans le délai de 21 jours, les autres témoins ne peuvent déposer qu'à partir des 8 et 14 février 2005 respectivement.

4. Le Procureur attire l'attention de la Chambre sur une correspondance du 27 janvier 2005 dans laquelle la Défense de Nyiramasuhuko modifie encore l'ordre de comparution des témoins. Par ailleurs, en violation des obligations que lui imposent les paragraphes 73 *ter* (b), (c) et (d), la Défense de Nyiramasuhuko a indiqué dans son mémoire préalable à la présentation des moyens à décharge qu'elle ne peut pas communiquer les résumés des dépositions envisagées des témoins BH, BK, BN, DN, NEM, WBKP, WBNC, WBNM, WBND, WBNM, WBUC, WFMG, WHNC, WJN, WLMF et WLNA de peur de révéler leur identité. Le Procureur estime que la Défense qui a communiqué les résumés des dépositions envisagées des témoins WBND et WHNC, devrait aussi être capable de communiquer ceux des autres témoins sans révéler leur identité.

5. Le Procureur soutient que la communication tardive de l'identité des témoins à décharge ne lui a pas laissé suffisamment de temps pour mener des enquêtes sur les

[2] L'identité des témoins WFGS et WMCZ a été communiquée pour la deuxième fois le 19 janvier 2005.

to undertake investigations on the witnesses' antecedents thereby causing prejudice to the Prosecution who will be unable to conduct an effective cross-examination. The Prosecution relies on the jurisprudence of the Tribunal in the cases of Nyiramasuhuko et al[3] and Bagilishema[4].

6. The Prosecution submits that it will suffer prejudice if the Defence is allowed to call witnesses who do not meet the 21 day disclosure requirement. The Prosecution therefore moves the Chamber to exclude from giving evidence the witnesses whose identities were disclosed for the first time on 19, 25 and 27 January 2005 or in the alternative, that they should only be allowed to testify from 8 and 14 February 2005 respectively, when they meet the 21 day requirement.

*Nyiramasuhuko's Response*

7. The Defence opposes the Prosecution submission that apart from three witnesses (i.e., Witnesses WFGS, WMCZ and CHD who are the first, second and twelfth witnesses intended to be called to testify) the disclosure of the identities of al1 the other witnesses was made late. The Defence submits that the Prosecution has failed to indicate that the Defence had personally disclosed to Ms. Silvana Arbia, Senior Trial Attorney in charge of the case, the identity of four of its other witnesses – MNW, WHCN, WKKTD and WTMP – on 14 January 2005. For this reason, the Defence submits that these four witnesses may be called to testify as from Thursday 3 January 2005 [*sic*][5].

8. Regarding the other Defence Witnesses whose identities were disclosed on 18 January 2005 – CEM, LHC, WBNC, WZJM and WZNJC – the Defence argues that the said witnesses may be called to testify as from the week commencing on 7 February 2005.

9. Regarding the ten witnesses whose identities were disclosed on 24 January 2005 – Witnesses WBKPP, KNNCI, WKNK1, WKNNI, WNKPP, WTRT, WZAN, WZMR and WZNA and the will Say of WBND. The identity of CHD was also disclosed for the second time on this date – the Defence agrees with the Prosecution that this batch of witnesses may only testify as from the week cornmencing on 14 January 2005 [sic][6] – the Monday of the third week of the trial session. With regard to Witness WTBE whose identity was disclosed on 26 January 2005, the Defence notes that this witness may testify as from 15 January 2005 [*sic*][7] – the Tuesday of the third week of the trial session.

[3] Prosecutor v Nyiramasuhuko et al., Decision on the Prosecutor's Motion to stay Disclosure until Protection Measures are put in Place, (TC), 27 March 2002; *Prosecutor v. Nyiramasuhuko et al.*, Decision on Defence Motions by Nyiramasuhuko, Ndayambaje and Kanyabashi on inter dia, Full Disclosure of unredacted Witness Statements, (TC) of 13 November 2001 at para. 16.

[4] *Prosecutor v. Bagilishema,* Oral Decision found in transcript of 25 January 2000 (TC) at pg. 13.

[5] In its Response, the Defence mistakenly referred to 3 January 2005 when it should correctly be 3 February 2005.

[6] In its Response, the Defence mistakenly referred to 14 January 2005 when it should correctly be 14 February 2005.

[7] In its Response, the Defence mistakenly referred to 15 January 2005 when it should correctly be 15 February 2005.

antécédents des témoins, ce qui lui cause un préjudice puisqu'il ne sera pas en mesure de mener le contre-interrogatoire comme il se doit. Le Procureur se fonde sur la jurisprudence du Tribunal dans les affaires *Nyiramasuhuko et consorts*[3] et *Bagilishema*[4].

6. Le Procureur soutient qu'il subira un préjudice si la Défense est autorisée à citer des témoins dont l'identité n'a pas été communiquée 21 jours avant leur comparution. Il demande donc à la Chambre de ne pas entendre les témoins dont l'identité a été communiquée pour la première fois les 19, 25 et 27 janvier 2005 ou, à titre subsidiaire, de ne leur permettre de déposer qu'à partir des 8 et 14 février respectivement après l'expiration du délai de 21 jours.

*Réponse de Nyiramasuhuko*

7. La Défense conteste l'argument du Procureur selon lequel la communication de l'identité des témoins a été faite trop tard sauf pour trois de ceux-ci (c'est-à-dire WFGS, WMCZ et CHD qui sont les premier, deuxième et douzième témoins cités). Elle fait valoir que le Procureur a omis d'indiquer qu'elle avait communiqué en personne à Mme Arbia, avocat général principal en l'espèce, l'identité de quatre de ses autres témoins, soit MNW, WHCN, WKKTD et WTMP, le 14 janvier 2005. Aussi, ces quatre témoins peuvent-ils, selon elle, être cités à comparaître dès jeudi le 3 janvier 2005 [*sic*][5].

8. S'agissant des autres témoins à décharge dont l'identité a été communiquée le 18 janvier 2005, soit CEM, LHC, WBNC, WZJM et WZNJC, la Défense soutient que ces témoins peuvent être cités à partir de la semaine qui commence le 7 février 2005.

9. S'agissant des 10 témoins dont l'identité a été communiquée le 24 janvier 2005, soit WBKPP, KNNC1, WKNK1, WKNNI, WNKPP, WTRT, WZAN, WZMR et WZNA et le résumé de la déposition envisagée du témoin WBND. L'identité de CHD a été aussi communiquée pour la deuxième fois à cette date. La Défense, tout comme le Procureur, estime que ce groupe de témoins ne pourra déposer qu'à partir de la semaine commençant le 14 janvier 2005 [*sic*][6] – le lundi de la troisième semaine de la session du procès. S'agissant du témoin WTBE dont l'identité a été communiquée le 26 janvier 2005, la Défense relève que ce témoin peut déposer à partir du 15 janvier 2005 [*sic*][7], le mardi de la troisième semaine de la session du procès.

---

[3] *Le Procureur c. Nyiramasuhuko et consorts*, *Decision on the Prosecutor's Motion to Stay Disclosure until Protection Measures are put in place* (Chambre de première instance), 27 mars 2002; *Le Procureur c. Nyiramasuhuko et consorts*, Décisions sur les requêtes de Nyiramasuhuko, Ndayambaje et Kanyabashi aux fins, entre autres, de divulgation complète des déclarations non caviardées des témoins à charge (Chambre de première instance) du 13 novembre 2001, para. 16.

[4] *Le Procureur c. Bagilishema,* Décision orale reproduite dans le compte rendu de l'audience du 25 janvier 2000 (Chambre de première instance), p. 12.

[5] Dans sa Réponse, la Défense se réfère à tort au 3 janvier 2005 alors que la date exacte est le 3 février 2005.

[6] Dans sa Réponse, la Défense se réfère à tort au 14 janvier 2005 alors que la date exacte est le 14 février 2005.

[7] Dans sa réponse, la Défense se réfère tort au 15 janvier 2005 alors que la date exacte est le 15 février 2005.

10. The Defence submits therefore that it continues to respect the Chamber's order for disclosure of the identities of its witnesses.

11. With regard to the Prosecution contention that the Defence continues to modify the order of calling its witnesses, the Defence submits that this modification was necessary following information it received from the Witnesses and Victims Support Section (the "WVSS") about witnesses'availability.

12. With regard to the issue of disclosure of summaries of the testimonies of Defence Witnesses WHNC, WBNC and WBND, the Defence submits that they were disclosed to the Prosecution on 18, 19 and 24 January respectively. The Defence adds that it continues to disclose summaries of testimonies and that it shall make such disclosure at least 21 days before the said witnesses testify.

13. With regard to those witnesses whose summaries have not been provided for reasons outlined in its Pre-Defence Brief, the Defence submits that it maintains its reasons and that in any case, it shall disclose summaries at least 21 days before the respective witnesses testify.

14. In conclusion, the Defence requests the Chamber's indulgence in the event certain delays are occasioned when the WVSS encounters difficulties or in other instances when these are caused by the health of witnesses.

15. For all these reasons, the Defence requests that the Chamber reject the Motion.

## Deliberations

16. The Chamber notes that the Motion raises two specific issues, that of disclosure of the identities of witnesses and that of disclosure of the summary of the testimony of witnesses. The Chamber shall address both these issues hereunder.

### (A) *On the Issue of Disclosure of the Identities of Witnesses*

17. The Chamber observes that, knowing that the trial was scheduled to commence on 31 January 2005, the Prosecution expected the Defence for Nyiramasuhuko to have disclosed to the Prosecution the full identities of the witnesses it intended to call during this session at least 21 days before the testimonies of said witnesses thereby allowing it enough time to conduct investigations and to prepare cross-examination.

18. The Chamber further notes that the Defence for Nyiramasuhuko subrnits that it had disclosed the identities of its first and second witnesses – WFGS and WMCZ – to be called to testify on 11 January 2005, thereby allowing it to call the said witnesses according to schedule. With regard to the other witnesses scheduled to appear between 31 January and 19 February 2005, the Chamber notes that the Defence for Nyiramasuhuko submits that it disclosed the identity of Witness CHD on 12 January 2005; of a second batch of witnesses on 14 January 2005 (Witnesses, MNW, WHCN, WKKTD and WTMP); a third batch on 18 January 2005 (Witnesses CEM, LHC, WBNC, WZJM and WZNJC) and a fourth batch on 24 January 2005 (Witnesses WBKPP, KNNC1, WKNK1, WKNNI, WNKPP, WTRT, WZAN, WZMR and WZNA and the will Say of WBND). The Chamber further notes that it is the Defence submission that most of these witnesses may be called to testify by the second and third

10. En conséquence, la Défense affirme qu'elle continue de respecter la décision de la Chambre relative à la communication de l'identité de ses témoins.

11. En ce qui concerne le grief du Procureur lui reprochant de continuer à modifier l'ordre de citation de ses témoins, la Défense affirme que la modification a été rendue nécessaire par les informations sur la disponibilité des témoins qu'elle a reçues de la Section d'assistance aux victimes et aux témoins.

12. Pour ce qui est de la communication des résumés des dépositions des témoins à décharge WHNC, WBNC et WBND, la Défense affirme qu'ils ont été communiqués au Procureur les 18, 19 et 24 janvier respectivement. Elle ajoute qu'elle continue de communiquer les résumés de dépositions et qu'elle le fera 21 jours au moins avant la déposition du témoin.

13. En ce qui concerne les témoins dont les résumés n'ont pas été communiqués pour les raisons exposées dans le mémoire préalable à la présentation des moyens à décharge, la Défense réitère les mêmes arguments et affirme qu'elle communiquera, en tout cas, les résumés des dépositions des témoins 21 jours au moins avant qu'ils déposent.

14. Pour conclure, la Défense sollicite l'indulgence de la Chambre au cas où des retards auraient été occasionnés du fait des difficultés auxquelles se serait heurtée la Section d'aide aux victimes et aux témoins ou du fait de l'état de santé des témoins.

15. Pour toutes ces raisons, la Défense prie la Chambre de rejeter la requête.

## Délibération

16. La Chambre relève que la requête soulève deux questions bien précises, celle de la communication de l'identité des témoins et celle de la communication des résumés des dépositions des témoins. Elle les examinera ci-après.

### A) *Sur la question de la communication de l'identité des témoins*

17. La Chambre fait observer que, sachant que le procès allait commencer le 31 janvier 2005, le Procureur s'attendait à ce que la Défense de Nyiramasuhuko lui communique l'identité complète des témoins qu'elle avait l'intention de citer au cours de la présente session 21 jours au moins avant qu'ils déposent afin de lui donner suffisamment de temps pour mener ses enquêtes et préparer le contre-interrogatoire.

18. La Chambre relève en outre que la Défense de Nyiramasuhuko affirme avoir communiqué l'identité de ses premier et deuxième témoins à comparaître, soit WFGS et WMCZ le 11 janvier 2005, ce qui lui permettait de les citer en respectant le calendrier fixé. S'agissant des autres témoins dont la comparution est prévue entre le 31 janvier et le 19 février 2005, la Chambre relève que la Défense de Nyiramasuhuko affirme avoir communiqué l'identité du témoin CHD le 12 janvier 2005, celle d'un deuxième groupe de témoins le 14 janvier 2005 (MNW, WHCN, WKKTD et WTMP); celle d'un troisième groupe le 16 janvier 2005 (CEM, LHC, WBNC, WZJM et WZNJC) et celle d'un quatrième groupe le 24 janvier 2005 (WBKPP, KNNCI, WKNKI, WKNNI, WNKPP, WTRT, WZAN, WZMR et WZNA et la déposition envisagée de WBND). La Chambre note en outre que, d'après la Défense, la plupart de ces témoins peuvent être cités au cours des deuxième et troisième semaines de février 2005. Elle

weeks of February 2005. The Chamber observes that the Defence has been disclosing the identity of its witnesses at different times, in a rolling system.

19. On this issue, the Chamber recalls its Oral Ruling of 18 October 2004[8] where, in a bid to harmonize the disclosure deadlines of the identities of Defence witnesses, the Chamber ordered disclosure of the identities of all Defence witnesses 21 days before the testimonies of witnesses. Therefore, any witness called to testify must have had hislher full identity disclosed to the Prosecution at least 21 days before he/she is called to testify.

20. The Chamber notes that the Prosecution requests the exclusion of the witnesses who are called to testify in breach of the 21 day disclosure deadline or, in the alternative, that said witnesses be called at the stage when the 21 day disclosure deadline is met. The Chamber further notes the Prosecution argument that if witnesses are called to testify without having met the 21 day disclosure deadline, this would cause prejudice to the Prosecution who would not have had adequate time to conduct investigations and to prepare cross-examination of the concerned witnesses.

21. Regarding the Prosecutions request to exclude witnesses whose identities were not disclosed within the 21 day disclosure deadline, the Chamber finds this request to be theoretical, at this stage, because, as submitted by the Defence, the first and second witnesses heard have met the 21 day disclosure deadline before being called upon to testify. In the Chamber's opinion, the Prosecution request for exclusion of witnesses is unjustified particularly as it does not indicate which witnesses have not met the 21 day disclosure deadline. The Chamber considers that the Defence's purported failure to fulfil its disclosure obligation, as submitted by the Prosecution without specifics, does not warrant the exclusion of witnesses at this stage. Accordingly, the Chamber denies the Prosecution request to exclude Defence witnesses.

22. Regarding the alternative prayer of the Prosecution that a witness should be called only at the time when he/she has met the 21 day disclosure deadline, the Chamber finds this Prosecution request to be premature at this stage. Given that al1 Parties are aware of the Chamber's Oral Ruling of 18 October and that the Defence has submitted that its witnesses will meet the 21 day disclosure deadline when called as scheduled, the Chamber accordingly denies this Prosecution request because it is moot.

23. Nonetheless, the Chamber wishes to underscore that it expects Counsel to act diligently when disclosing identities of witnesses so that the Trial is conducted in a smooth manner. Recalling its Oral Ruling of 18 October 2004, the Chamber urges Defence Counsel not to be too rigid on the 21 day timeframe but to disclose the identities of a larger number of witnesses at a time so that if a witness becomes unavailable at any given time, the Defence should be in a position to present another witness, who has met the 21 day disclosure deadline.

### (B) *On the Disclosure of Summaries of anticipated Witness Testimonies*

24. The Chamber notes the Prosecution submission that the Defence of Nyiramasuhuko has not disclosed a number of summaries of the anticipated testimonies of their wit-

[8] T. 18 October 2004, p. 20.

fait remarquer que la Défense a communiqué l'identité de ses témoins par tranches à différentes dates.

19. La Chambre rappelle à ce sujet sa décision orale du 18 octobre 2004[8]. Elle avait alors, dans un souci d'harmonisation des délais de communication de l'identité des témoins à décharge, ordonné la communication de l'identité de tous les témoins à décharge 21 jours avant leur déposition. L'identité complète de tout témoin cité à comparaître doit donc avoir été communiquée au Procureur 21 jours au moins avant que l'intéressé dépose.

20. La Chambre prend acte de la demande du Procureur la priant de ne pas entendre les témoins dont l'identité n'a pas été communiquée 21 jours avant leur comparution ou, à titre subsidiaire, de ne leur permettre de déposer qu'après l'expiration du délai de 21 jours. Elle prend en outre acte du grief du Procureur faisant état du préjudice qui lui serait causé si les témoins étaient cités à comparaître sans respecter le délai de 21 jours (il n'aurait alors pas suffisamment de temps pour mener ses enquêtes et se préparer en vue du contre-interrogatoire des témoins concernés).

21. S'agissant de la demande du Procureur de ne pas entendre les témoins dont l'identité n'a pas été communiquée dans le délai de 21 jours, la Chambre juge cette demande théorique à ce stade de la procédure puisque, comme l'a affirmé la Défense, ce délai a été respecté en ce qui concerne les premier et deuxième témoins entendus. Elle estime cette demande non justifiée surtout que le Procureur n'indique pas l'identité des témoins pour lesquels le délai de communication de 21 jours n'a pas été respecté. La Chambre estime que le non-respect de ses obligations de communication par la Défense, que lui reproche le Procureur sans donner de précision, ne la fonde pas à refuser d'entendre des témoins à ce stade de la procédure. En conséquence, la Chambre rejette la demande du Procureur la priant de ne pas entendre des témoins à décharge.

22. S'agissant de la conclusion subsidiaire du Procureur selon laquelle un témoin ne devrait être cité à comparaître qu'après l'expiration du délai de communication de 21 jours, la Chambre juge la demande prématurée à ce stade de la procédure. Étant donné que toutes les parties sont au courant de la décision orale qu'elle a rendue le 18 octobre 2004 et que la Défense a déclaré que le délai de communication de 21 jours serait respecté en ce qui concerne tous les témoins qui seront cités selon le calendrier, la Chambre rejette la demande du Procureur au motif qu'elle est sans objet.

23. Cela dit, la Chambre tient à souligner qu'elle s'attend à ce que les conseils fassent preuve de diligence dans la communication de l'identité des témoins afin que le procès se déroule sans contretemps. Rappelant sa décision orale du 18 octobre 2004, la Chambre exhorte les conseils de la Défense à ne pas faire une application stricte du délai de 21 jours mais à communiquer l'identité d'un grand nombre de témoins à la fois de sorte que si l'un d'eux n'est pas disponible à un moment donné, elle puisse citer un autre pour lequel le délai de communication de 21 jours a été respecté.

B) *Sur la communication des résumés des dépositions envisagées des témoins*

24. La Chambre prend acte du grief du Procureur reprochant à la Défense de Nyiramasuhuko de ne pas lui avoir communiqué un certain nombre de résumés des dépo-

[8] Compte rendu de l'audience du 18 octobre 2004, pp. 24 et 25.

nesses thereby violating the Chamber's Order, Rule 73 *ter* (b), (c) and (d) and prejudicing the Prosecution.

25. At the outset, the Chamber reminds the Defence of its obligations under Rule 73 *ter* (B) (iii) (b) requiring the Defence to disclose in its Pre-Defence Brief, "a summary of the facts on which each witness will testify", and the order of the Chamber in its Oral Ruling of 18 October 2004 that all the Defence teams are obliged to file a Pre-Defence Brief by 31 December 2004.

26. Given the provisions of Rule 73 *ter* and the Chamber's Oral Ruling of 18 October 2004, the Defence was obliged to file its Pre-Defence Brief containing al1 the requirements under Rule 73 *ter* by 31 December 2004. The Chamber emphasizes that the requirement to disclose a summary of the facts on which each witness will testify upon is different from the requirement to disclose the identities of a witness : Disclosure of witness summaries ought to have been made by 31 December 2001, whereas disclosure of witness' identifying information should be made at least 21 days before testimony of a witness.

27. The Chamber underscores that it should be possible for parties to provide an intelligible summary of a witness' anticipated testimony without compromising his/her identity. Nonetheless, the Chamber notes that if the Defence encountered any impediment in complying with its obligations under Rule 73 *ter* and the Chamber's Oral Ruling of 18 October 2004, the Defence was required to make an appropriate and prompt application to the Chamber. In this connection, the Chamber notes that the Defence for Nyiramasuhuko has filed an ex parte Motion seeking extra protection measures for some of its witnesses. The Chamber observes, without prejudice that in filing the said ex parte Motion after the date for filing its Pre-Defence Brief, the Defence has violated its obligations under Rule 73 *ter* and the Chamber's Oral Ruling of 18 October 2004.

28. The Chamber therefore, orders the Defence for Nyiramasuhuko to irnmediately comply with its Oral Ruling of 18 October 2004 and to disclose to the Prosecution and other Parties, "a summary of the facts on which each witness will testify" pursuant to Rule 73 *ter.*

FOR THE ABOVE REASONS, THE TRIBUNAL

ORDERS the Defence for Nyiramasuhuko to immediately comply with its Oral Ruling of 18 October 2004 and to disclose to the Prosecution and other Parties, "a summary of the facts on which each witness will testify" pursuant to Rule 73 *ter.*

DENIES the Motion in all other respects.

Arusha, 18 February 2005.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

***

sitions envisagées de ses témoins en violation de la décision de la Chambre et des paragraphes 73 *ter* (b), (c) et (d) du Règlement, ce qui lui a porté préjudice.

25. Tout d'abord, la Chambre rappelle à la Défense les termes du sous-alinéa 73 *ter* (B) (iii) (b) du Règlement qui l'oblige à communiquer dans son mémoire préalable à la présentation des moyens à décharge «[u]n résumé des faits au sujet desquels chaque témoin déposera» et sa décision orale du 18 octobre 2004 par laquelle elle avait enjoint à toutes les équipes de la Défense de déposer un mémoire préalable à la présentation des moyens à décharge au plus tard le 31 décembre 2004.

26. Conformément à l'article 73 *ter* du Règlement et à la décision orale de la Chambre du 18 octobre 2004, la Défense était tenue de déposer son mémoire préalable à la présentation des moyens à décharge répondant à toutes les exigences de cet article au plus tard le 31 décembre 2004. Elle souligne qu'il y a une différence entre l'obligation de communiquer un résumé au sujet desquels chaque témoin déposera et celle de communiquer l'identité d'un témoin : la communication des résumés des faits aurait dû être fait; au plus tard le 31 décembre 2001 tandis que la communication des renseignements sur l'identité d'un témoin doit être faite 21 jours au moins avant qu'il dépose.

27. La Chambre souligne qu'il devrait être possible pour les parties de communiquer un résumé intelligible de la déposition envisagée d'un témoin sans dévoiler son identité. Cela étant, elle fait remarquer que la Défense était tenue, si elle se trouvait empêchée de remplir les obligations que lui imposent l'article 73 *ter* et la décision orale de la Chambre du 18 octobre 2004, de la saisir sans tarder par voie de requête appropriée. À cet égard, la Chambre fait remarquer que la Défense de Nyiramasuhuko a déposé une requête unilatérale demandant des mesures de protection supplémentaires pour certains de ses témoins. La Chambre fait observer, sous toutes réserves, qu'en déposant ladite requête unilatérale après la date prévue pour le dépôt de son mémoire préalable à la présentation des moyens à décharge, la Défense a manqué aux obligations que lui imposaient l'article 73 *ter* du Règlement et la décision orale de la Chambre du 18 octobre 2004.

28. En conséquence, la Chambre enjoint à la Défense de Nyiramasuhuko de se conformer immédiatement à sa décision orale du 18 octobre 2004 et de communiquer au Procureur et aux autres parties «[u]n résumé des faits au sujet desquels chaque témoin déposera» conformément à l'article 73 *ter* du Règlement .

PAR CES MOTIFS, LE TRIBUNAL

ORDONNE à la Défense de Nyiramasuhuko de se conformer immédiatement à la décision orale du 18 octobre 2004 et de communiquer au Procureur et aux autres parties «[u]n résumé des faits au sujet desquels chaque témoin déposera», conformément à l'article 73 *ter* du Règlement.

REJETTE la requête pour le surplus.

Arusha, le 18 février 2005.

[Signé] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" 22 February 2005 (ICTR-97-21-T; Joint Case : ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Arsène Shalom Ntahobali – Reconsideration of the Trial Chamber's Decision, Inherent jurisdiction of a Chamber to reconsider its decision in particular circumstances – Frivolous ground, Warning to the Defence Counsel – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (B), 73* bis *(E) and 73 (F)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Arsène Shalom Ntahobali, *Decision on Ntahobali's Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness 'QCB' Pursuant to Rule 91 (B) of the Rules, 26 June 2002 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Arsène Shalom Ntahobali, *Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness 'TN', 1 July 2002 (ICTR-98-42); 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)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial", filed on 8 February 2005 (the "Motion")[1];

CONSIDERING :

i. the Prosecutor's Response to Arsène Shalom Ntahobali's Motion for Reconsideration of the Decision of the Trial Chamber on the Request for a Separate Trial, filed on 14 February 2005 (the "Prosecutor's Response");

[1] The Motion was originally filed in French and entitled : "*Requête de Arsène Shalom Ntahobali en reconsidération de la* 'Decision on Ntahobali's Motion for Separate Trial'".

ii. Kanyabashi's Response to Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial", filed on 14 February 2005 ("Kanyabashi's Response")[2];

iii. Ntahobali's Reply to the Prosecution Response to the Motion for Reconsideration of the Decision of the Trial Chamber on the Request for a Separate Trial, filed on 17 February 2005 ("Ntahobali's Reply to the Prosecution")[3];

iv. Ntahobali's Reply to Kanyabashi's Response to the Motion for Reconsideration of the Decision of the Trial Chamber on the Request for a Separate Trial, filed on 17 February 2005 ("Ntahobali's Reply to Kanyabashi")[4];

CONSIDERING that Nsabimana's Response to Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial" filed on 16 February 2005 ("Nsabimana's Response")[5] was filed out of time and shall not be considered by the Chamber;

CONSIDERING that Ntahobali's Reply to Nsabimana's Response to the Motion for Reconsideration of the Decision of the Trial Chamber on the Request for a Separate Trial, filed on 17 February 2005 ("Ntahobali's Reply to Nsabimana") shall also not be considered by the Chamber;

CONSIDERING the Decision on Ntahobali's Motion for Separate Triai issued by the Chamber on 2 February 2005 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the written submissions only .

## SUBMISSIONS OF THE PARTIES

*Ntahobali's Motion*

1. The Defence seeks reconsideration of the Impugned Decision on the ground that the Chamber would have mistakenly considered that the issue of the order of presentation of the Defence cases had already been raised by the Defence and ruled upon on 18 October 2004.

[2] The Response was originally filed in English and entitled : "*Réponse de Joseph Kanyabashi à la Requête de Shalom Ntahobali en reconsidération de la Décision relative à la requête demandant un procès séparé*".

[3] The Response was originally filed in French and entitled : "*Réplique de Shalom Ntahobali à la Réponse du Procureur à la requête en reconsidération de la décision sur la requête en séparation de procès*".

[4] The Response was originally filed in French and entitled : "*Réplique de Shalom Ntahobali à la Réponse de Joseph Kanyabashi à la requête en reconsidération de la décision sur la requête en séparation de procès*".

[5] The Response was originally filed in French and entitled : "*Réponse de Sylvain Nsabimana à la Requête de Arsène Shalom Ntahobali en reconsideration de la Decision on Ntahobali's Motion for Separate Trial*".

2. The Defence contests having made oral submissions on that issue on 18 October 2004 and submits consequently that the Oral Ruling of 18 October 2004 denying the oral Motion made by Counsel for Pauline Nyiramasuhuko on that issue did not apply to Arsène Shalom Ntahobali.

3. The Defence admits having said, notably[6] :

> Furthermore, let me say that the proposed procedure, whereby the number of days prior to submission of witness statements shall be harmonised, is fine with me, Mr President; however, I would like to suggest that if you were to proceed in that manner, then it might be appropriate for the first teams to disclose identity of their witnesses prior to the other teams disclosing the identity of their witnesses. This causes a prejudice for those who would disclose first, as compared to the other teams who would be expected to disclose subsequently.

4. The Defence further submits that the mistake cornmitted by the Chamber is a ground to apply for reconsideration of the Impugned Decision.

5. For the foregoing reasons, the Defence prays the Chamber to reconsider the Impugned Decision and order that Accused Nsabimana and Kanyabashi present their Defence before Ntahobali.

*Prosecutor's Response*

6. The Prosecution submits that the Motion does not raise any new issue and is an attempt to relitigate the dismissed Motion for Separate Trial filed on 18 January 2005. Relying on the Chamber's Decision on Prosecutor's Motion for Disclosure of Evidence and Protective Measures of 30 November 2004, the Prosecution submits that the 18 October 2004 Oral Ruling cannot be reopened by the Defence for Ntahobali.

7. The Prosecution further that the Defence has failed to demonstrate the existence of exceptional circurnstances that may justify the reconsideration of the Impugned Decision by the Chamber.

8. The Prosecution adds that the Defence submission that the Chamber erred in the Impugned Decision is baseless and unfounded as al1 parties present at the hearing were given ample opportunity to address the Chamber and present their arguments on the reordering of the Defence case.

9. The Prosecutor prays the Chamber to deny the Motion and finally submits that the Motion is frivolous and therefore deserves the non-payment of Counsel's fees associated with the Motion and costs thereof in accordance with Rule 73 (F).

*Kanyabashi's Response*

10. The Defence for Kanyabashi submits that the Motion is only aimed at having Accused Nsabimana and Kanyabashi present their Defence before Ntahobali.

11. The Defence for Kanyabashi submits that the Impugned Decision considered that Ntahobali had failed to demonstrate that there is a conflict of interests of such a nature as may cause a serious prejudice to his Defence, or that it is othenvise in the interests of justice to order a severance. The alleged conflict of interests was Nta-

[6] T. 18 October 2004, p. 15, lines 19-24 (English version).

hobali's only ground for requesting either a separate trial or the reordering of the presentation of the Defence. Since the ground failed, both requests have to be denied.

12. The Defence for Kanyabashi further submits that the issue of reordering the defence case was indeed raised on 18 October 2004 and that Counsel for Ntahobali added to the Oral Motion made by Counsel for Nyiramasuhuko.

13. The Defence for Kanyabashi finally reiterates the submissions it made in its Response to Ntahobali's Motion for Separate Trial and prays the Chamber to deny the Motion.

*Ntahobali's Reply to the Prosecution*

14. The Defence for Ntahobali submits that the only ground for reconsideration is that the Chamber comrnitted a fundamental error of fact in the Impugned Decision. The Defence submits that this error constitutes an exceptional circumstance which justifies that the Chamber reconsiders its Decision.

15. The Defence challenges the Prosecution's right to make submissions on the issue of conflict of interests, since it did not develop this matter during the previous discussions. The Defence therefore submits that the Prosecution Response is frivolous and that the salaries of the Prosecutor's representatives, either Sylvana Arbia or Michael Adenuga, should be reduced accordingly.

*Ntahobali's Reply to Kanyabashi*

16. The Defence for Ntahobali submits that the fact that its main request for separate trial was rejected by the Impugned Decision does not mean that its alternative request for modification of the order of presentation of the Defence should also be denied on the sarne ground.

## DELIBERATIONS

17. The Chamber recalls the finding of the 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)* rendered on 15 June 2004 by Trial Chamber I[7] :

> The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances" and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.

[7] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, 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, para. 7.

18. The Chamber notes that the Defence's ground to apply for reconsideration of the Impugned Decision is that the Chamber mistakenly considered that Counsel for Ntahobali had addressed the issue of reordering the Defence case during the Status Conference held on 18 October 2004.

19. In the view of the Chamber, it appears from the transcripts of the 18 October 2004 Status Conference that Counsel for Arsène Shalom Ntahobali took the floor irnrnediately after Counsel for Pauline Nyiramasuhuko moved the Chamber to reorder the presentation of the Defence case[8]. The Chamber considers that, in his oral submissions, Counsel for Ntahobali addressed the issue of order of disclosure of the identity of the Defence witnesses. It is therefore the view of the Chamber that Counsel for Arsène Shalom Ntahobali supplemented to Counsel for Pauline Nyiramasuhuko's Motion and that the Oral Ruling that was rendered immediately after the submissions by Counsel for Ntahobali considered the submissions made by both Parties[9].

20. The Chamber also notes that the Impugned Decision addresses the whole merits of the Motion for Separate Trial as regards the main request for severance. The findings of the Chamber on this issue also apply to the subsidiary request for reordering of the Defence case.

21. Therefore, it is the view of the Chamber that the Defence has failed to demonstrate the existence of "particular circumstances" that may lead to a reconsideration of the Impugned Decision.

22. For the foregoing reasons, the Chamber denies the Motion.

23. Moreover, the Charnber considers that the Motion relies on a frivolous ground. As it did in previous occasions[10], the Chamber therefore warns the Defence for Ntahobali against filing frivolous motions and recails that such motions may attract in the future the sanctions stipulated under Rule 73 (F) of the Rules, such as the nonpayment, in whole or in part, of fees associated with the motion andlor costs thereof.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DENIES the Motion in its entirety

Arusha, 22 February 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

[8] T. 18 October 2004, p. 14 (ICS) (English version).

[9] T. 18 October 2004, p. 16 (ICS), lines 16-20; See also T. 18 October 2004, p. 20 (English version).

[10] *Prosecutor v. Ntahobali*, ICTR-98-42-T, Decision on Ntahobali's Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness 'QCB' Pursuant to Rule 91 (B) of the Rules (TC), 26 June 2002; *Prosecutor* v. *Ntahobali,* ICTR-98-42-T, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness 'TN' (TC), 1 July 2002.

## *Decision on the confidential Prosecutor's Motion to be served with particulars of Alibi pursuant to Rule 67 (A) (ii) (a) 1st March 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Alibi, Notification of the Defense Alibi, Time of the notification of the alibi – Fair and expeditious trial – Motion partially granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 67, 67 (A), 67 (A) (ii) (a), 67 (B), 73 and 73 (A); Statute, art. 19*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 the Confidential "Prosecutor's Motion to be served with the Particulars of Alibi pursuant to Rule 67 (A) (ii) (a)" filed on 27 January 2005 (the "Motion");

CONSIDERING the :

(A) *"Réponse à la Requête du Procureur intitulée '*Prosecutor's Motion to be served with the Particulars of Alibi pursuant to Rule 67 (A) (ii) (a)'" filed by the Defence of Ndayambaje on 31 January 2005 ("Ndayambaje's Response");

(B) *"Réponse de Shalom Ntahobali et Pauline Nyiramasuhuko à la Requête du Procureur intitulée '*Prosecutor's Motion to be served with the Particulars of Alibi pursuant to Rule 67 (A) (ii) (a)'" filed by the Defence of Ntahobali and Nyiramasuhuko on 31 January 2005 ("Joint Response of Ntahobali and Nyiramasuhuko");

(C) Confidential *"Réponse d'Alphonse Nteziryayo au '*Prosecutor's Motion to be served with the Particulars of Alibi pursuant to Rule 67 (A) (ii) (a)" *du 27 janvier 2003'* filed by the Defence of Nteziryao on 1 February 2005 ("Nteziryayo's Response");

(D) *"Réponse de Joseph Kanyabashi à la Requête du Procureur demandant des '*Particulars of Alibi'" filed by the Defence of Kanyabashi on 2 February 2005;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 67 (A) and 73 of the Rules;

NOW DECIDES the Motion pursuant to Rule 73 (A) on the basis of written submissions filed by the Parties.

SUBMISSIONS OF THE PARTIES

*Submissions of the Prosecution*

1. The Prosecution submits that following receipt of the Pre-Defence Briefs wherein the Defence have cited witnesses they intend to rely on

> "it is apparent from the said briefs that all the Defendants will be bringing forth alibi evidence in support of their cases"[1]

2. The Prosecution, relying on the provisions of Rule 67(A) (ii) (a) and the jurisprudence of the Tribunal[2], challenges the admissibility of any alibi evidence to be called by all Defence teams on the basis that the Defence have failed to serve the Prosecution with a notice and particulars of their alibi *as early as practicable but in any event prior to the commencement of the trial.* (Their emphasis)

3. The Prosecution submits that the information regarding alibi as discerned from the Pre-Defence Briefs is so general that it is unable to investigate the alibi before commencement of trial, thereby impeding its ability to prepare effective cross-examination of those witnesses who will bring forth an alibi defence.

4. The Prosecution relies on the jurisprudence of the Tribunal in *Prosecutor v. Laurent Semanza*[3] to submit that notwithstanding the provisions of Rule 67 (B), the failure of the Defence to furnish a full, complete and accurate account of the alibi is prejudicial to the rights of the Prosecution and to the conduct of a fair trial. The Prosecution further submits that Rule 67 (B) should not be violated flagrantly by the defendants while they are aware they intend to advance such a defence.

5. The Prosecution therefore prays that the Chamber :

A. *Directs the Defence to comply with the provisions of Rule 67 (A) (ii) (a) of the Rules by furnishing :*

(i) The place or places at which the accused claims to have been present at the time of the alleged crime;

(ii) Names, addresses and other identifying information of any witnesses the Defence intends to call in support of the alibi;

(iii) All other evidence on which the accused intends to rely in support of the alibi; and

[1] See the Motion at paragraph 1 and at footnote 2 it is submitted, 'Accused Nyiramasuhuko; See for *e.g.* summaries of witnesses WHNC, MNW, TBM, FAH, CEM, CHT, CRS, RGH, WKNKI, WKKTD, WMKL, WBNJ, WCRB, LHC, WMCZ, WBND; Accused Nteziryayo; AND-1, AND-5, AND-14, AND-15; Accused Ntahobali; WCNF, WCMNA, WCNMC, WCUJM, HIB6, WUNBJ; Accused Kanyabashi; D-2-8-B, D-2-9-M, D-2-12W, D-2-13-G, D-2-14-D, D-2-15-K; Accused Ndayambaje; ANGE, GABON, LIMAN, LINDI, MARVA, TANGO.

[2] *The Prosecutor v. Kayishema et al.* (Case N° ICTR-95-1-T); Decision on the Prosecution Motion for an Order Requesting Compliance by the Defence with Rules 67 (A) (ii) and 67 (C) of the Rules, (TC) of 15 June 1998, p. 3; *The Prosecutor v. Rutaganda*, Appeals Chamber Judgement (AC) of 26 May 2003.

[3] *The Prosecutor v. Laurent Semanza*, ICTR-97-20-T; Decision on the Prosecutor's Motion for Leave to call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence (TC), 27 March 2002 paragraph 12.

B. *Order the Defence to call only those witnesses who do not testify to alibi evidence until such a time as the Prosecutor has been served with the alibi notice and particulars thereby allowing the Prosecutor sufficient time upon receipt of alibi particulars to conduct a full and complete investigation of the alibi witnesses and Defence evidence for purposes of an effective cross-examination before such witnesses give evidence.*

*Ndayambaje's Response*

6. The Defence of Ndayambaje objects to the Motion. The Defence argues that the Prosecution essentially requests the Chamber to force the Defence to file information regarding a defence of alibi or any prospect thereof pursuant to the provisions of Rule 67 (A) (ii) (a) of the Rules.

7. The Defence reminds the Chamber of the provisions of Rule 67 (B) which provide that,

> "Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences thereof".

The Defence argues that the above-cited sub-Rule does not create an obligation on the Defence rather it is there to protect the rights of the Defence. (Emphasis theirs)

8. With regard to the Prosecution's reliance on the *Semanza* Decision, the Defence submits that it will do everything in its power to preserve judicial time having due regard to the rights of the Accused.

9. The Defence submits that the Accused had, since his arrest in Belgium, maintained his innocence of the crimes for which he is charged and that he has always denied having participated or having been present during the events that took place at the Mugombwa Parish and on Kibuye hill. Furthermore, regarding the allegations made by Prosecution witnesses, it is impossible to decipher the exact days and hours when the events at the Mugombwa Parish and the Kabuye hill occurred. Therefore, it is impossible for the Defence at this stage to give specific details of an accused alibi. In any case, Defence witnesses and the Accused himself will give evidence to establish the places where they were when the alleged events occurred at the Mugombwa Parish and the Kibuye hill.

*Joint Response of Ntahobali and Nyiramasuhuko*

10. The Defence of Ntahobali and Nyiramasuhuko object to the Prosecution request that they furnish a notice of alibi pursuant to the provisions of Rule 67 (A). The Defence argue that if the Prosecution considers that the information contained in the Pre-Defence Briefs is too general and insufficient to conduct investigations on the alibi of the accused thereby violating its right to conduct an efficient cross-examination, the Defence submits that information in their Pre-Defence Brief is no more general or imprecise than the Indictment and the Prosecution Pre-Trial Brief. The Defence argue that none of the Prosecution witnesses were able to give precise dates and times when they saw the Accused persons during the period when the alleged events occurred.

11. Since Prosecution witnesses were unable to give precision as to dates and times when they saw the Accused persons during the period when the events allegedly

occurred, the Defence submit that they do not have any obligation to furnish a notice of alibi under Rule 67 (A) (ii) (a).

*Nteziryayo's Response*

12. The Defence of Nteziryayo objects to the characterisation by the Prosecution of the Accused case as being an alibi defence. The Motion itself is very vague and premature.

13. The Defence submits that the Prosecution evidence was vague as to the exact time of the alleged events. While some Prosecution witnesses testified to an event having taken place in April 1994, other witnesses testified to the same event having taken place in June 1994. In these circumstances it is impossible to situate the time when the events occurred in order to give an alibi as to where the Accused was. This situation also applies to the place where certain of the events took place.

14. When the Accused contests that an event took place, it does not mean that he is bringing forth a defence of alibi. For example, the Defence will bring forth evidence that there was only one ceremony held for his inauguration as prefect. The Accused's defence is not one of alibi if proving that the second ceremony never took place.

15. The Defence submits that a defence of alibi consists of positive circumstances by a person that she did not commit the crime for which she is charged because at the material time when the crime was committed, that person was in another place which can be specified. In essence, it is necessary to have a precise time when the event took place.

16. The Defence further reminds the Chamber of the provisions of Rule 67 (A) (ii) (a) and (B). The Defence adds that it will be up to the Chamber to evaluate whether it is reasonable to expect the Accused to remember where he was each minute of each day between April and July 1994, particularly when the Accused contests that he was present when a specific event occurred but cannot specify where he was when the said event occurred. For instance, if there are two witnesses who testify to an event and one testifies that the Accused was present while the other testifies that he was not, it does not mean that the witness who testified that the Accused was not present at the event is an alibi witness. The Defence submits that the Chamber will have to decide if proof of the presence of the accused was made beyond reasonable doubt.

17. In conclusion, the Defence argues that Rule 67 (A) (ii) (a) stipulates that "[…] at the time of the alleged crime." It submits that it is only until the Prosecution specifies "the time of the alleged crime" that the Accused will be in a position to specify where he was at that specific time.

*Kanyabashi's Response*

18. As a preliminary matter, the Defence submits that it was in transit on the days when the Response to the Motion was due to be filed, *i.e.*, 27 and 28 January 2005 and so it files its Response late.

19. The Defence notes the Prosecution submission that

"It is apparent from the said briefs [the Pre-Defence Briefs] that all the Defendants will be bringing forth alibi evidence of their cases"

and by this, the Defence assumes that the Prosecution refers to seven of its listed witnesses[4] who will testify that they did not see or hear that the Accused was present at the places where the various events where crimes he is charged with occurred, in particular the events of Kabakobwa. The said witnesses do not claim to have been elsewhere with Kanyabashi when the crimes occurred. It is only when a witness claims to have been elsewhere with Kanyabashi when the crimes occurred that said witness' evidence can be called an alibi.

20. The Defence makes reference to various texts to support its submissions[5]. The Defence submits therefore that bringing forth evidence that an Accused person was not present at the place where a crime was committed does not mean that it is a defence of alibi. The Defence argues that Rule 67, which stems from the common law system, is also very specific on this issue, when it provides at sub-Rule (A)(ii)(a) that;

"in which case the notification shall specify the place or places at which *the accused claims to have been present* at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused *intends to rely to establish the alibi."* (Emphasis theirs)

21. The Defence submits that it is very possible for the Accused to indicate that he was not present when a specific event occurred but at the same time be unable to specify exactly where he was when the said event occurred. Generally the Accused is bringing an alibi each time he refutes being present when an event occurred.

22. The Defence finally recalls the provisions of Rule 67 (B) and submits that the provisions therein are clear with regard to the Chamber's discretion to evaluate alibi evidence, for which notice to the Prosecution be given late.

23. With regard to the six witnesses identified by the Prosecution to be alibi witnesses, the Defence submits that if the Motion was granted, the Defence would have to disclose their identities earlier that the 21 days prior to their testimony. The Defence hopes that the Motion is not an attempt to bypass the Chamber's disclosure order which was contested by the Prosecution.

24. The Defence thus prays that the Chamber receive the said Response and to reject the Motion.

## Deliberations

25. The Chamber recalls that Article 19 of the Statute of the Tribunal empowers it to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules;

26. The Chamber further recalls the relevant provisions of Rule 67 (A) and (B) to be :

Rule 67 : Reciprocal Disclosure of Evidence

[4] Said witnesses are mentioned at footnote 1 above.

[5] Archbold International Criminal Courts, Practice, Procedure and Evidence (Thompson, 2003) paragraph 17-35; Canadian Criminal Evidence (3rd edition, McWilliams) paragraph 28 : 10715.

Subject to the provisions of Rules 53 and 69 :

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

(i) […]

(ii) The Defence shall notify the Prosecutor of its intent to enter :

(a) The Defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) […]

(B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

27. he Chamber finds that if the Defence wishes to rely on the defence of alibi, it must make the necessary disclosures immediately, in accordance with the provisions of Rule 67. The Chamber notes that the obligations prescribed under the Rule are clear and unambiguous that the Defence is required to, as early as reasonably practicable and in any event prior to the commencement of the trial, notify the Prosecution of its intention to enter the defence of alibi, and in that notice, the Defence is obliged to specify the names and addresses of witnesses on which the accused intends to rely to establish the alibi.

28. With respect to Kanyabashi's submissions that the Prosecution may be attempting to bypass the Chamber's disclosure order[6] that identities of Defence witnesses be disclosed 21 days before they testify, the Chamber finds this submission to be erroneous as the obligations prescribed under Rule 67 are totally different from disclosure of the identities of Defence witnesses.

29. Accordingly, the Chamber grants the Motion and directs the Defence to immediately make the necessary disclosures in accordance with Rule 67, if it wishes to rely on the defence of alibi.

30. Regarding the Prosecution's second prayer, the Chamber finds that this does not arise at this stage, consequently, it is denied.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion in part; and

DIRECTS the Defence to immediately make the necessary disclosures in accordance with Rule 67, if it wishes to rely on the defence of alibi; and

DENIES the Motion in all other respects.

Arusha, 1 March 2005.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

***

[6] See the Chamber's Oral Ruling in the T. 18 October 2004, pg 20.

## *Decision on Nyiramasuhuko's Strictly Confidential* Ex-Parte – *Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses 1st March 2005 (ICTR-97-21-T; Joint Case : ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Pauline Nyiramasuhuko – Bernard Ntuyahaga –* Ex parte *Motion, Special protective measures to witnesses, In camera proceedings, Protection of the victim's identity, Eligibility to protective measures, Cumulative criteria, Relevance of the Testimony, Necessity of will-say statements to evaluate the relevance of the testimony, Dependence of the Tribunal on eyewitness testimony, Real fear for the safety of the witness, Objective basis underscoring the fear, Insufficiency of the subjective fear, Arrest of a defence witness, Disappearance of a defence witness, Threat to get divorced insufficient to additional protective measures, Scope of "in danger or at risk", Threat of unlawful acts, Strictly necessary measures, Clear preference for testimony in court, Favour of less restrictive measure, Exception of safe conduct, Immunity granted by the Tribunal, Exclusion of the perjury, Limitation* ratione materiae *of the safe conduct, Limitation* ratione temporis *of the safe conduct, Limitation* ratione loci *of the safe conduct – No application of the additional criteria for granting protective measures (No* prima facie *evidence that the witness is untrustworthy, Length of time of protection of the identity of the victims and witnesses, Fair position of both Parties to confront the witness, Lack of efficient witness protection program) – Duty of confidentiality of the members of the Registry, Solemn declaration of non-divulgation – Burden of the proof,* Actori Incumbit Probatio *– Probative value of an NGO report – Equality of the Parties, Fair and expeditious trial – Doctrinal interpretation of the Rules, Case Law of the ICTY – Motion mostly denied*

*International Instruments cited :*

*Directive for the Registry of the International Criminal Tribunal for Rwanda – Judicial and Legal Services Division, art. 7; Rules of Procedure and Evidence, rules 3 (E), 32, 54, 69, 73 (B), 75 (A), 76 and 90 (E); Statute, art. 19, 20 (1) and 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Decision on the Motion for the Protection of Defence Witnesses, 6 October 1997 (ICTR-95-1); Trial Chamber,* The Prosecutor v. Joseph Kanyabashi, *Decision on the Protective Measures for Defence Witnesses and Their Families, 25 November 1997 (ICTR-96-15); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko, *Decision on Protective Measures for Defence Witnesses and Their Families and Relatives*

*13 March 1998 (ICTR-97-21); Trial Chamber,* The Prosecutor v. Georges Rutaganda, *Decision on the Urgent Motion Filed by the Defence for the Immediate Transfer and Appearance of a Detained Witness, Froduald Karamira, 26 March 1998 (ICTR-96-3); Trial Chamber,* The Prosecutor v. André Ntagerura, *Decision on the Defence Motion for the Protection of Witnesses, 24 August 1998 (ICTR-96-10A); Trial Chamber,* The Prosecutor v. Emmanuel Bagambiki et al., *Decision on the Defence Motion for the Protection of Witnesses, 30 September 1998 (ICTR-97-36); Trial Chamber,* The Prosecutor v. Théoneste Bagosora, *Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for M. Bernard Ntuyahaga, 13 September 1999 (ICTR-96-7); Trial Chamber,* The Prosecutor v. Ferdinand Nahimana, *Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution Motion for Special Protective Measures for Witness "A" pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure Evidence, 5 June 2002 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Edouard Karemera, *Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure, 20 October 2003 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosecutor's Extremely Urgent Motion Requesting That the Extraordinarily Vulnerable Witnesses XI006 and 039 Testify by Closed Video Transmission Link With a Location at The Hague And Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75, 4 June 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dusko Tadic, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 August 1995 (IT-94-1); Trial Chamber,* The Prosecutor v. Dusko Tadic, *"Décision relative aux requêtes de la défense aux fins de citer à comparaître et de protéger des témoins à décharge et de présenter des témoignages par vidéoconférence", 25 June 1996 (IT-94-1); Trial Chamber,* The Prosecutor v. Slavko Dokmanović, *Decision Regarding Defence Motion to Protect Witness, 27 August 1997 (IT-95-13a); Trial Chamber,* The Prosecutor v. Mile Mrkšić et al., *Order on Defence Motion for Safe Conduct, 12 June 1998 (IT-95-13/1); Trial Chamber,* The Prosecutor v. Tihomir Blaškić, *Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements, 3 September 1998 (IT-95-14); Trial Chamber,* The Prosecutor v. Tihomir Blaškić, *Order granting Safe-Passage to Defence Witness "D/G", 7 September 1998 (IT-95-14); Trial Chamber,* The Prosecutor v. Radoslav Brđanin, *Decision on Motion by Prosecution for Protective Measures, 3 July 2000 (IT-99-36); Trial Chamber,* The Prosecutor v. Slobodan Milosević, *Partly Confidential and* Ex Parte *Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002 (IT-02-54); Trial Chamber,* The Prosecutor v. Slobodan Milosević, *Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002 (IT-02-54); Trial Chamber,* The Prosecutor v. Slobodan Milosević, *Decision on Confidential With an* Ex-Parte *Annexure Prosecu-*

*tion's Motion for Video-Conference Link And Protective Measures For Witness Named Herein, 19 March 2003 (IT-02-54)*

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

SITTING as Trial Chamber II cornposed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of Nyiramasuhuko's Stnctly Confidentiai *Ex Parte* – Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses (Article 21 and Rules 54, 69 and 75), filed on 19 January 2005 (the "Motion")[1];

NOTING that, being *ex parte,* the Motion was not served to the Prosecution or any other Party in the case;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"');

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the *ex parte* written submissions of the Defence only.

SUBMISSIONS OF THE DEFENCE

1. After recalling the Decisions rendered on 13 March 1998 and 20 March 2001 regarding witness protection, which ordered disclosure of witnesses' identifying information no later than 21 days before their appearance, the Defence submits that sorne Defence witnesses have expressed fear for their security despite existing protective orders, should they come to testify.

2. The Defence subrnits that ail witnesses mentioned in the Motion are informed of previous attempts made by the Rwandan authorities to have defence witnesses arrested and extradited to Rwanda, in particular in November 2003 in the *Ndindabahizi* case; they also lcnow about the recent disappearance of a Defence witness in the *Simba* case. They therefore fear for they security.

3. The Defence makes the following submissions regarding witnesses it wishes to be granted additional protective measures :

– Defence Witness WJN occupied an imporiant position in Rwanda during the events of April-July 1994. He fears to be arrested and fears for the securiîy of his close family, presently refugee in a country of southem Afnca, as well as other rnembers of his family who are still in Rwanda. He also fears for potentiai reprisais against him and his family, after his testirnony and when the ICTR protection stops. The Defence submits that Defence Witness WJN has important information and that it would be in the interest of justice to hear his testimony. The Defence announces that his Will-Stay Statement is annexed to the Motion, when it is not;
– Defence Witness BK refuses to come to the ICTR because he fears to be arrested by the OTP and by the Rwandan authonties. Defence Witness BK occupied an

[1] The Motion mas originally filed in French and entitled : " *Requête strictement confidentielle ex parte sous scellés, de Pauline Nyiramasuhuko en mesures de protection additionnelles de certains témoins à decharge*".

important position in Rwanda in 1994. He fears for the securily of his immediate family, currently refugee in an African country, and other rnembers of his family who are still in Rwanda. He aiso fears for potential reprisais against him and his family, after his testimony and when the ICTR vrotection will be over. BK currently lives under a false identity in an African Country. He took this identity when he was a refugee in Congo in 1994-1995, because the RPF was tracking the former authorities and their family in Hutu refugee camps. After Congo, BK went to Tanzania in 1996**,** where the authorities returned Rwandan refugees by force to where the authorities returned Rwandan refugees by force to Rwanda, where they were either killed, tortured or imprisoned. The Defence annexes to the Motion a Report of the organization Amnesty International, which is entitled "Rwanda : Refugees must be protected". Defence Witness BK fled to an African country via Burundi and lives there under his false identity He still fears to be arrested and returned by force to Rwanda. The Defence submits that the false identity of the witness does not affect his credibility, but is necessary for his life and the life of his family. Defence Witness BK has important information and it wouid be in the interest of justice to hear his testimony. The Defence announces that his Will-Stay Statement is annexed to the Motion, when it is not;

– Defence Witness BN also occupied an important position in Rwanda in 1994 and fears to be arrested by the OTP or the Rwandan authorities. He also fears for the security of his immediate family, who has taken refuge in an African counts : as well as other relatives who are still in Rwanda. He fears for reprisals against him and his family after his testimony and when the ICTR protection will be over. Defence Witness BN has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;
– Defence Witness NEM refuses to come to Arusha, because his testimony charges a Rwandan authority and he fears to be abducted, killed or extradited to Rwanda. He also fears to be extradited from the African country where he has requested the refugee status as a Burundian citizen. The Defence submits that the false information provided to the national authorities about his nationality does not affect his credibility, but was a necessity. NEM was detained, tried and acquitted in Rwanda for genocide. However, he fears to be re-arrested because his acquittal was challenged and members of the population are still accusing him. NEM fears for his security and the security of his relatives who are still in Rwanda. Defence Witness NEM has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;
– Defence Witness WBKP refuses to come to Arusha, because his absence would be noticed by his wife, who is Tutsi and threatens to divorce if he testifies on behalf of the Defence. WBKP could testify from Brussels, where he currently lives, without his wife knowing about his testimony. WBKP has important information and it would be in the interest of justice to hem his testimony. His Will-Say Statement is annexed to the Motion;
– Defence Witness WLNA was very close to one Prosecution Witness. WLNA gave false information on his nationality and identity to the Immigration authorities of the African country where he currently lives in order to be allowed in the country. He is living there with his family. WLNA does not want the ICTR to reveal his true particulars, but he is ready to reveai his identity and nationality in closed ses-

sion. The Defence submits that the false information on his identity and nationality does not affect his credibility, but were necessary for his life and the life of his family. WLNA has important information and it would be in the interest of justice to hear his testimony. His Will-Say Statement is annexed to the Motion;

– Defence Witness WLMF is in the same situation as Defence Witness WLNA. He has important information and it would be in the interest ofjustice to hear his testimony. His Will-Say Statemenits ann€xedto the Motion;
– Defence Witness MAC left the African corurtry where she lived alone and was a refugee, when she heard about enforced repatriation. She followed members of her family in another African country unknown to the immigration authorities to avoid being forced to live in a refugee camp and because she feared to be sent back to Rwanda MAC is 50 years old and ill. MAC has important information and it would be in the interest of justice to hear her testimony. Her Will-Say Statement is annexed to the Motion.
– Defence witnesses WBNC, WHNC, WFMG, WBUC, WBND, WBNM and WLMF are all members of the Accused family who were present at Ihuriro Hotel between April and July 1994. The Defence was not able to meet these people before 31 December 2004. Those witnesses are currently met by Co-counsel for the Accused. Their will-say statements will be disclosed to the parties 21 days before their testimony, as fixed by the Chamber, but their will-say statements cannot be added to the Pre-Defence Brief, because their testimony would clearly identify them. Their will-stay statements are not annexed to the Motion.

4. Summarizing the relevant applicable law, case-law and the former decisions rendered in the present case, the Defence submits that Rwanda remains a very dangerous country for Hutu who are "voluntarily" repatriated there The Defence relies on a Report made by the organization Amnesty Intemational, which is annexed to the Motion.

5. The Defence submits that the right of the Accused to have a fair trial is one of the elements to consider in ordering protective measures for witnesses. Therefore, these protective measures should *a fortiori* be granted when they are requested by the Defence, because they cannot jeopardize the right to have a fair trial.

6. The Defence further submits that, for a proper defence to be granted, the identity of Defence witnesses must be protected. The outcome of the trial depends on the capacity and willingness of witnesses to testify. The Defence submits that it is particularly true as regards witnesses who occupied an important position in their country and/or possess sensitive in formation. The disclosure of the identity of the enumerated witnesses several days before their testimony creates actual and serious risks that they should not face. The Defence submits that the witnesses and Victims Support Section (WVSS) informed the counselt hat, once the identity of the witnesses is disclosed, it could not guarantee that their identity would not be revealed to third persons, in particular the Rwandan authorities. The Defence's purpose is not to accuse anybody within the OTP, but to underline the actual risk that information on the identity of the witnesses be revealed to third persons, as it occured in November 2003 in the Ndindabahizi case.

7. The Defence submits that, in the *Blaskic* and, *Delalic* cases, the ICTY authorized the Defence to disclose the identity of its witnesses only seven open days before their testimony. In the *Milosevic* case, the prosecution was authorized to disclose the iden-

tity of some witnesses possessing sensitive information to the Accused only ten days before their testimony.

8. Therefore, considering the situation of Defence Witnesses WJN, BK BN, NEM and WBKP, the Defence requests that their identity be disclosed to the prosecution on the very day of their testimony oniy. This measure is the only one limiting to the minimum the risk that their identity be disclosed to third persons. The Defence submits that the information detained by those wimesses is crucial for the manifestation of truth, and that this type of witnesses never appear before the ICTR because safety risks.

9. The Defence submits that the exceptional circumstances described as regards Defence Witnesses WJN, BK, BN, NEM and WBKP meet the critena for the organization of their testimony by way of video-link. In support of this request, the Defence relies on the Decision rendered by Trial Chamber I on 8 October 2004 in the *Bagosora et al.* case, which ruled that a request for testimony by means of video-link should be considered under the "interests of justice" standard set forth in the *Nahimana et al.* case, namely taking into account such considerations as the materiality of the testimony, the complexity of the case, the prejudice to the Defence including elements of surprise, ongoing investigations, and replacement and corroboration of evidence.

10. The Defence further submits that the exceptional circumstances described as regards Defence Witnesses WJN, BK, BN and NEM meet the criteria for maximal measures and therefore requests, heyond other protective measures, the alteration of their image and voice during their testimony. The Defence submits that such measures were used in several cases before the ICTY.

11. At last, the Defence submits that Defence Witnesses WJN, BK, BN and NEM and their family live in very precarious conditions in refugee camps, which make them particularly vulnerable to retaliation and murder. The Defence reminds that Mr Seth Sendashonga, was murdered in Nairobi hy RPF agents a few days before his testimony in the *Kayishema/Ruzindana* case and submits that there is a high risk that the mentioned witnesses be killed as well. The Defence submits that a Chamber can order a State to arrest a person and it can, pursuant to Article 28 of the Statute, order a State to welcome a person if necessary. Such measures are taken by some European and North-American tribunals. In some instances, a new identity is also granted to the re-installed witness. The Defence believes that such measures were used for Prosecution Witness ZC who testified in the *Media* and *Military I* cases. The Defence submits that Defence Witnesses WJN, BK, BN and NEM meet the cnteria for their relocalisation, together with their family, in a European country after their testimony.

12. Therefore, the Defence prays the Chamber to grant the following additionai measures for the protection of the mentioned Defence witnesses :

– To order that, should the Motion and its annexed be translated, the Motion be translated by a person chosen by the Defence and paid by the Registry;
– To order the Prosecution and other Parties to the case, as well as al1 persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where he currently lives or any other authorities, that Witness NEM declared that he was Burundian when he is actually Rwandan;
– To order the Prosecution and other Parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion

and its annexes, not to reveal to the Immigration Authorities of the African country where she currently lives or any other authorities, that Witness MAC never presented herself to the national authorities of that State :

– To order the Prosecution and other Parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African Country where they currently live or any other authorities, that Witnesses WLNA and WLMF gave false information on their identity and nationality to the authorities of that country;
– To order the Prosecution and other Parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where he currently lives or any other authorities, that Witness BN gave false information on his identity;
– To order that the identity of Witnesses WJN, BK, BN, NEM, and WBKP not be disclosed to the Prosecution and to other Parties in the case before the very day of their testimony;
– To order that the information contained in the will-say statements of Witnesses WJN, BK, BN, NEM and WBKP remain redacted until the day of their testimony;
– To order that witnesses WJN, BK, BN and NEM testify by video-link from Paris or Brussels;
– To order that Witness WBKP testify by video-link from Brussels;
– To order that appropriate measures be used to alter the face and the voice of Witnesses WJN, BK, EN and NEM;
– To order that Wimesses WJN, BK, BN and NEM be relocalised with their family in an European country.

**Deliberations**

13. The Chamber recalls that all Parties are, pursuant to Article 20 (1) of the Statute, equal before the Tribunal[2] and that the Chamber must take appropriate measures to ensure that the truth is ascertained in a fair and expeditious trial[3].

14. The Chamber also notes that, since the filing of the Motion, the Defence has disclosed the will-say statements of Witnesses WBNC, WHNC, WFMG and WBND in its revised Pre-Defence Brief filed on 31 January 2005 without the additional protective measures requested in the Motion. Consequently, the Chamber considers the Motion moot as regards Defence Witnesses WBNC, WHNC, WFMG and WBND.

[2] See *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Decision on the Motion for the Protection of Defence Witnesses (TC), 6 Octobre 1997; *Prosecutor v. Bagambiki et al.,* ICTR-97-36-T, Decision on the Defence Motion for the Protection of Witnesses (TC), 30 September 1998.

[3] See ICTY, *Prosecutor v. Blaskić,* IT-95-14-T, Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements (TC), 3 September 1998.

*Applicable Law*

15. Pursuant to Article 21 of the Statute :

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

16. Accordingly, Rule 69 states :

> (A) In exceptional circumsiances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit.
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence.

And Rule 75 (A) further States :

> A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concemed, 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.

17. The Chamber recalls the 13 September 1999 Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr Bernard Ntuyahaga, rendered in the *Prosecutor* v. *Bagosora* case[4] :

> To grant protective mesures to a witness, pursuant to Rule 75, the following conditions must also apply. Firstly, the testimony of the witness must be relevant and important to the party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied. See *Prosecutor v. Tadic,* Case IT-94-1-T (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) (10 August 1995).

18. In addition to those three criteria, some decisions rendered by the Tribunal or the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") have mentioned additional criteria, such as the fact that there must be no *prima facie* evidence that the witness is untrustworthy[5], the length of time at which the identity of the victims and witnesses must be disclosed to the parties[6], the fact that the Parties

[4] *Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the extremely urgent Request made by the Defence for Protection Measures for M. Bernard Ntuyahaga (TC), 13 September 1999, para. 28

[5] ICTY, *Prosecutor v. Tadić,* IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (TC), 10 August 1995, para. 64; ICTY, *Prosecutor v. Milosević,*IT-02-54-T, Partly Confidential and *Ex Parte* Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69 (TC), 19 February 2002, para. 25.

[6] ICTY, *Prosecutor v. Milosević,* IT-02-54-T, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (TC), 18 June 2002, para. 7.

must be in a fair position to confront the witness[7], the lack of efficient witness protection program[8] and others. It is the view of the Chamber that, while keeping these additional criteria in mind, the Motion shall be determined on the basis of the three principal above-mentioned criteria.

19. The Chamber recalls that the burden of proof for the fulfilment of the applicable criteria lies with the Party requesting additional protective measures. As stated in the 8 October 2004 Decision rendered in the *Military I* case[9] :

> [T]he applicant must make some showing that giving testimony in that manner is necessary to safeguard the witness' security.

20. The Chamber will consider the three above mentioned cntena and determine whether the Defence has demonstrated that they are fulfilled for each and every witness for whom additional protection is requested. The Chamber notes that the third criterion is relevant to the choice of protective measures to apply to those witnesses who fulfil the first two criteria. Therefore, the Chamber will first apply the first two criteria to determine whether the witnesses are eligible to additional protective measures and, secondly, will apply the third criterion to determine which protective measures shall be applied to them.

*Relevance and Importance of the Testimony*

21. The jurisprudence of both Tribunals holds that, for special protective measures to be granted to a witness, his or her testimony must be relevant and important to the case of the requesting Party. As stated in the 10 August 1995 Decision rendered by the ICTY in the *Tadić* case[10] :

> [T]he testimony of the particular witness must be important to the Prosecutor's case : '[T]he evidence must be sufficiently relevant and important to make it

[7] *Prosecutor v. Nahimana,* ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001, para. 35; *Prosecutor v. Karemera,* ICTR-98-44-I, Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure (TC), 20 October 2003, para. 13.

[8] *Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the Prosecution Motion for Special Protective Measures for Witnesses 'A' Pursuant to Rules 66 (C), 69 (A) and 75 (TC), 5 June 2002, para. 29; ICTY, *Prosecutor v. Milosević,* IT-02-54-T, Decision on Prosecution Motion for Provisional Measures Pursuant to Rule 69 (TC), 19 February 2002, para. 25

[9] *Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, para. 8, see also *Prosecutor* v. *Rutaganda,* ICTR-96-3-T, Decision on the Urgent Motion Filed by the Defence for the Immediate Transfer and Appearance of a Detained Witness, Froduald Karamira (TC), 26 March 1998, paras. 7-10; *Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para.19; ICTY, *Prosecutor* v *Brdanin and Talić,* IT-99-36-T, Decision on Motion by Prosecution for Protective Measures (TC), 3 July 2000, paras. 16-17.

[10] ICTY, *Prosecutor v. Tadić,* IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 63; See also *Prosecutor* v. *Bagosora,* ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999, para. 29.

unfair to the prosecution to compel the prosecutor to proceed without it'. (*R. v. Taylor,* Ct App. Crim. Div. 22 July 1994). In this respect, it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. Further, the Prosecutor has stated that this testimony is important and, for some witnesses, critical.

22. The Chamber notes that the Defence has annexed will-say statements of some witnesses for whom additional protection is sought. On the basis of the annexed will-say statements, the following distinction can be made :

– Defence Witnesses MAC, NEM and WLMF are expected to testify on facts they say they have directly seen and which are directly connected to the Accused;
– Defence Witness WLNA says that he was in close relation with a Prosecution Witness;
– The expected testimonies of Defence Witnesses BN and WBKP are limited to the general background of the Rwandan situation in 1994 and make no mention of any specific element related to the acts and conduct of the Accused.

23. It is the view of the Chamber that the relevance of Defence Witnesses MAC, NEM, WLMF and WLNA cannot be disputed. As regards the expected testimonies of Defence Witnesses BN and WBKP, the Chamber considers that the Defence is free to design its strategy and that, since the elements contained in the expected testimonies of these witnesses present some relevance and some importance to the Defence case, the criterion is fulfilled.

24. The Chamber further notes that, for other witnesses, namely BK, WBNM, WBUC and WJN, additional protection is requested without any will-say statements being disclosed to the Chamber. The will-say statements of Witnesses BK and WJN are said to be annexed to the Motion, but are not. The Defence submits that it lacked time to contact Wihesses WBNM, WBUC and WLMF and that their will-say staternents will be disclosed to the Parties 21 days before their appearance; the Defence only subrnits that those witnesses are family members of the Accused who were present at the Ihuriro Hotel in Butare between April and July 1994. However, the will-say statement of Witness WLMF is annexed to the Motion and it does not appear that the witness was a family member of the Accused or that he stayed at Ihuriro Hotel between April and July 1994.

25. Failure to provide the Chamber with the will-say statements of those witnesses prevents the Chamber from assessing the relevance and importance of their testimonies. It results that the Defence has failed to demonstrate the relevance and importance of the testimonies of Witnesses BK, WBNM, WBUC and WJN and that the first criterion for the application of additional protective measures is not met. Since the first two criteria are cumulative, it is the view of the Chamber that there is no need for further determination on the fulfilment of the second criteria for these witnesses who are not eligible to additional protective measures. The Chamber therefore denies the Motion as far as Witnesses BK, WBNM, WBUC and WJN are concerned.

*Real Fear underscored by an objective Basis*

26. The Chamber now considers the second criterion to Defence Witnesses BN, MAC, NEM, WBKP, WLMF and WLNA. As mentioned in the above-cited *Bagosora*

Decision of 13 September 1999, subjective fear is insufficient and must be underscored by objective considerations. In the *Prosecutor v. Milosević* case, the ICTY further ruled[11] :

> [F]ears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk.

27. The Chamber recalls that the security situation of witnesses for whom additional protection is sought, as submitted by the Defence, can be summarized as follows :

– Witnesses BN and NEM fear to be arrested by the Office of the Prosecutor (the "OTP") or the Rwandan authorities, fear for the security of their family and fear reprisals once the protection provided by the Tribunal ends;
– Witnesses NEM, WLNA and WLMF have given false information on their particulars to the authorities of the State where they are currently living and fear that their coming to the Tribunal or the disclosure of their identity may reveal the irregularity of their situation to those national authorities;
– Witness MAC did not declare herself to the authorities of the State where she lives;

Witness WBKP fears that his wife may divorce him if he testifies.

28. In support of the fear of Witnesses BN and NEM for their security and the security of their farnily, especially the risk of retaliation, the Defence submits that the witnesses are aware of a former attempt to arrest a defence witness in the *Ndindabahizi* case, that they are also aware of the recent disappearance of a defence witness in the *Simba* case and produces in annex to the Motion a 2004 Report of Amnesty International on the protection of Rwandese refugees in the Great Lakes region. The Chamber considers that those elements constitute an objective basis underscoring the fears expressed by those witnesses that their security or the security of their family may be threatened, should they corne to testify.

29. As regards the fear to be arrested by either the OTP or the Rwandan authorities expressed by Witnesses BN and NEM, the Chamber notes that it results from the willsay statements of Witnesses BN and NEM that they held important positions in Rwanda in 1994 and that their fear therefore appears to be justified. The Chamber further notes that this risk is objectively underscored by the report of Amnesty International annexed to the Motion. However, the Chamber recalls the Parties that, as stated in the 13 September 1999 Decision in the *Bagosora* case[12] :

> [T]he phrase "in danger or at risk" does not include being subject to lawful acts of a State, *e.g*., prosecution. For a person to be in danger or at risk, the threat must be of an unlawful act.

30. Therefore, the Chamber considers that the risk to be legally arrested andlor prosecuted is out of the scope of protective measures, with the limited exception of the granting of safe conduct. This exception is discussed below.

31. In support of the fear of Wimesses MAC, NEM, WLMF and WLNA as regards their irregular situation on the territory of the State where they currently live, the

[11] ICTY, *Prosecutor v. Milosevic,* T-02-54-T, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002, para. 7.

[12] *Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Bernard Ntuyahaga (TC), 13 September 1999, para. 34.

Defence produces no element supporting those assertions. In particular, the Defence does not provide any document permitting to verify the genuineness of their alleged current situation. The sole assertions by the Defence Counsel do not constitute evidence and the Chamber notes, in particular, that those assertions are not even reflected in the will-say statements of the witnesses. The Chamber therefore considers that the Defence has failed to adduce evidence of the situation of Witnesses MAC, NEM, WLMF and WLNA on the territory of the States where they currently live.

32. Moreover, would those assertions be supported by evidence, it is the view of the Chamber that, as stated in the above-mentioned Decision of 13 September 1999 in the Bagosora Case, the risks comected to the illegal situation of the witnesses on the territory of a State are risks of "being subject to lawful acts of a State" and are no ground for protective measures. The Chamber finds that there is no measure within its power that would be appropriate to prevent such a risk. For the foregoing reasons, the Chamber is not satisfied that this threat fulfils the second criterion for the application of additional protective measures.

33. As regards the fear expressed by Witness WBKP that his wife may divorce him if he comes to testify, the Chamber similarly notes that the Defence produces no element underscoring this fear. In any event, the Chamber considers that the marital situation of the Witness and the threat to get divorced could not be considered as sufficient ground for additional protective measures. Consequently, in the view of the Chamber, Witness WBKP does not meet the second criterion for the application of additional protective measures.

34. For the foregoing reasons, the Chamber considers that the Defence has failed to demonshate that the testimonies of Witnesses BK, WBNM, WBUC and WJN were suficiently relevant and important to the Defence case to justify the application of additional protective measures. The Chamber further considers that the Defence has also failed ta demonstrate that Witnesses MAC, WBKP, WLMF and WLNA are confronted with objective risks for their security or the security of their family. The Chamber finds that Witnesses BN and NEM are the only witnesses who meet the criteria for the application of additional protective measures.

*Strictly Necessary Protective Measures*

35. The Defence prays the Chamber to apply the following protective measures to Witnesses BN and NEM :

– To order that, should the Motion and its annexed need to be translated, the Motion be translated by a person chosen by the Defence and paid by the Registiy;
– To order the Prosecution and other parties to the case, as well as all persons working for the ICTR who could have access to the information contained in the Motion and its annexes, not to reveal to the Immigration Authorities of the African country where he lives or any other authorities, that Witness NEM declared that he was Burundian when he was Rwandan;
– To order that the identity of Witnesses BN and NEM be not disclosed to the Prosecution and to other parties in the case before the very day of their testimony;
– To order that the information contained in the will-say statement of witnesses BN and NEM remain redacted until the day of their testimony;
– To order that witnesses BN and NEM testify by video-link from Paris or Bmssels;

– To order that appropriate measures be used to alter the face and the voice of witnesses BN and NEM;
– To order that witnesses BN and NEM be reinstailed with their family in an European country.

36. As regards measure (i), the Chamber reminds the Defence that, pursuant to Rule 32 of the Rules and Article 7 of the Directive for the Registry of the International Criminal Tribunal for Rwanda – Judicial and Legal Services Division, staff members of the Regishy are bound by a Solemn Declaration made before commencing their duties not to reveal any non-public information which they have access to in the course of the work performed on behalf of the Tribunal. This duty of confidentiality is specifically recalled as regards interpreters and translators in Rule 76 of the Rules. In accordance with Rule 3 (E) of the Rules, the translation of the working languages is under the responsibility of the Registrar. Therefore, the Chamber sees no basis to order a measure such as measure (i).

37. As regards measure (ii), the Chamber repeats its finding that the Defence failed to provide the Chamber with evidence that Witness NEM was at risk on the territory of the State where he currently lives. Therefore, the Chamber sees no ground for the requested measure to be granted.

38. As regards measures (iii) and (iv), the Chamber is aware that short time-limits for disclosure of the identity of witnesses and non redacted statements have been previously granted before the ICTY. In its 3 September 1998 Decision rendered in the *Prosecutor v. Blaskic* case, the Chamber ordered the Defence to disclose to the Prosecutor the names and identifying information of Witnesses, as well as the summary of all facts about which they would testify, at least seven (7) days prior the date of their appearance[13]. In the 18 June 2002 Decision rendered in the *Prosecutor v. Milosevic* case, the Prosecution was granted its request to delay the disclosure to ten (10) days before the appearance of the witness[14].

39. However, in the present case, the Chamber notes that the fear for which those measures are aimed at preventing, namely the risk of pressure or retaliation on the witness or his family, is only evidenced by the Amnesty International Report annexed to the Motion. The Chamber considers that the risks underscored by this Report are already addressed by the current protective measures that apply to all Defence witnesses in the present case pursuant to the 13 March 1998 Decision on Protective Measures for Defence Witnesses and Their Families and relatives[15], namely the use of a pseudonym and confidentiality of identifying information which can be addressed in closed session only. Moreover, the Chamber notes that Witness NEM also mentions a Co-Accused of Pauline Nyiramasuhuko and that there is a need to strike a balance between the opposite interests of the Parties with regard to the preparation of their case, in accordance with Rule 75 (A). In the view of the Chamber, the current dispo-

[13] ICTY, *Prosecutor v. Blaskić,* IT-95-14-T, Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements (TC), 3 September 1998.

[14] ICTY, *Prosecutor* v. *Milosević,* IT-02-54-T, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002.

[15] *Prosecutor v Nyiramasuhuko,* ICTR-97-21-T, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 13 March 1998.

sitions for the disclosure of identifying information and unredacted statements of Defence witnesses, as resulting from the 18 October 2004 Oral Ruling, do strike this balance. Therefore, the Chamber considers that the risks addressed by measures (iii) and (iv) are already addressed by current protective measures and that there is no ground to reconsider the time-frame for disclosure of identifying information and unredacted statements of Witnesses BN and NEM.

40. As regards measure (v), the Chamber notes that, although the testimony of witnesses via video-link has been granted in other cases[16], such measure was granted under absolute necessity only and the Tribunal regularly recalled that it had a clear preference for testimony in court[17]. The Chamber further notes that, each time the security concerns of the witness could be satisfied by a less restrictive measure, this measure was favoured. As observed in the 13 September 1999 Decision rendered in the *Prosecutor v. Bagosora* case[18] :

> Thus it is seen that Bagosora's right to a fair trial, pursuant to Articles 19 and 20, could be secured by use of a less restrictive measure than that proposed by the Defence, and without interference in matters of national jurisdiction and interaction between States.

41. In the present case, the Defence prays the Chamber to organize the testimony via videolink from Paris or Brussels of witnesses, who are allegedly currently living in African countries. As regards Witness NEM, the Defence more specifically submits that he is currently living under a false identity, but, as noted earlier, no evidence is adduced in support of that allegation. The only fears expressed by Witnesses BN and NEM which are evidenced by some objective elements are the threat of pressure or retaliation on the witnesses or their family and the potential arrest and extradition to the Rwandan authorities.

42. As regards the fear of pressure or retaliation on the witnesses or their families, the Chamber recalls that those risks are already addressed by the measures ordered

[16] For example, *Prosecutor v. Nahimana,* ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001; *Prosecutor v. Bagosora,* ICTR-96-7-1, Decision on the Prosecution Motion for Special Protective Measures for Witnesses 'A' Pursuant to Rules 66 (C), 69 (A) and 75 (TC), 5 June 2002; ICTY, *Prosecutor v. Milosević, IT-02-54-T,* Decision on Confidential with an *Ex-Parte* Annexure Prosecution's Motion for Video-Conference Link and Protective Measures for Witness Named Herein (TC), 19 March 2003; *Prosecutor v. Karemera,* ICTR-98-44-I, Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure (TC), 20 October 2003; *Prosecutor v. Bizimungu et al.,* ICTR-99-50-T, Decision on Prosecutor's Extremely urgent Motion Requesting That the Extraordinarily Vulnerable Witnesses XI006 and 039 Testify by Closed Video Transmission Link with a Location at The Hague and other related special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75 (TC), 4 June 2004.

[17] *Prosecutor v. Nahimana,* ICTR-99-52-I, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 37, *Prosecutor* v. *Bagosora,* ICTR-96-7-I, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004, para. 15.

[18] *Prosecutor v. Bagosora,* ICTR-96-74, Decision on the Extremely urgent Request made by the Defence for Protection Measures for Mr Bernard Ntuyahaga (TC), 13 September 1999, para. 38.

in the above-mentioned Decision on Protective Measures for Defence Witnesses and Their Families and Relatives of 13 March 1998[19]. It is the view of the Chamber that the organization of their testimony via video-link would not be an appropriate answer to the problem : this measure would not diminish the risks before and after the protection by the Tribunal ends; neither would it diminish the risks for the witness' relatives who are still in Rwanda. Confidentiality of the witnesses' particulars and identifying information appears to be the most appropriate measures to prevent the risk of pressure or retaliation on the witnesses or their families.

43. As regards the fear of criminal prosecution expressed by Witnesses BN and NEM, the Chamber has already noted that this risk is not a ground for protective measures, with the exception of the granting of a safe conduct which has been admitted by the jurisprudence[20]. The Chamber reminds the Parties that

> "protective measures for witnesses should not hinder due process or be used a a way of providing immunity to the witnesses against possible prosecution"[21].

and that

> "the only type of immunity which falls within the jurisdiction of the Tribunal is the kind provided for under Rule 90 (E) whereby witnesses will not be prosecuted by this Tribunal for giving compelled evidence which may incriminate them excluding perjury"[22].

However, these considerations do not prevent frome granting, in accordance with Rule 54, a safe conduct to the witness whose appearance is necessary and who fears to be arrested. The Chamber concurs with the statement made by the ICTY in the 27 August 1997 Decision rendered in the *Prosecutor v. Dokmanović*[23], that 'an order for safe conduct grants only a very limited immunity from prosecution' and

> 'only with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal and only for the time during which the witness is present at the seat of the International Tribunal for purpose of giving testimony'.

Therefore, and considering the fear expressed by the witnesses that they may be arrested and extradited to the Rwandan authorities, the Chamber deems appropriate

---

[19] *Prosecutor v. Nyiramasuhuko,* ICTR-97-21-T, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 13 March 1998.

[20] ICTY, *Prosecutor v. Tadić,* IT-94-1-T, Decision on the Defence Motion to summon and protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996; ICTY, *Prosecutor v. Dohanović,* IT-95-13a-T, Decision Regarding Defence Motion to Protect Witness (TC), 27 August 1997; ICTY, *Prosecutor v. Mrksic et al.* ("Vukovar Hospital"), IT-95-13/1-T, Order on Defence Motion for Safe Conduct (TC), 12 June 1998; ICTY, *Prosecutor v. Blaskić*, IT-95-14-T, Order granting Safe-Passage to Defence Witness "D/G" (TC), 7 September 1998.

[21] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Decision on the Motion for Protection of Defence Witnesses (TC), 6 October 1997; *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr Bernard Ntuyahaga (TC), 13 September 1999, paras. 33-35.

[22] *Prosecutor v. Ntagerura*, ICTR-96-10A-I, Decision on the Defence Motion for the Protection of Witnesses (TC), 24 August 1998.

[23] ICTY, *Prosecutor v. Dokmanović*, IT-95-13a-T, Decision regarding Defence Motion to Protect Witnesses (TC), 27 August 1997.

to issue, pursuant to Rule 54, an order of safe conduct for Defence Witnesses BN and NEM.

44. As regard measure (vi), namely the distortion of voice and image of witnesses BN and NEM, the Chamber recalls the measures already ordered for protection of the identity of Defence witnesses and notes that the Defence did not demonstrate that those measures are insufficient to prevent the alleged risks of identification. Neither did the Defence make a demonstration of the reason why the requested distortion should be ordered. Therefore, it is the view of the Chamber that there is no point ordering the distortion of the witness' voice and image.

45. As regards measure (vii), namely that Witnesses BN and NEM be reinstalled with their family in an European Country, the Chamber recalls the finding made in 25 November 1997 Decision rendered in the *Prosecutor v. Kanyabashi* case[24] :

> The Trial Chamber is, however, of the view that the granting of refugees status falls within the ambit of domestic law, in this case under Kenyan Law and Kenyan authorities hold the soverign right to prosecute criminal offenders within their territory.

46. It results from this finding that the Tribunal has no authority and no jurisdiction to grant the refugee status to a witness in any State.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DECLARES the Motion moot as regards requested protective measures for Defence Witnesses WBNC, WBND, WFMG and WHNC,

DENIES the Motion in its entirety,

ORDERS pursuant to Rule 54 that Defence Witness BN shall not be prosecuted, detained or subjected to any other restriction of his personal liberty, for acts or convictions falling within the jurisdiction of the Tribunal, during his presence in Tanzania and his travel between that country and his place of residence and, accordingly :

DECIDES that such immunity shall take effect from the date of the present Decision and shall remain in force for a maximum of seven (7) days following the completion of the testimony of Witness BN;

DECIDES, moreover, that should illness prevent Witness BN from leaving Tanzania or should Witness BN be detained for an offence he may have committed during his stay in Tanzania, the seven days the-limit shall start to run from the time he is again able to travel or has been released;

DECIDES that Witness BN may travel only between the country's point of entry and exit and his place of residence, within a limited radius around his place of residence, and between such place and the Tribunal;

ORDERS pursuant to Rule 54 that Defence Witness NEM shall not be prosecuted, detained or subjected to any other restriction of his personal liberty, for acts or convictions falling within the jurisdiction of the Tribunal, during bis presence in Tanzania and his travel between that country and his place of residence and, accordingly :

[24] *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Protective Measures for Defence Witnesses and Their Families (TC), 25 November 1997.

DECIDES that such immunity shall take effect from the date of the present Decision and shall remain in force for a maximum of seven (7) days following the completion of the testimony of Witness NEM;

DECIDES, moreover, that should illness prevent Witness NEM from leaving Tanzania or should Witness NEM be detained for an offence he may have committed during his stay in Tanzania, the seven days the-limit shall start to run from the time he is again able to travel or has been released;

DECIDES that Witness NEM may travel only between the country's point of entry and exit and his place of residence, within a limited radius around his place of residence, and between such place and the Tribunal.

Arusha, 1st March 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Prosecutor's Motion requesting reciprocal inspection of the materials of the Accused persons pursuant to Rule 67 (C) of the Rules of Procedure and Evidence 14 March 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Disclosure of Materials by the Prosecutor, Reciprocal Disclosure of Evidence, reciprocal right of inspection – Motion partially granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 66 (B), 67 (C) and 73; Statute, art. 19*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 the "Prosecutor's Motion Requesting Reciprocal Inspection of the Materials of the Accused Persons Pursuant to Rule 67 (C) of the Rules of Procedure and Evidence" filed on 28 January 2005 (the "Motion");

CONSIDERING the

(i) "*Réponse à la requête du Procureur intitulée* 'Prosecutor's Motion Requesting Reciprocal Inspection of the Materials of the Accused Persons Pursuant to Rule 67 (C) of the Rules of Procedure and Evidence'" filed by Counsel for Ndayambaje on 2 February 2005 ("Ndayambaje's Response");

(ii) "*Réponse de Nyiramasuhuko à la* "Prosecutor's Motion Requesting Reciprocal Inspection of the Materials of the Accused Persons Pursuant to Rule 67 (C) of the Rules of Procedure and Evidence"" filed on 1 February 2005 ("Nyiramasuhuko's Response");

(iii) "*Réponse de Sylvain Nsabimana à la requête du Procureur aux fins d'inspection réciproque des pièces de la Défense*" filed on 31 January 2005 ("Nsabimana's Response");

(iv) "*Réponse d' Alphonse Nteziryayo au* "Prosecutor's Motion Requesting Reciprocal Inspecting of the Materials of the Accused Persons Pursuant to Rule 67 (C) of the Rules of Procedure and Evidence"" filed on 1 February 2005 ("Nteziryayo's Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 67 (C);

## *Décision relative à la requête du Procureur aux fins d'examiner, à titre de réciprocité, les documents et objets des accusés conformément à l'article 67 (C) du Règlement de Procédure et de preuve 14 mars 2005 (ICTR-98-42-T)*

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de Chambre; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Communication des pièces par le Procureur, Échange des moyens de preuve entre les parties, Droit réciproque à l'inspection de leurs pièces – Requête partiellement acceptée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 66 (B), 67 (C) et 73; Statut, art. 19*

LE 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 Balungi Bossa (la «Chambre»),

SAISI de la «Requête du Procureur aux fins d'examiner, à titre de réciprocité, les documents et objets des accusés conformément à l'article 67 (C) du *Règlement de procédure et de preuve*» déposée le 28 janvier 2005 (la «requête»),

VU les documents mentionnés ci-après :

«Réponse à la requête du Procureur intitulée *"Prosecutor's Motion Requesting Reciprocal Inspection of the Materials of the Accused Persons Pursuant to Rule 67* (C) *of the Rules of Procedure and Evidence"*» déposée par le conseil de Ndayambaje le 2 février 2005 («réponse de Ndayambaje»),

«Réponse de Pauline Nyiramasuhuko à la *"Prosecutor's Motion Requesting Reciprocal Inspection of the Materials of the Accused Persons Pursuant to Rule 67 (C) of the Rules of Procedure and Evidence"*» déposée le 1er février 2005 («réponse de Nyiramasuhuko»),

«Réponse de Sylvain Nsabimana à la requête du Procureur aux fins d'inspection réciproque des pièces de la Défense» déposée le 31 janvier 2005 («réponse de Nsabimana»),

«Réponse d'Alphonse Nteziryayo à la *"Prosecutor's Motion Requesting Reciprocal Inspection of the Materials of the Accused Persons Pursuant to Rule 67* (C) *of the Rules of Procedure and Evidence"*» déposée le 1er février 2005 («réponse de Nteziryayo»),

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), et notamment son article 67 (C),

NOW DECIDES the matter on the basis of the written submissions of the Parties pursuant to Rule 73 of the Rules.

## SUBMISSIONS OF THE PARTIES

*Submissions of the Prosecution*

1. The Prosecution submits that despite the Chamber's order dated 1 November 2000 that the Defence, pursuant to Rule 67 (C) of the Rules, permit the Prosecutor to inspect, upon his request, all books, documents, photographs and other tangible objects in its possession or under its control and that it intends to use as evidence at trial, the Defence for Ndayambaje, Nyiramasuhuko and Ntahobali, Nsabimana and Nteziryayo have failed to do so.

2. The Prosecution recalls that all six accused received copies of the exhibits the Prosecutor intended to use in court on 27 September 2001. However, when the Defence for Kanyabashi acknowledged receipt, it noted that its acceptance of the exhibits was not a Rule 66 (B) inspection but only an acceptance of the collaboration of the Prosecutor. Therefore, the Prosecutor submits that the only accused whose actions did not give rise to Rule 66 (B) obligations is Kanyabashi as all the other accused had always treated the inspections as Rule 66 (B) inspections. Thus, the Prosecutor submits that their inspections give rise to a reciprocal right of inspection on the part of the Prosecutor.

3. The Prosecutor recalls a letter written on 15 June 2001 to all Defence counsel reminding them that they had inspected the documents and that it had given rise to a reciprocal right of inspection. The responses varied : Counsel for Kanyabashi and Ntahobali do not appear to have responded to the letter; Counsel for Nsabimana made available to the Prosecutor a list of exhibits in May 2000; Counsel for Ndayambaje responded on 21 June 2001 but was silent as to the reciprocal right of inspection; Counsel for Nteziryayo responded on 25 June 2001 and acknowledged the right of the Prosecutor to inspect under Rule 67 (C) but stated that at that time they had not yet made a determination of what materials they intended to use at trial; Counsel for Nyiramasuhuko responded on 20 June 2001 stating that they did not have the exhibits ready and would make them available during the course of their case or at the end of the case for the Prosecution.

4. On 17 January 2005, the Prosecutor requested inspection of all the materials that the Defence intended to use at the trial. With the exception of the Defence for Nyiramasuhuko, none of the other counsel responded. The Defence for Nyiramasuhuko annexed a partial list of exhibits claiming there was not sufficient time for them to consider all their materials. The Prosecutor submits that this position is untenable and does not satisfy the obligation of the Defence under Rule 67 (C) which grants the Prosecutor the right of full inspection of all books, documents, photographs and other tangible objects which the Defence intends to use at the trial.

5. The Prosecution submits that as none of the other counsel responded to the letter dated 17 January 2005; it is unable to assess the availability of materials for inspec-

STATUANT sur la requête sur la base des mémoires des parties conformément à l'article 73 du Règlement,

ARGUMENTS DES PARTIES

*Arguments du Procureur*

1. Le Procureur soutient que les Défenses de Ndayambaje, de Nyiramasuhuko et Ntahobali, de Nsabimana et Nteziryayo n'ont pas donné suite à la décision de la Chambre rendue le 1er novembre 2000, leur ordonnant, en vertu de l'article 67 (C) du Règlement, de permettre au Procureur d'examiner, à sa demande, tous livres, documents, photographies et autres objets se trouvant en leur possession ou sous leur contrôle et qu'elles entendent produire au procès.

2. Le Procureur rappelle que tous les six accusés ont reçu copies des pièces à conviction qu'il entendait produire comme moyens de preuve au procès le 27 septembre 2001. Toutefois, lorsqu'elle a accusé réception desdites pièces, la Défense de Kanyabashi a fait observer que plutôt que de les recevoir dans le cadre de l'examen prévu à l'article 66 (B) du Règlement, elle les prenait pour une marque de collaboration du Procureur. En conséquence, le Procureur soutient que Joseph Kanyabashi est le seul accusé dont les actes ne relèvent pas des obligations prévues à l'article 66 (B) du Règlement, tous les autres accusés ayant toujours considéré l'examen des pièces comme relevant de l'article 66 (B) du Règlement. Ainsi, le Procureur fait-il valoir que la Défense ayant examiné les pièces à conviction à charge, cela lui ouvrait un droit réciproque à l'examen des pièces à conviction à décharge.

3. Le Procureur évoque une lettre en date du 15 juin 2001 adressée à tous les conseils de la Défense, leur rappelant qu'ils avaient examiné ses documents et que cela lui avait ouvert un droit réciproque à l'inspection de leurs documents. Les réponses étaient variées : il semblerait que les conseils de Kanyabashi et de Ntahobali n'ont pas répondu à la lettre; en mai 2000, les conseils de Nsabimana ont mis à la disposition du Procureur une liste de leurs pièces à conviction; les conseils de Ndayambaje ont répondu le 21 juin 2001 sans rien dire du droit réciproque du Procureur d'examiner les pièces à conviction à décharge; les conseils de Nteziryayo ont répondu à ladite lettre le 25 juin 2001 en reconnaissant le droit du Procureur d'examiner les pièces à conviction à décharge en application de l'article 67 (C) du Règlement, mais ils ont dit qu'à cette époque ils n'avaient pas encore décidé des documents qu'ils produiraient au procès; les conseils de Nyiramasuhuko ont répondu le 20 juin 2001 en affirmant que les pièces à conviction n'étant pas prêtes, ils les mettraient à la disposition du Procureur au cours de la présentation des moyens à décharge ou à la fin de celle des moyens à charge.

4. Le 17 janvier 2005, le Procureur a demandé à examiner toutes les pièces que la Défense entendait produire au procès. À l'exception de la Défense de Nyiramasuhuko, aucun des autres conseils n'a répondu. La Défense de Nyiramasuhuko a annexé à sa réponse une liste partielle de pièces à conviction, en déclarant n'avoir pas assez de temps pour étudier toutes ses pièces. Le Procureur estime que cette position est inadmissible et qu'elle constitue un manquement de la Défense à ses obligations au titre de l'article 67 (C) du Règlement qui reconnaît au Procureur le droit d'examiner intégralement *tous* livres, documents, photographies et autres objets que la Défense entend produire au procès.

5. Le Procureur soutient que comme aucun des autres conseils n'a répondu à la lettre datée du 17 janvier 2005, il n'est pas en mesure d'évaluer les pièces disponibles

tion and is thus forced to insist upon the right to do so by motion. The Prosecution therefore moves the Chamber to grant it the right to inspect all the exhibits which all accused persons but for Kanyabashi intend to use at trial.

*Ndayambaje's Response*

6. The Defence for Ndayambaje submits that it does not object to the Motion and suggests that such inspection be carried out upon an appointment set by both Parties.

*Nyiramasuhuko's Response*

7. The Defence for Nyiramasuhuko submits that the Motion is moot since it has already informed the Prosecution on 26 January 2005 that it is available to proceed with the inspection of materials.

*Nsabimana's Response*

8. The Defence for Nsabimana states that all documents it intends to use have been in the Prosecution's possession since 25 June 2001.

*Nteziryayo's Response*

9. The Defence for Nteziryayo submits that it does not intend to adduce new documents. It intends to use materials which have already been tendered by the Prosecution during the course of its case and admitted as exhibits by the Chamber.

DELIBERATIONS

10. The Chamber recalls that Article 19 of the Statute of the Tribunal empowers it to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules.

11. The Chamber recalls the relevant provisions of Rule 66 (B) and Rule 67 (C) to be :

> Rule 66 : Disclosure of Materials by the Prosecutor
>
> (B) At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused..
>
> Rule 67 : Reciprocal Disclosure of Evidence
>
> (C) If the defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tan-

pour examen, et est ainsi obligé d'insister, par voie de requête, sur son droit de procéder audit examen. En conséquence, le Procureur prie la Chambre de première instance de lui permettre d'examiner toutes les pièces à conviction que tous les accusés à l'exception de Joseph Kanyabashi entendent produire au procès.

*Réponse de Ndayambaje*

6. La Défense de Ndayambaje déclare ne pas contester la requête et propose qu'un rendez-vous soit fixé par les deux parties afin que le Procureur procède à cet examen autres objets se trouvant en leur possession ou sous leur contrôle et qu'elles entendent produire au procès,

*Réponse de Nyiramasuhuko*

7. La Défense de Nyiramasuhuko soutient que la requête est caduque puisqu'elle avait déjà informé le Bureau du Procureur, le 26 janvier 2005, qu'elle était prête à laisser le Procureur examiner les pièces.

*Réponse de Nsabimana*

8. La Défense de Nsabimana déclare que depuis le 25 juin 2001, le Procureur est en possession de tous les documents qu'elle entend produire.

*Réponse de Nteziryayo*

9. La Défense de Nteziryayo soutient qu'elle n'entend pas produire d'autres documents que ceux qui sont déjà en preuve. Elle entend utiliser ceux qui ont déjà été présentés par le Procureur durant la présentation de ses moyens et admis par la Chambre comme pièces à conviction.

DÉLIBÉRÉ

10. La Chambre rappelle que l'article 19 du Statut du Tribunal l'habilite à veiller à ce que le procès soit équitable et rapide et à ce que l'instance se déroule conformément au Règlement.

11. La Chambre rappelle par ailleurs le texte des articles 66 (B) et 67 (C) du Règlement qui s'appliquent en l'espèce :

> Article 66 : Communication des pièces par le Procureur
>
> B) À la demande de la défense, le Procureur doit, sous réserve du paragraphe (C), permettre à celle-ci d'examiner tous livres, documents, photographies et autres objets se trouvant en sa possession ou sous son contrôle qui sont nécessaires à la défense de l'accusé, ou seront utilisés par le Procureur comme moyens de preuve au procès, ou ont été obtenus de l'accusé ou lui appartiennent.
>
> Article 67 : Échange des moyens de preuve
>
> C) Si la défense introduit la requête prévue au paragraphe (B) de l'Article 66, le Procureur est autorisé à examiner tous livres, documents, photographies et

gible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial.

12. The Chamber notes the arguments of the Defence for Nsabimana that all documents it intends to use have been in the Prosecution's possession since 25 June 2001. The Chamber also notes the arguments of the Defence for Nteziryayo that it has no intention of adducing further documents other than materials which have already been tendered by the Prosecution and admitted as exhibits by the Chamber. Therefore, the Chamber finds that the Motion is moot as far as the accused Nsabimana and Nteziryayo are concerned.

13. The Chamber notes the arguments of the Defence for Ndayambaje asserting that inspection by the Prosecution could be carried out upon an appointment set by both Parties and also that of the Defence for Nyiramasuhuko alleging that it had already informed the Prosecution on 26 January 2005 that it is available to proceed with the inspection of materials. In this regard, the Chamber directs the Parties to agree on a timeframe for the inspections to be carried out.

14. The Chamber notes that the Defence for Ntahobali did not respond to the Motion. The Chamber also notes the argument of the Prosecution alleging that a letter dated 15 June 2001 was addressed to all Defence counsel reminding them that they had inspected the documents that the Prosecution intended to use during the course of the trial and that this had given rise to a reciprocal right of inspection.

15. The Chamber recalls that once the Defence makes a request under Rule 66 (B) it triggers the reciprocal provision of Rule 67 (C). Accordingly, the Chamber directs the Defence of Ntahobali to comply with the provision of Rule 67 (C).

FOR THE ABOVE REASONS, THE TRIBUNAL

DECLARES the Motion moot as regards the Defence for Nsabimana and Nteziryayo;

GRANTS the Motion in part; and

DIRECTS the Parties to set an appointment for the Prosecution to inspect any books, documents, photographs and tangible objects, which are within the custody or control of both the Defence of Nyiramasuhuko and Ndayambaje and which they intend to use as evidence at the trial;

DIRECTS the Defence of Ntahobali to comply with the provision of Rule 67 (C).

Arusha, 14 March 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

autres objets se trouvant en la possession ou sous le contrôle de la défense et qu'elle entend produire au procès.

12. La Chambre prend acte des arguments invoqués par la Défense de Nsabimana selon lesquels depuis le 25 juin 2001, le Procureur est en possession de tous les documents qu'elle entend produire. La Chambre prend également acte des arguments de la Défense de Nteziryayo selon lesquels elle n'entend pas produire d'autres documents que ceux qui ont déjà été présentés par le Procureur et admis par la Chambre comme pièces à conviction. La Chambre conclut dès lors que la requête est sans objet en ce qui concerne les accusés Nsabimana et Nteziryayo.

13. La Chambre prend acte des arguments de la Défense de Ndayambaje qui propose qu'un rendez-vous soit fixé par les deux parties afin que le Procureur procède à l'examen des pièces. Elle prend aussi acte de ceux de la Défense de Nyiramasuhuko qui affirme avoir déjà informé le Procureur, le 26 janvier 2005, qu'elle était prête pour tout examen des pièces de sa part. Aussi la Chambre ordonne-t-elle aux parties de convenir d'une date pour procéder à ces examens.

14. La Chambre note que la Défense de Ntahobali n'a pas répondu à la requête. Elle prend également acte de l'argument du Procureur selon lequel la lettre datée du 15 juin 2001 était adressée à tous les conseils de la Défense et leur rappelait qu'ils avaient examiné les documents qu'il entendait produire au procès et que cela lui avait ouvert un droit réciproque à l'inspection de leurs pièces.

15. La Chambre rappelle que toute demande formulée par la Défense en vertu de l'article 66 (B) du Règlement, fait jouer de l'article 67 (C) du même Règlement qui institue la réciprocité. Ainsi la Chambre enjoint-elle à la Défense de Ntahobali de se conformer à l'article 67 (C) du Règlement.

PAR CES MOTIFS,

DÉCLARE la requête sans objet en ce qui concerne les Défenses de Nsabimana et de Nteziryayo;

FAIT DROIT à la requête en partie;

ENJOINT aux parties de fixer un rendez-vous afin que le Procureur puisse examiner tous livres, documents, photographies et autres objets se trouvant en la possession ou sous le contrôle de la Défense de Nyiramasuhuko et de celle de Ndayambaje et qu'elles entendent produire au procès;

ENJOINT à la Défense de Ntahobali de se conformer à l'article 67 (C) du Règlement.

Arusha, le 14 mars 2005.

[Signé] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on the Prosecutor's Motion for the Exclusion of the Proposed Expert Report and Evidence of Edmond Babin 11 April 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Qualification of the witness as an expert – Premature motion – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A) and 94* bis

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 the "Prosecutor's Motion for the Exclusion of the Proposed Expert Report and Evidence of Edmond Babin," filed on 18 March 2005 (the "Motion");

CONSIDERING the *"Réponse de Shalom Ntahobali à la Requête du Procureur intitulée "*Prosecutor's Motion for the Exclusion of the Proposed Expert Report and Evidence of Edmond Babin"", filed on 24 March 2005 ("Ntahobali's Response");

AND The "Prosecutor's Response to Ntahobali's *Requête du Procureur intitulée "*Prosecutor's Motion for the Exclusion of the Proposed Expert Report and Evidence of Edmond Babin"", filed on 31 March 2005 (the "Prosecution Reply to Ntahobali");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rule 94 *bis* of the Rules;

NOW DECIDES the Motion pursuant to Rule 73 (A) on the basis of the written submissions filed by the Parties.

### Submissions of the Parties

*The Prosecution*

1. The Prosecution submits that, after receiving the Report and all the supporting documentation[1] filed on behalf of Mr. Edmond Babin, it requests the Chamber to

[1] The documentation includes five CDs, a *Curriculum Vitae* and two DVDs; See para. 1 of the Motion.

## *Décision relative à la requête du Procureur intitulée «Prosecutor's Motion for the Exclusion of the proposed Expert Report and Evidence of Edmond Babin» 11 avril 2005 (ICTR-98-42-T)*

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de chambre; Arlette Ramaroson; Solomy B. Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Qualification en tant que témoin expert – Requête prématurée – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73 (A) et 94* bis

LE 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 Balungi Bossa (la «Chambre»),

SAISI de la requête du Procureur intitulée «*Prosecutor's Motion for the Exclusion of the Proposed Expert Report and Evidence of Edmond Babin*», déposée le 18 mars 2005 (la «Requête»),

CONSIDÉRANT la Réponse de Shalom Ntahobali à la Requête, déposée le 24 mars 2005 (la «Réponse de Ntahobali»), et la Réplique du Procureur à la Réponse de Ntahobali, déposée le 31 mars 2005 (la «Réplique du Procureur»),

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve (le «Règlement»), notamment l'article 94 *bis* du Règlement,

STATUE sur la requête conformément à l'article 73 (A) du Règlement, sur la base des conclusions écrites des parties.

### Arguments des parties

*Le Procureur*

1. Le Procureur explique qu'ayant reçu le rapport et la documentation à l'appui'[1] déposés au nom de M. Edmond Babin, il a demandé à la Chambre d'écarter l'expert

[1] La documentation comprend cinq CD, un *curriculum* vitae et deux DVD; voir para. 1 de la Requête.

order that the proposed common expert to Nyiramasuhuko and Ntahobali and his testimony be excluded and/ or ruled inadmissible pursuant to Rules 54, 73, 89 and 94 *bis*. The Prosecution further submits that the proposed witness does not qualify as an expert whose opinion ought to be received by the Chamber and that the expert report proffers evidence that is irrelevant to the matters to be determined by the Chamber.

2. The Prosecution also notes that although it will cross-examine the proposed expert, it will conduct such cross-examination without having heard any evidence in support of the case for Ntahobali.

3. The Prosecution submits that although the bulk of the material with respect to the proposed expert comprises of photographs and videos of various scenes around Butare, the said material does not include an analysis of what the witness is expected to say about said photographs and videos. The Prosecution argues that the procedure whereby the Defence would seek that the said photographs and videos be entered into evidence and thereafter the witness make comments on them is wrong in law because nowhere is it indicated that the proposed expert is an investigator who has made investigations in Butare. Furthermore, the Prosecution argues that nowhere is it indicated that the proposed expert has expertise in taking the photographs and videos he took, or that he has special expertise concerning the events in Rwanda.

4. The Prosecution submits that for testimony to be considered expert, "the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgement about it if unassisted by people with special knowledge"[2]. The Prosecution argues that the proposed expert does not possess the expertise, educational, experimental or experiential credentials as would qualify him as an expert whose opinion should be received by the Trial Chamber.

5. The Prosecution further argues that the proposed expert's evidence on crime scene analysis is not relevant to the determination of the matters before it. In particular, the Prosecution argues that the report of the expert contains no expert opinion with footnotes or a bibliography, it contains no analysis, no indication of the methodology used or hypotheses useful to the Trial Chamber in the determination of the matter before it. Moreover, the proposed expert will give evidence based on his personal opinion or his observations without centring this opinion on specialized expertise. The *Curriculum Vitae* does not contain any indication that the proposed expert has expert knowledge in the form of publications, research undertaken or some kind of specialised training in the field of crime scene analysis, rather it indicates general training courses undertaken by the proposed expert. The Prosecution submits that the onus is on the Defence to provide the Chamber with the information that would indicate that the proposed evidence is relevant to the matters before it.

*Ntahobali's Response*

6. The Defence for Ntahobali submits that all the arguments advanced by the Prosecution are premature and that the Motion itself is frivolous and constitutes an

[2] See the Motion at para. 9.

commun proposé par la Défense de Nyiramasuhuko et celle de Ntahobali et d'écarter cette déposition et/ou de la déclarer inadmissible en vertu des articles 54, 73, 89 et 94 *bis* du Règlement. Il conteste en outre la qualification du témoin en tant qu'expert dont l'opinion devrait être reçue par la Chambre et affirme que le rapport de l'expert présente des preuves sans lien avec les questions qui doivent être examinées par la Chambre.

2. Le Procureur indique qu'il compte procéder au contre-interrogatoire de l'expert proposé, mais qu'il le fera sans avoir entendu de témoignage à l'appui de la thèse de Ntahobali.

3. Le Procureur soutient que le gros des pièces produites par l'expert proposé consiste en des photographies et vidéos de divers sites autour de Butare, mais qu'on n'y trouve pas une analyse de ce que le témoin devrait dire au sujet de ces photographies et vidéos. Selon le Procureur, la Défense n'est pas habilitée à demander que l'on verse lesdites photographies et vidéos au dossier, le témoin étant ensuite invité à les commenter, car rien ne permet de dire que l'expert proposé est un enquêteur qui a enquêté à Butare. Toutefois, selon le Procureur, il n'est indiqué nulle part que l'expert proposé a une expérience de photographe et de réalisateur de vidéos ou qu'il est un expert particulièrement au fait des événements survenus au Rwanda.

4. D'après le Procureur, pour qu'un témoignage puisse être considéré comme étant celui d'un expert, «l'objet de l'enquête doit être tel qu'un profane ait peu de chance d'en prendre correctement la mesure sans le concours de gens particulièrement versés en la matière»[2].

Or, à l'entendre, l'expert proposé ne possède pas les connaissances spécialisées, la formation, le bagage expérimental ou l'expérience qui en feraient un expert dont l'opinion devrait être reçue par la Chambre.

5. Le Procureur allègue en outre que ce que l'expert proposé a à dire en guise d'analyse du lieu du crime n'a aucun rapport avec les questions dont la Chambre est saisie. Il explique, en particulier, que le rapport de l'expert ne contient aucune opinion d'expert assortie de notes de bas de page ou d'une bibliographie, aucune analyse, ni aucune indication des méthodes employées ou des hypothèses qui pourraient aider la Chambre dans l'examen des questions qui lui sont soumises. De plus, le témoignage attendu s'appréciera sur l'opinion personnelle de l'expert ou sur ses observations sans que cette opinion soit nourrie de connaissances spécialisées. Le *Curriculum vitae* ne dit rien du savoir spécialisé que l'expert proposé aurait accumulé, qu'il s'agisse de ses publications, de ses recherches ou de la formation spécialisée qu'il aurait reçue dans le domaine de l'analyse du lieu du crime, et se borne à mentionner les cours de formation générale suivis par l'expert proposé. Le Procureur affirme qu'il appartient à la Défense d'établir aux yeux de la Chambre que le témoignage proposé est pertinent par rapport aux questions dont celle-ci est saisie.

*Réponse de Ntahobali*

6. La Défense de Ntahobali soutient que tous les arguments avancés par le Procureur sont prématurés et que la Requête elle-même est fantaisiste et constitue un abus

[2] Voir la Requête, para. 9.

abuse of process under Rule 73 (E) as it does not respect the requirements of the Rules.

7. The Defence submits that the Prosecution is aware of the *voire-dire* procedure in which the qualifications of proposed expert witness can be contested. The Defence submits that the Chamber has the discretion to decide whether a witness may or may not testify as an expert following oral submissions made by the Parties at the end of the *voire-dire* procedure.

8. Additionally, the Defence submits that contrary to the Prosecution submissions, the report of the proposed expert found in the CD-ROMs filed on 23 February 2005 effectively contains an analysis. It submits that different experts may make different analyses and in this case, the witness uses sketches and descriptions.

9. Regarding the Prosecution submission concerning the time when the Prosecution will cross-examine the proposed expert, the competence and qualifications of the expert, the relevance and probative value of the evidence he will give, the Defence submits that the said submissions are premature at this stage and that all these will be considered following the *voire-dire* procedure.

10. The Defence thus requests the Chamber to dismiss the Motion in its entirety.

*Prosecution Reply to Ntahobali*

11. In its Reply, the Prosecution reiterates the prayers it made in its Motion and submits that its Motion is not frivolous nor does it constitute an abuse of process. Rather the Motion is relevant, in order and has been filed in a timely manner.

**Deliberations**

12. The Chamber recalls the provisions of Rule 94 *bis* and finds that the Motion is premature at this stage.

13. Nevertheless, this is without prejudice to the rights of the Parties to raise the issues canvassed in this Motion at the time of the process of qualifying the witness to testify as an expert.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the Motion in its entirety.

Arusha, 11 April 2005.

[Signed] : William H. Sekule ; Arlette Ramaroson; Solomy Balungi Bossa

***

de procédure au sens de l'article 73 (e) [*sic*], car elle ne respecte pas les conditions posées par le Règlement.

7. La Défense fait valoir que le Procureur est au courant de la tenue d'un interrogatoire préliminaire au cours duquel les compétences du témoin expert peuvent être contestées. Elle soutient que la Chambre a le pouvoir discrétionnaire de décider si un témoin peut ou non comparaître en qualité d'expert à la suite d'arguments oraux présentés par les parties à la fin de l'interrogatoire préliminaire permettant d'évaluer les compétences du témoin en tant qu'expert.

8. La Défense fait en outre valoir que contrairement aux allégations du Procureur, le rapport de l'expert trouvé sur les CD-Rom déposés le 23 février 2005 contient effectivement une analyse. Elle soutient que des experts différents peuvent faire des analyses différentes, et, en l'espèce le témoin utilise des croquis et des descriptions.

9. Quant aux arguments du Procureur relatifs au moment où se situera le contre-interrogatoire de l'expert, à sa compétence et à ses qualifications, à la pertinence et à la valeur probante du témoignage qu'il fera, la Défense soutient qu'ils sont prématurés à ce stade et qu'ils seront examinés après l'interrogatoire préliminaire permettant d'évaluer les compétences du témoin en tant qu'expert.

10. La Défense demande donc à la Chambre de rejeter la Requête dans son intégralité.

*Réplique du Procureur*

11. Le Procureur réitère les demandes faites dans sa Requête et soutient que celle-ci n'est ni fantaisiste ni constitutive d'un abus de procédure. Au contraire, selon lui, elle est pertinente, appropriée et a été déposée en temps utile.

**Après en avoir délibéré**

12. La Chambre rappelle les dispositions de l'article 94 *bis* du Règlement et conclut que la Requête est prématurée à ce stade.

13. Toutefois, ceci laisse intact le droit des parties de soulever les questions esquissées dans la présente Requête lorsque viendra le moment d'établir si le témoin a la qualification requise pour déposer en tant qu'expert.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête dans son intégralité.

Arusha, le 11 avril 2005.

[Signé] : William H. Sekule; Arlette Ramaroson; Solomy B. Bossa

***

## *Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness 13 April 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Qualification of a witness as an expert, Requalification as factual witness – Motion denied*

MR. PRESIDENT :

Yes, the proceedings are resumed.

Yes, this is the oral decision on qualification of Mr. Edmond Babin[1].

Paragraph 1 : During the hearing of 12 April 2001-2005, the Defence teams for Nyiramasuhuko and Ntahobali jointly tendered Mr. Edmond Babin as an expert in the field of crime scene analysis, who, on his part wrote an expert report containing sketches, videos, photographs of the various scenes he visited in Rwanda.

Paragraph 2 : The Prosecution raised objection to Mr. Babin testifying as an expert at – at a trial. The Prosecution essentially submitted that the proposed expert, who worked as a police officer for over 31 years in Canada, requires more qualifications than the mere certificates he acquired during his career to be qualified to testify to in the field of crime scene analysis. The Prosecution argued that the Defence was required to demonstrate through academic qualifications, coupled with specific experience, the expertise of the witness in his field. The Prosecution submitted that the Defence had failed to do so.

Paragraph 3 : In arguing against the Prosecution objection, the Defence teams of Nyiramasuhuko and Ntahobali made reference to jurisprudence of the Tribunal for Rwanda, and that of the Former Yugoslavia on the requirement of a witness who may be called to appear in court as an expert. The Defence argued that it had sufficiently demonstrated that Mr. Babin is qualified to appear as an expert in this trial. The Defence submitted that there were various types of experts and that it is not a strict requirement that an expert possess academic qualification. Rather, his or her experience in the specialised field for which he is proffered could be – could be of assistance to the triers of fact when considering matters at issue before them. The Defence argued that it is – it was within the Chamber's discretion to decide who they considered to be expert to testify as an expert at trial. The Defence finally argued that the expert opinion of Mr. Babin was relevant to the issues before the Chamber in order to contradict the testimonies of Prosecution witnesses.

[1] T. of 13 March 2005, pp. 12–14.

Paragraph 4 : The Chamber has considered the submissions of the parties as well as the CV and the report for the proposed expert of the Defence, Mr. Edmond Babin, and it accordingly finds as follows :

Paragraph 5 : The Chamber recalls the provisions of Rule 94 *bis*, which provide for the proffering of the testimony of expert witnesses at the Tribunal. The Chamber further notes the jurisprudence of the Tribunal that the role of an expert is to provide opinion or inferences to assist the finders of fact in understanding the facts at issue before the Chamber. Contrary to the submissions of the Prosecution, the opinion of an expert need not be essential or strictly necessary, or that any of his knowledge lie beyond the understanding of the triers of fact or as a predict – predicate of its admissibility. Rather, the said evidence needs to be useful to the finders of fact. The Chamber also notes that before a witness may be called to testify as an expert, he or she must possess some specialised knowledge acquired through education, experience, or training in the field that may assist the fact finders to understand the evidence or to assess a fact in issue.

Paragraph 6 : The Chamber finds that the proposed expert is essentially a police officer, who started working as an investigator in road traffic accidents, and later became a crime scene technician in the police force of Canada. The Chamber notes that from his evidence his role was to visit the crime scene, inspect it, collect, trace, preserve, and gather evidence, then make a report which he gave to other colleagues for further action. Subsequently, if called upon – if called upon, Mr. Babin gave evidence before the criminal, penal and other courts in Canada, testifying in the capacity of a policeman working in the area of crime scenes. In regard to his role in Canada, the Chamber notes that the Defence did not demonstrate as to which specific areas of crime scene analysis Mr. Babin dealt with, and the exact nature of his evidence when he gave testimony in the courts of Canada. Moreover, the Chamber notes that there has been no demonstration by the Defence of Mr. Babin's academic qualifications apart from his on-the-job training.

Paragraph 7 : The Chamber notes that although the witness has been proffered as an expert in crime scene analysis in this case, the Defence has not demonstrated the exact nature of the analysis he will give in this trial. In answer to questions put to him by counsel, Mr. Babin essentially testified that at the request of the Defence of Ntahobali, he and the said counsel went to Rwanda where they visited specific locations for purposes of drawing up diagrams, or sketches, which were a faithful reproduction of the scales of the locations visited. He then took photographs or videos of the said locations so as to determine the distances and determine whether someone in those locations may see or hear certain events. Mr. Babin testified that he was finally required to give testimony in court through the sketches, photographs, and videos he made.

Paragraph 8 : After having carefully examined the evidence, the Chamber finds that Mr. Edmond Babin is essentially an investigator. Therefore, the Chamber is not convinced that he is an expert in the field for which he is proffered.

Paragraph 9 : For these reasons, the Chamber finds that it will not derive assistance from the testimony of Mr. Babin if he testifies as an expert, but – the Chamber therefore denies the Defence request to declare Mr. Babin an expert witness.

Paragraph 10 : The Defence may however wish to call Mr. Babin as a factual witness.

This is the ruling of the Trial Chamber on this matter. So decided.

[Signed] : Unspecified

***

## *Decision on Nyiramasuhulo's Motion for Certification to Appeal the Decision on Nyiramasuhuko's Strictly Confidential* Ex-Parte – *Under Seal – Motion for additional Protective Measures for some Defence Witnesses and Reconsideration of that Decision as Regards Witness BK 14 April 2005 (ICTR-97-21-T ; Joint Case : ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, President ; Arlette Ramaroson ; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Modification of the witness list – Criteria for reconsideration a Trial Chamber's decision, Will-say Statement, Affection of the fair and expeditious conduct of the proceedings, Affection of the outcome of the trial – Request for safe-conduct for witnesses – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (B) and 73* bis *(E)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process', 19 March 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. 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)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 Nyiramasuhuko's Extremely Urgent Motion for Certification to Appeal the Decision on Nyiramasuhuko's Strictly Confidential *Ex Parte* – Under Seal

– Motion for Additional Protective Measures for Some Defence Witnesses (Article 21 and Rules 54, 69 and 75), filed on 7 March 2005 (the "Motion")[1], and its redacted version filed on 10 march[2] pursuant to the Chamber's instruction of 8 March 2005;

NOTING the "Prosecutor's Response to Nyiramasuhuko's *Requête d'extrême urgence aux fins de certification d'appel de la Décision sur la requête strictement confidentielle* ex parte *sous scellés de Pauline Nyiramasuhuko en mesures de protection additionnelle de certains témoins* à *décharge et en reconsidération de la Décision concernant le témoin BK Article 73 (B)"*, filed on 15 March 2005 (the "Response");

CONSIDERING the "Decision on Nyiramasuhuko's Strictly Confidential *Ex Parte* – Under Seal – Motion for additional protective Measures for some Defence Witnesses" of 1 March 2005 (the "Impugned Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the written submissions of the Parties.

## SUBMISSIONS OF THE PARTIES

*The Defence*

1. The Defence annexes the will-say statement of Witness BK to the Motion for certification and prays the Chamber to decide on the additional protective measures that were requested for this witness in its *ex-parte* Motion. The Defence admits that it mistakenly annexed the will-say statement of Witness BK to the *ex-parte* Motion without mentioning its pseudonym. The Defence prays the Chamber to state that Witness BK is irregularly settled on the territory of a State and to decide accordingly.

2. The Defence further applies for certification to appeal the Impugned Decision pursuant to Rule 73 (B). It submits that the Impugned Decision jeopardizes the fairness of the proceedings, that it is directly related to the outcome of the trial and that an immediate resolution of the question may materially advance the proceedings.

3. The Defence underscores the relevance and importance of Witnesses MAC, WLNA, NEM and BN for its case. The Defence submits that the Chamber was consequently bound, pursuant to Article 19 (1) of the Statute to order the necessary measures for the appearance of these witnesses and their protection.

4. The Defence submits that the Chamber can consider that the measures ordered in this case for the protection of Defence witnesses are sufficient, but the witnesses refuse to testify in these conditions. Those witnesses were expected to give exculpatory information on some charges and the Impugned Decision therefore jeopardizes the fairness and the outcome of the trial. The Defence submits that the resolution of

[1] The Motion was originally filed in French and entitled : «*Requête d'extrême urgence aux fins de certification d'appel de la Décision sur la requête strictement confidentielle ex parte sous scellés, de Pauline Nyiramasuhuko en mesures de protection additionnelles de certains témoins à décharge et en reconsidération de la Décision concernant le témoin BK* ».

[2] The redacted Motion was originally filed in French and had the same title as in its unredacted version.

the Decision [*sic*] by the Appeals Chamber may materially advance the proceedings because it would give an opportunity to the Appeals Chamber to rule upon the right to be granted appropriate protective measures once the criteria of relevance of the testimony and objectively underscored fears are met.

5. Moreover, the Defence submits that the safe-conducts granted to Witnesses NEM and BN can be considered as appropriate, but that this measure is incomplete and is insufficient for the witnesses to appear : the safe-conduct does not protect the witnesses from arrest by Rwandan authorities on the ground of crimes that are outside the jurisdiction of the Tribunal, such as looting or non assistance to endangered people; neither does it protect the witnesses from risks related to their illegal situation on the territory of the States where they are refugees. The Defence further submits that the same safe-conduct should also have been granted to Witnesses MAC, WLMF and WLNA.

6. The Defence submits that the fears expressed by Witness NEM are not different from those expressed by Witnesses WLMF, WLNA and MAC as regards their security and the harassment of the Rwandan government against the Hutu refugees, as confirmed by Amnesty International in the Report annexed to the *ex-parte* Motion.

7. The Defence submits that the Impugned Decision is contrary to the jurisprudence quoted in the *ex-parte* Motion since it does not consider the refusal of the witnesses to testify in Arusha. Since the Chamber found that their testimony was relevant and that their fears were objectively underscored, it should have considered that their refusal to come to the ICTR was justified.

8. The Defence submits :

– That the Chamber erred in law and in facts by denying the appearance of witnesses by way of video-conference from an European country;
– That the Chamber erred in law and in facts by denying the alteration of the witnesses' voice and image;
– That the Chamber erred in law and in facts by refusing to guarantee the witnesses against the "voluntary deportation" they would incur if their "irregular situation" was to be discovered by the national authorities of the States where they are refugees. The Defence submits that it did not believe that the Chamber would require a proof of their irregular situation and the Chamber should have asked the Defence to adduce such a proof before denying the Motion, or grant the protective measure under reserve of proof of their irregular situation;
– That, as regards Witness WBKP, if a witness who cannot come to the Tribunal because of his health is authorized to testify by way of video-conference, a witness who cannot come because of his marital situation should as well be granted that measure.

9. The Defence submits that the postponement of disclosure of the witnesses' identity to the Prosecution and to other Defence teams is justified : as confirmed in the *Ndindnbahizi* Case, the ICTR cannot guarantee the confidentiality of documents, despite ail the orders rendered on this issue. The Defence submits that, very recently, the identity, whereabouts and unredacted statements of Kanyabashi's Defence witnesses have been circulated to al1 Parties, when the Defence Counsel had stipulated that those documents were confidential. Therefore, the Defence submits that the Chamber

erred in law and in facts by denying the requested modification of the time limits for disclosure of the witnesses' identity.

*Prosecutor's Response*

10. The Prosecution submits that the certification requested does not meet the conditions of Rule 73 (B).

11. The Prosecution submits that the irregular situation of Defence witnesses is supported by no evidence and that the risks connected with this situation are no ground for protective measures.

12. With respect to the request for reconsideration of the impugned Decision with regard to Witness BK, the Prosecution submits that the Defence does meet the threshold requirements for reconsideration. The Defence has failed to provide the Chamber with the "will-say" of Witness BK and has failed to demonstrate how the Chamber has occasioned a miscarriage of justice in the Impugned Decision with respect to Witness BK when the Defence's omission prevented the Chamber from assessing the relevance and importance of his testimony.

13. As regards the Defence assertion that additional protective measures must be applied if a witness refuses to appear before the Tribunal, the Prosecution submits that the Defence did not demonstrate that special circumstances nor that there was a clear error or that it is necessary to reconsider the impugned Decision to prevent an injustice. The Prosecution submits that the Defence is simply re-litigating issues it had raised in its *ex-parte* Motion.

14. The Prosecution makes the same submissions as regards the request for late disclosure of the witnesses' particulars.

15. The Prosecution prays the Chamber to dismiss the Motion in its entirety as it is without merit in law or fact.

## DELIBERATIONS

*Request for Reconsideration as Regards Witness BK*

16. With respect to the criteria for reconsideration, the Chamber recalls the finding of the "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)" rendered on 15 June 2004 by Trial Chamber I[3] :

> The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances" and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider

[3] *Prosecutor v. Bagosora et al.,* ICTR-98-41-T, 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, para. 7.

its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances.

17. The Chamber notes that the only ground submitted by the Defence in support of its request for reconsideration is the fact that the Defence mistakenly omitted to mention Witness BK'S pseudonym on the will-say statement annexed to the *ex-parte* Motion for additional protective measures filed on 19 January 2005. The Chamber finds that a mistake committed by the moving Party is not a particular circumstance justifying such an exceptional measure and is therefore no ground for reconsideration. In the view of the Chamber, such request should rather have been made by way of a new motion. Therefore, the Chamber denies the request for reconsideration of the Impugned Decision as regards Witness BK.

*Request for Safe-Conduct for Witnesses MAC, WLMF and WLNA*

18. As regards the Defence submission that witnesses MAC, WLMF and WLNA should also be granted safe-conduct, the Chamber notes that the original *ex-parte* motion for additional protective measures for Defence witnesses filed on 19 January 2005 did not request safe-conducts for any witnesses and that this measure was granted *proprio motu* to Witnesses NEM and BN by the Chamber. Therefore, the Chamber considers that this is a new request that cannot be made within a Motion for certification to appeal the Impugned Decision and denies the Motion on this point.

*Request for Certification to Appeal*

19. The Chamber recalls that certification to appeal a decision under Rule 73 must meet the specific criteria enounced in Paragraph B of the Rule :

> 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.

20. The Chamber refers to the discussion it has already held on those criteria in its former decisions, in particular the "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process'" rendered in the present case on 19 March 2004[4].

21. As regards the first criterion, namely the fact that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Chamber notes the Defence submission that the witnesses whose additional protection is requested were expected to give exculpatory information on some charges and that the appearance of Defence witnesses may affect the outcome of the trial. The Chamber considers that all Defence witnesses have already been granted protective measures in order to facilitate their

[4] *Prosecutor* v. *Nyiramasuhuko,* ICTR-97-21-T, Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004, para. 12-17.

appearance before the Tribunal. The Chamber further considers that new additional protective measures would not affect those witnesses' testimonies. For these reasons, it is the view of the Chamber that the Defence has failed to demonstrate that the Impugned Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Certification is therefore denied.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 14th April 2005.

[Signed] : William H. Sekule; Arlette Ramaroson ; Solomy Balungi Bossa

***

## *Decision on Nyiramasuhulo's Strictly Confidential* ex-parte – *Under Seal – Motion for additional Protective Measures for Defence Witness BK 15 June 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Equality of the parties before the Tribunal, Fair and expeditious trial – Criteria to evaluate the creditworthiness of a witness, Eligibility of a witness to additional protective measures, Real Fear Underscored By an Objective Basis, Strictly Necessary Protective Measures, Video-link testimony, Safe-conduct, Refugee status to a witness, Absence of immunity for the witnesses, Perjury – Right to a fair trial, Balance between the protection of the witnesses and the right of the accused to the prepare his/her case – Amnesty International – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 54, 69, 73 (B), 75 and 90 (E); Statute, art. 19, 20, 20 (1) and 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Decision on the Motion for the Protection of Defence Witnesses, 6 October 1997*

*(ICTR-95-1); Trial Chamber,* The Prosecutor v. Joseph Kanyabashi, *Decision on the protective Measures for Defence Witnesses and their families, 25 November 1997 (ICTR-96-15); Trial Chamber,* The Prosecutor v. Georges Rutaganda, *Decision on the urgent Motion filed by the Defence for the immediate Transfer and Appearance of a detained Witness, Froduald Karamira, 26 March 1998 (ICTR-96-3); Trial Chamber,* The Prosecutor v. André Ntagerura, *Decision on the Defence Motion for the Protection of Witnesses, 24 August 1998 (ICTR-96-10A); Trial Chamber,* The Prosecutor v. Théoneste Bagosora, *Decision on the extremely urgent Request made by the Defence for Protection Measures for M. Bernard Ntuyahaga, 13 September 1999 (ICTR-96-7); Trial Chamber,* The Prosecutor v. Ferdinand Nahimana et al., *Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for protective Measures, 14 September 2001 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution Motion for Special Protective Measures for Witness "A" pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure Evidence, 5 June 2002 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Joseph Nzirorera, *Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T and to extend the Decision on protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence Motion for immediate Disclosure, 20 October 2003 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosecutor's extremely urgent Motion requesting that the extraordinarily vulnerable Witnesses XI006 and 039 testify by closed Video Transmission Link with a Location at The Hague And other related special protective Measures pursuant to Article 21 of the Statute and Rules 73 and 75, 4 June 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004 (ICTR-98-41)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dusko Tadic, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 August 1995 (IT-94-1); Trial Chamber,* The Prosecutor v. Dusko Tadic, *"Décision relative aux requêtes de la défense aux fins de citer à comparaître et de protéger des témoins à décharge et de présenter des témoignages par vidéoconférence", 25 June 1996 (IT-94-1); Trial Chamber,* The Prosecutor v. Slavko Dokmanović, *Decision Regarding Defence Motion to Protect Witness, 27 August 1997 (IT-95-13a); Trial Chamber,* The Prosecutor v. Mile Mrkšić et al., *Order on Defence Motion for Safe Conduct, 12 June 1998 (IT-95-13/1); Trial Chamber,* The Prosecutor v. Tihomir Blaškić, *Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements, 3 September 1998 (IT-95-14); Trial Chamber,* The Prosecutor v. Tihomir Blaškić*, Order granting Safe-Passage to Defence Witness "D/G", 7 September 1998 (IT-95-14); Trial Chamber,* The Prosecutor v. Radoslav Brđanin, Decision on Motion by Prosecution for Protective Measures*, 3 July 2000 (IT-99-36); Trial Chamber,* The Prosecutor v. Slobodan Milosević, *Partly Confidential and* Ex Parte *Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002 (IT-02-54); Trial Chamber,* The Prosecutor v. Slobodan Milosević, *Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002 (IT-02-54); Trial Chamber,* The Prosecutor v. Slobodan Milosević, *Decision on confidential with an* Ex-Parte *Annexure*

*Prosecution's Motion for Video-Conference Link And Protective Measures For Witness Named Herein, 19 March 2003 (IT-02-54)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 Nyiramasuhuko's Strictly Confidential *Ex Parte* – Under Seal – Motion for Additional Protective Measures for Defence Witness BK, filed on 3 June 2005 (the "Motion")[1];

NOTING that, being *ex parte*, the Motion was not served to the Prosecution or any other Party in the case;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (B), on the basis of the *ex parte* written submissions of the Defence only.

SUBMISSIONS OF THE DEFENCE

1. The Defence recalls the Decisions rendered on 13 March 1998[2], 20 March 2001[3] and 1 March 2005[4] regarding witness protection, which ordered disclosure of witnesses' identifying information no later than 21 days before their appearance and denied further protective measures for Witness BK. The Defence further reminds the Chamber of the Decision of 15 April 2005 which denied the Defence request to certify the Decision of 1 March 2005, stating that the only reason for reconsideration was the Defence's omission to mention Witness BK'S pseudonym and that the proper procedure to remedy that mistake would have been the submission of a new motion.

2. The Defence submits that in spite of existing protective measures, Witness BK has refused to come to Arusha to testify because he fears for his safety.

3. Summarizing the relevant applicable law, case-law and the former decisions rendered in the present case, the Defence argues that Rwanda remains a very dangerous country for "voluntarily" repatriated Hutus[5].

[1] The Motion was originally filed in French and entitled : "*Requête de l'accusée Pauline Nyiramasuhuko strictement confidentielle ex parte sous scellés de Pauline Nyiramasuhuko en mesure de protection additionnelle du témoin à décharge BK*" *(sic).*

[2] *Prosecutor v. Nyiramasuhuko.* ICTR-97-2 1-T, Decision on Protective Measures for Defence Witnesses and Their Families and Relatives (TC), 13 March 1998 (the "Decision on Protective Measures of 13 March 1998").

[3] *Prosecutor v. Nyiramasuhuko and Ntahobali,* ICTR-97-21-T, Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their family members (TC), 20 March 2001.

[4] *Prosecutor v. Nyiramasuhuko,* ICTR-97-21-T, joint case ICTR-98-42-T, Decision on Nyiramasuhuko's strictly confidential *ex-parte* - under seal - Motion for additional protective measures for some Defence Witnesses (TC), 1 March 2005.

4. The Defence submits that the Accused's right to a fair trial is one of the elements to be considered when ordering protective measures for witnesses. Therefore, these protective measures should *a fortiori* be granted when they are requested by the Defence, because they cannot jeopardize the right to a fair trial.

5. The Defence further submits that, for a proper defence to be granted, the identity of Defence witnesses must be protected. The outcome of the trial depends on the capacity and willingness of witnesses to testify. The Defence argues that this is particularly true as regards witnesses who occupied an important position in their country and/or possess sensitive information. The disclosure of the identity of witnesses several days before their testimony creates actual and serious risks that they should not have to face. The Defence has been informed by the Witnesses and Victims Support Section (WVSS) that, once the Witness's identity is disclosed, it could not guarantee the non-disclosure of his identity to third persons, in particular the Rwandan authorities. The Defence's purpose is not to make allegations against anybody within the OTP, rather it seeks to stress the actual and existing risk of information regarding the Witness's identity being revealed to third persons, as has occurred in November 2003 in another case.

6. The Defence submits that, in the *Blaskic* and *Delalic* cases and in the *Milosevic* case, the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") authorized the Defence to disclose the identity of some of its witnesses seven and ten days respectively, before said witnesses testified[6].

7. Therefore, considering the situation of Defence Witness BK, the Defence requests that the Chamber order that his identity should not be disclosed to the Prosecution before the very day of his testimony. The Defence argues that such an order would be the only measure limiting the risk that his identity be disclosed to third persons to a strict minimum.

8. The Defence submits that the information to be divulged by the Witness is crucial for the determination of truth because this type of witness never appears before the ICTR, justly fearing safety risks. According to the Defence, Witness BK could never take the risk of testifying, if the Tribunal does not grant him all the protective measures in its power. The Defence submits that the exceptional circumstances described as regards Defence Witness BK meet the criteria for the organization of his testimony by way of video-link. In support of this request, the Defence relies on the *Bagosora* Decision of 8 October 2004, which ruled that a request for testimony by means of video-link should be considered under the "interests of justice" standard set forth in the *Nahimana* case[7].

[5] See the Chamber's Decision of 20 March 2001 and the report and press release of Amnesty International annexed to the motion.

[6] ICTY, *Prosecutor v. Blaskic,* IT-95-14-T, Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements(TC), 3 September 1998; ICTY, *Prosecutor* ***v.*** *Milosevic,* IT-02-54-T, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002 (the "*Milosevic* Decision of 18 June 2002").

[7] *Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004 ("The *Bagosora* Decision of 8 October 2004").

9. The exceptional circumstances affecting Witness BK justify, according to the Defence, a testimony via video-link, be that decision founded on Rule 75 or on the criterion of the interests of justice.

10. The Defence further submits that the exceptional circumstances described as regards Defence Witness BK meet the criteria for maximal protection measures and therefore requests, in addition to the other protective measures, the use of adequate devices for the alteration of his image and voice during his testimony. The Defence submits that in several cases before the ICTY, al1 these measures have been accorded cumulatively to one witness and stresses that Witness BK, particularly in as far as his fears for his family are concerned, is in need of image- and voice-altering devices on the basis of Rules 54 and 75.

11. Finally, the Defence submits that Defence Witness BK and his family live in very precarious conditions in refugee camps, which make them particularly vulnerable to retaliation measures, including their murder. The Defence recalls Mr Seth Sendashonga's murder by RPF agents in Nairobi, a few days before he was scheduled to testify in the *Kayishema/Ruzindana* case, and submits that there is a risk of Witness BK and his family being killed in reprisals, stressing that they are even more vulnerable than Mr Sendashonga because of living in a refugee camp.

12. The Defence argues that since pursuant to Art. 28, a Chamber can order a State to arrest a suspect, a Chamber also has the competence to order a State to welcome a person if necessary. Such measures are taken by some European and North-American jurisdictions. In some instances, a new identity is also granted to the re-installed witness. The Defence believes that such measures were used for Prosecution Witness ZC who testified in the *Media* and *Military I* cases and submits that Defence Witness BK, incontestably among the most vulnerable Witnesses the Tribunal could hear, fulfils the conditions for relocation to a European country, together with his family.

13. Therefore, the Defence prays the Chamber to grant the following additional measures for the protection of Defence Witness BK :

– To order the non-disclosure of the Witness's identity to the Prosecutor and the other parties before the day the Witness will testify;
– To order the redaction of all information contained in the Witness's will-say statement that would allow his identify to be disclosed, until the day he will testify;
– To order that the testimony of Witness BK be taken by video-link from Paris or Brussels;
– To order that appropriate measures be used to alter the Witness's voice and image during testimony;
– To order the relocation of the Witness and his family to a European country.

## DELIBERATIONS

14. The Chamber recalls that all Parties are, pursuant to Article 20 (1) of the Statute, equal before the Tribunal[8] and that the Chamber must take appropriate measures to ensure that the truth is ascertained in a fair and expeditious trial[9].

15. The Chamber recalling the provisions of Article 21 of the Statute and Rules 69 and 75 of the Rules, reiterates its analysis of the case law regarding the request for

extra protective measures found in its Decision of 1 March 2005, as enunciated in the *Bagosora* Decision of 13 September 1999 :

> To grant protective measures to a witness, pursuant to Rule *75,* the following conditions must also apply. Firstly, the testimony of the witness must be relevant and important to the party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied[10].

16. In addition to those three criteria, some decisions rendered by the Tribunal or the ICTY have mentioned further issues, such as the fact that there must be no *prima* facie evidence that the witness is untrustworthy[11], the length of time at which the identity of the victims and witnesses must be disclosed to the parties[12], the fact that the Parties must be in a fair position to confront the witness[13], the lack of an efficient witness protection program[14]. It is the view of the Chamber that, while keeping these additional issues in mind, the Motion shall be determined on the basis of the three principal criteria mentioned above.

17. The Chamber recalls that the burden of proof for the fulfilment of the applicable criteria lies with the Party requesting additional protective measures. As stated in a Decision rendered in the *Bagosora* Decision of 8 October 2004 and others :

> [T]he applicant must make some showing that giving testimony in that manner is necessary to safeguard the witness' security[15].

18. The Chamber will thus consider the three above-mentioned criteria and determine whether the Defence has demonstrated that they are fulfilled in the case of Wit-

[8] See *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Decision on the Motion for the Protection of Defence Witnesses (TC), 6 October 1997; *Prosecutor v. Bagambiki et al.,* ICTR-97-36-T, Decision on the Defence Motion for the Protection of Witnesses (TC), 30 September 1998

[9] See ICTY, *Prosecutor v. Blaskic,* IT-95-14-T, Decision on the Prosecutor's Motion for Seven (7) Days Advance Disclosure of Defence Witnesses and Defence Witnesses Statements (TC), 3 September 1998

[10] *Prosecutor v. Bagosora.* 1CTR-96-7-1, Decision on the extremely urgent Request made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 28. (the "*Bagosora* Decision of 13 September 1999").

[11] ICTY, *Prosecutor v. Tadic,* IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (TC), 10 August 1995, para. 64 (the *"Tadic* Decision of 10 August 1995"); ICTY, *Prosecutor v. Milosevic,* IT-02-54-T, partly confidential and *Ex Parte* Decision on Prosecution Motion for provisional protective Measures pursuant to Rule 69 (TC), 19 February 2002, para. 25.

[12] The *Milosevic* Decision of 18 June 2002, para. 7.

[13] *Prosecutor v. Nahimana,* ICTR-99-52-1, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001, para. 35; *Prosecutor v. Karemera,* ICTR-98-44-1, Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to extend the Decision on protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for immediate Disclosure (TC), 20 October 2003, para. 13

[14] *Prosecutor v. Bagosora.* ICTR-96-7-1, Decision on the Prosecution Motion for Special Protective Measures for Witnesses 'A' Pursuant to Rules 66 (C), 69 (A) and 75 (TC), 5 June 2002, para. 29; ICTY, *Prosecutor v Milosevic,* IT-02-54-T, Decision on Prosecution Motion for provisional protective Measures pursuant to Rule 69 (TC), 19 February 2002, para. 25.

ness BK. The Chamber notes that the third criterion is relevant to the choice of protective measures to be granted to those witnesses fulfilling the first two criteria. Therefore, the Chamber will start by determining whether in the light of the first two criteria the Witness is eligible to additional protective measures and will then decide which protective measures shall be applied.

19. The jurisprudence of both Tribunals holds that, for special protective measures to be granted to a witness, his or her testimony must be relevant and important to the case of the requesting Party. As stated in the Decision rendered on 10 August 1995 by the ICTY in the *Tadic* Case :

> [T]he testimony of the particular witness must be important to the Prosecutor's case : '[Tlhe evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it'. (*R. v. Taylor,* Ct. App. Crim. Div. 22 July 1994). In this respect, it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. Further, the Prosecutor has stated that this testimony is important and, for some witnesses, critical[16].

20. The Chamber notes that the Defence has referred to a previously filed will-say statement of Witness BK. On its basis, the Witness was *bourgmestre* in Butare *préfecture.* His expected testimony will cover facts he says he has directly seen, including massacres in his *commune* between 16 and 19 April 1994 and two meetings with Sindikubwabo and other politicians in April 1994. It is the view of the Chamber that the relevance of his testimony cannot be disputed.

*Real Fear underscored By an objective Basis*

21. As mentioned in the above-cited *Bagosora* Decision, to fulfil the second criterion for protective measures, the witness' subjective fear is insufficient and must be underscored by objective considerations. In the *Milosevic* Decision of 18 June 2002, the ICTY further ruled :

> [F]ears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk[17].

22. The Chamber recalls that the security situation of Witness BK, as submitted by the Defence, can be summarized as follows : Witness BK, who as a *bourgmestre* held an important position during the events of 1994, has had reason to fear being killed since 1994. This fear for his and his family's safety has prompted him to assume a

[15] See the *Bagosora* Decision of 8 October 2004 at para. 8; see also *Prosecutor v. Rutaganda,* ICTR-96-3-T, Decision on the urgent Motion filed by the Defence for the immediate Transfer and Appearance of a detained Witness, Froduald Karamira (TC), 26 March 1998, paras. 7-10; The *Bagosora* Decision of 13 September 1999, para. 19; ICTY, *Prosecutor* ***v.*** *Brdanin and Talic,* IT-99-36-T, Decision on Motion by Prosecution for Protective Measures (TC), 3 July 2000, paras. 16-17.

[16] ICTY, *Prosecutor v. Tadic,* IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 63; see also *Prosecutor* ***v.*** *Bagosora,* ICTR-96-7-1, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999, para. 29.

[17] The *Milosevic* Decision of 18 June 2002, para. 7.

false identity, under which he lives with his family in a refugee camp in an African country. The danger he believes they are in is both related to the office he held in 1994, and that he possesses crucial information regarding the genocide. The danger for former Rwandan authorities is borne out by reports of humanitarian organizations, such as those of Amnesty International annexed to the Motion. More specifically, Witness BK fears being arrested by the OTP or the Rwandan authorities, he fears for the security of his family, as well as reprisals once the protection provided by the Tribunal ends. The Chamber considers that those elements constitute an objective basis underscoring the fears expressed by the Witness that his security or the security of his family may be threatened, should he testify.

23. As regards his fear of arrest by either the OTP or the Rwandan authorities, the Chamber notes that according to his will-say statement, Witness BK held an important position in Rwanda in 1994. In the Chamber's opinion, although Witness BK'S fears appear to be justified, as objectively underscored by the 2004 report of Amnesty International, the Chamber recalls that, as stated in the *Bagosora* Decision of 13 September 1999 :

> [T]he phrase "in danger or at risk" does not include being subject to lawful acts of a State, *e.g.*, prosecution. For a person to be in danger or at risk, the threat must be of an unlawful act[18].

24. Therefore, the Chamber considers that the risk to be legally arrested and/or prosecuted by the OTP or the Rwandan Authorities is outside the scope of protective measures, with the limited exception of the granting of safe-conduct. This exception is discussed below.

25. For the foregoing reasons, the Chamber considers that the Defence has demonstrated that Witness BK meets the criteria for the application of additional protective measures.

*Strictly Necessary Protective Measures*

26. The Chamber recalls the measures requested for by the Defence as outlined at paragraph 13.

27. As regards measures (i) and (ii), the Chamber is aware that short time-limits for disclosure of the identity of witnesses and non-redacted statements have been previously granted before the ICTY.

28. However, in the present case, the Chamber notes that the fears which those measures are supposed to allay, i.e. the risk of pressure or retaliation on the Witness or his family, are already adequately addressed by the protective measures granted to al1 Defence witnesses in the present case in the Decision on Protective Measures of 13 March 1998, namely, the use of a pseudonym and confidentiality of identifying information which may be addressed in closed session only. The Chamber considers that the balance to be struck between the Parties' opposing interests in regard to the preparation of their case is achieved by the measures already granted. There is therefore no reason to reconsider the time-frame for the disclosure of identifying information and unredacted statements of Witness BK as measures (i) and (ii) seek to do.

[18] The *Bagosora* Decision of 13 September 1999, para. 34.

29. As regards measure (iii), the Chamber notes that, although the testimony of witnesses via video-link has been granted in other cases[19], this has been limited to circumstances of absolute necessity, the Tribunal having regularly recalled that it had a clear preference for testimony in court[20]. The Chamber further notes that each time the security concerns of the witness could be satisfied by a less restrictive measure, this measure was favoured. As observed in the Decision rendered in the Bagosora Decision of 13 September 1999 :

> Thus it is seen that Bagosora's right to a fair trial, pursuant to Articles 19 and 20, could be secured by use of a less restrictive measure than that proposed by the Defence, and without interference in matters of national jurisdiction and interaction between States[21].

30. In the present case, the Defence moves the Chamber to organize Witness BK's testimony via video-link from Paris or Brussels, although he is allegedly currently living under an assumed identity as a refugee in an African country. The Chamber notes that no evidence has been adduced supporting this submission. It is the further view of the Chamber that the organization of Witness BK's testimony via video-link would not be an appropriate answer to the problem, as it would not diminish the risks already referred to in para. 28 above. Rather, it is the confidentiality of the Witness's particulars and identifying information that appears to be the most appropriate measure to prevent the risks described.

32. As regards the fear of criminal prosecution expressed by Witness BK, the Chamber has already noted that this risk is not a ground for protective measures, with the exception of the granting of a safe conduct, which has been repeatedly admitted in both the Tribunal's and the ICTY's jurisprudence[22].

33. The Chamber recalls that

> "protective measures for witnesses should not hinder due process or be used as a way of providing immunity to the witnesses against possible prosecution"[23]

---

[19] For example, *Prosecutor v. Nahimana,* ICTR-99-52-1, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001; *Prosecutor v. Bagosora.* ICTR-96-7-1, Decision on the Prosecution Motion for Special Protective Measures for Witnesses 'A' Pursuant to Rules 66 (C), 69 (A) and 75 (TC), 5 June 2002; ICTY, *Prosecutor v. Milosevic,* IT-02-54-T, Decision on Confidential With an *Ex-Parte* Annexure Prosecution's Motion for Video-Conference Link And Protective Measures For Witness Named Herein (TC), 19 March 2003; *Prosecutor v. Karemera,* ICTR-98-44-1, Decision on the Prosecutor's Motion for Special Protective Measures for Witness *G* and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for lmmediate Disclosure (TC), 20 October 2003; *Prosecutor v. Bizimungu et al.,* ICTR-99-50-T, Decision on Prosecutor's Extremely Urgent Motion Requesting That the Extraordinarily Vulnerable Witnesses XI006 and 039 Testify by Closed Video Transmission Link With a Location at The Hague And Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75 (TC), 4 June 2004.

[20] *Prosecutor v. Nahimana,* ICTR-99-52-1, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 37; *Prosecutor v. Bagosora,* ICTR-96-7-1, Decision on Prosecution Request for Testimony of Witness BT via Video-Link, 8 October 2004, para. 15.

[21] *Prosecutor v. Bagosora,* ICTR-96-7-1, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 38.

and that

> "the only type of immunity which falls within the jurisdiction of this Tribunal is the kind provided for under Rule 90 (E) whereby witnesses will not be prosecuted by this Tribunal for giving compelled evidence which may incriminate them, excluding perjury"[24].

34. However, these considerations do not prevent from granting, in accordance with Rule 54, a safe conduct to a witness whose appearance is necessary and who fears to be arrested. The Chamber concurs with the statement made by the ICTY in the Decision rendered in *Prosecutor v. Dokmanovic* on 27 August 1997[25] that,

> "an order for safe conduct gants only a very limited immunity from prosecution' and only 'with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal and only for the time during which the witness is present at the seat of the International Tribunal for purpose of giving testimony".

35. Therefore, and considering the Witness's fear of being arrested and extradited to the Rwandan authorities, the Chamber deems it appropriate to *proprio motu* issue, pursuant to Rule 54, an order of safe conduct for Defence Witness BK.

36. As regards measure (iv), namely, the distortion of Witness BK'S voice and image, the Chamber recalls the measures already ordered for the protection of the identity of Defence witnesses and notes that the Defence did not demonstrate that those measures are insufficient to prevent the alleged risks of identification. Nor did the Defence make a demonstration of the reason why the requested distortion should be ordered. Therefore, it is the view of the Chamber that there is no reason for ordering the distortion of the Witness's voice and image.

37. As regards measure (v), the Witness's relocation to a European country with his family, the Chamber recalls the finding made in the *Prosecutor* v. *Kanyabashi* case :

> The Trial Chamber is, however, of the view that the granting of refugees status falls within the ambit of domestic law, in this case under Kenyan Law and Kenyan Authorities hold the sovereign right to prosecute criminal offenders within their territory[26].

---

[22] ICTY, *Prosecutor v. Tadic*. IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996; ICTY, *Prosecutor v. Dokmanovic,* IT-95-13a-T, Decision Regarding Defence Motion to Protect Witness (TC), 27 August 1997; ICTY, *Prosecutor v. Mrksic et al. ("Vukovar Hospital"),* IT-95-1311-T, Order on Defence Motion for Safe Conduct (TC), 12 June 1998; ICTY, *Prosecutor* v. *Blaskic,* IT-95- 14-T, Order Granting Safe-Passage to Defence Witness "DIG" (TC), 7 September 1998.

[23] *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1-T, Decision on the Motion for Protection of Defence Witnesses (TC), 6 October 1997; *Prosecutor v. Bagosora,* ICTR-96-74, Decision on the extremely urgent Request made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, paras. 34-35

[24] *Prosecutor v. Ntagerura,* ICTR-96-10A-1, Decision on the Defence Motion for the Protection of Witnesses (TC), 24 August 1998.

[25] ICTY, *Prosecutor v. Dokmanovic,* IT-95-13a-T, Decision Regarding Defence Motion to Protect Witness (TC), 27 August 1997.

[26] *Prosecutor v. Kanyabashi,* ICTR-96-15-T, Decision on the Protective Measures for Defence Witnesses and Their Families (TC), 25 November 1997.

38. It results from this finding that the Tribunal has no authority and no jurisdiction to order a State to grant refugee status to a witness.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DENIES the Motion in its entirety,

ORDERS *proprio motu*, pursuant to Rule 54, that Defence Witness BK shall not be prosecuted, detained or subjected to any other restriction of his persona1 liberty, for acts or convictions falling within the jurisdiction of the Tribunal, during his presence in Tanzania and his travel between that country and his place of residence and, accordingly :

DECIDES that such immunity shall take effect from the date of the present Decision and shall remain in force for a maximum of seven days fidlouring the completion of the testimony of Witness BK;

DECIDES, moreover, that should illness prevent Witness BK from leaving Tanzania or should he be detained for an offence he may have ccinmiited dunng his stay in Tanzania, the seven days time-limit shall start to run from the time he is again able to travel or has been released;

DECIDES that Witness BK may travel only between the country's point of entry and exit and his place of residence, within a limited radius around his place of residence, and between such place and the Tribunal.

Arusha, 15 June 2005.

[Signed] : William H. Sekule; Arlette Ramaroson ; Solomy Balungi Bossa

***

## *Decision on Nyiramasuhuko's Strictly Confidential* **Ex-Parte** *Under Seal Motion for Additional Protective Measures for Defence Witness WBNM 17 June 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Equality of the parties before the Tribunal, Fair and expeditious trial – Criteria to evaluate the creditworthiness of a witness, Eligibility of a witness to additional protective measures, Relevance and*

*Importance of the Testimony, Real Fear Underscored By an Objective Basis, Strictly Necessary Protective Measures, Video-link testimony, Safe-conduct, Absence of immunity for the witnesses, Perjury – Refugee status to a witness, Belgium – Right to a fair trial, Balance between the protection of the witnesses and the right of the accused to the prepare his/her case – Amnesty International – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 54, 69, 73 (A), 75 and 90 (E); Statute, art. 20 (1) and 21*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Decision on the Motion for the Protection of Defence Witnesses, 6 October 1997 (ICTR-95-1); Trial Chamber,* The Prosecutor v. Georges Rutaganda, *Decision on the Urgent Motion Filed by the Defence for the Immediate Transfer and Appearance of a Detained Witness, Froduald Karamira, 26 March 1998 (ICTR-96-3); Trial Chamber,* The Prosecutor v. Emmanuel Bagambiki et al., *Decision on the Defence Motion for the Protection of Witnesses, 30 September 1998 (ICTR-97-36); Trial Chamber,* The Prosecutor v. Théoneste Bagosora, *Decision on the extremely urgent Request made by the Defence for Protection Measures for M. Bernard Ntuyahaga, 13 September 1999 (ICTR-96-7); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 October 2004 (ICTR-98-41)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dusko Tadic, *Decision on the Prosecutor's Motion for protective Measures for Victims and Witnesses, 10 August 1995 (IT-94-1); Trial Chamber,* The Prosecutor v. Slavko Dokmanović, *Decision regarding Defence Motion to protect Witness, 27 August 1997 (IT-95-13a); Trial Chamber,* The Prosecutor v. Radoslav Brđanin, *Decision on Motion by Prosecution for protective Measures, 3 July 2000 (IT-99-36); Trial Chamber,* The Prosecutor v. Slobodan Milosević, *Second Decision on Prosecution Motion for protective Measures for sensitive Source Witnesses, 18 June 2002 (IT-02-54)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 Nyiramasuhuko's Strictly Confidential *Ex Parte* – Under Seal - Motion for Additional Protective Measures for One Defence Witness (Article 21 and Rules 54, 69 and 75), filed on 23 May 2005 (the "Motion")[1];

CONSIDERING the annexes filed by the Defence on 6 and 10 June 2005 (the "Annexes");

[1] The Motion was originally filed in French and entitled : "*Requête strictement confidentielle* ex parte *sous scellés, de Pauline Nyiramasuhuko en mesures de protection additionnelles d'un témoin à décharge*".

CONSIDERING the "Addendum to Nyiramasuhuko's Strictly Confidential *Ex Parte* – Under Seal – Motion for Additional Protective Measures for One Defence Witness", filed on 30 May 2005 (the "Addendum");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73 (A), on the basis of the written submissions of the Defence.

SUBMISSIONS OF THE DEFENCE

1. The Defence moves the Chamber to allow the Defence Witness with the pseudonym WBNM on Pauline Nyiramasuhuko's list to testify by means of a video-conference from Belgium, where he currently resides. The Defence indicates that it would set an appropriate time for this at a later stage. The Defence further requests that the information concerning the expulsion order against Witness WBNM not be disclosed to any third party including the Prosecutor, the Rwandan State, other accused persons in this trial, or any other State or organisation. Finally, the Defence requests that Witness WBNM be granted immunity from any arrest connected to charges of genocide, be it under the jurisdiction of the ICTR, of Rwanda, or any other country.

2. In support of its motion, the Defence alleges that Witness WBNM unsuccessfully requested refugee status from Belgium[2] where he has been living for years. An expulsion order was issued against him in 2004. The Defence affirms that despite the expulsion order, Witness WBNM continues to be tolerated in Belgium for humanitarian reasons. The Defence goes on to state that if Witness WBNM leaves Belgium, he will be at risk of not being allowed back into that country, and might be thereafter arrested by Rwandan authorities. The Defence asserts that upon co-Counsel's return from Belgium, it will disclose to the Chamber a proof of the expulsion order as well as that of the appeal on humanitarian grounds filed by the witness.

3. The Defence further submits that Witness WBNM's name appears on the list of "*génocidaires*" in Rwanda. In this regard, the Defence states that it has learnt from the WVSS that it would be impossible to guarantee the protection of persons whose names are mentioned on this list, and that they were therefore advised by WVSS Witness WBNM's testimony be taken by video-conference.

4. The Defence submits that these factors constitute a real and objective basis for the Witness's fears related to his travel to Arusha in order to testify, and that the conditions for the granting of the requested protective measures are thus fulfilled[3]. The Defence points out that it does not believe that the Prosecutor intends to arrest the witness, but that there are no guarantees and therefore the Witness cannot be reassured on this issue. Accordingly, the Defence argues that there are real and objective

[2] The Defence annexed to the Motion, among others, a letter from the Belgian "*Commission Permanente de Recours des Réfugiés*" dated 22 October 2001, and notifying Witness WBNM of its decision N° 00-0678/R 9953/mak issued on 3 October 2001. A copy of the decision was disclosed to the Chamber on 6 June 2005.

[3] Annexed to the motion is an Amnesty International report, entitled : "Rwanda : Protecting their rights : Rwandese Refugees in the Great Lakes Region".

reasons to believe that the Tribunal will arrest Witness WBNM and moreover that he risks being transferred to Rwanda by the Tribunal.

5. The Defence submits that Witness WBNM is one of the very few people who held high political positions during Habyarimana's regime and are still alive and not detained by any State. In light of his situation, the witness fears that he may be arrested by the Rwandan authorities if he comes to Arusha.

6. The Defence furthermore alleges that Witness WBNM's expected testimony as summarized in his will-say statement filed on 7 February 2005 is important to Nyiramasuhuko's case. The Witness might be able to challenge or contradict various allegations involving himself and the Accused made by Mr Guichaoua and Ms Desforges. The Defence submits that it will be in the interests of justice and of a just and fair trial that the witness's testimony be heard[4].

## DELIBERATIONS

7. The Chamber recalls that all Parties are, pursuant to Article 20 (1) of the Statute, equal before the Tribunal[5] and that the Chamber must take appropriate measures to ensure that the truth is ascertained in a fair and expeditious trial.

8. The Chamber recalling the provisions of Article 21 of the Statute and Rules 69 and 75 of the Rules, reiterates its analysis of the case law regarding the request for extra protective measures found in its Decision of 1 March 2005, as enunciated in the *Bagosora* Decision of 13 September 1999 :

> To grant protective measures to a witness, pursuant to Rule 75, the following conditions must also apply. Firstly, the testimony of the witness must be relevant and important to the party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied[6].

9. The Chamber recalls that the burden of proof for the fulfilment of the applicable criteria lies with the Party requesting additional protective measures. As stated in the 8 October 2004 Decision rendered in the *Bagosora* case :

> [T]he applicant must make some showing that giving testimony in that manner is necessary to safeguard the witness' security[7].

---

[4] The Defence cites various ICTR and ICTY cases addressing the granting of testimony via video-link.

[5] See *The Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Decision on the Motion for the Protection of Defence Witnesses (TC), 6 October 1997; *The Prosecutor v. Bagambiki et al.*, ICTR-97-36-T, Decision on the Defence Motion for the Protection of Witnesses (TC), 30 September 1998.

[6] *The Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 28.

[7] *The Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, para. 8; see also *The Prosecutor v. Rutaganda*, ICTR-96-3-T, Decision on the urgent Motion filed by the Defence for the immediate

10. The Chamber will thus consider the three above-mentioned criteria and determine whether the Defence has fulfilled them with respect to the present Motion. The Chamber will firstly apply the first two criteria to determine whether or not the witness is eligible for additional protective measures; secondly, the Chamber will apply the third criterion to determine whether or not the testimony via video-conference canvassed by the Defence, meets the requirement of the jurisprudence that it should be a "strictly necessary protective measure" and that there is no other "less restrictive measure which can secure the required protection"[8].

*Relevance and Importance of the Testimony*

11. The jurisprudence of both Tribunals holds that, for special protective measures to be granted to a witness, his or her testimony must be relevant and important to the case of the requesting Party. As stated in the 10 August 1995 Decision rendered by the ICTY in the *Tadič* Case :

> [T]he testimony of the particular witness must be important to the Prosecutor's case : '[T]he evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it' (*R. v. Taylor*, Ct. App. Crim. Div. 22 July 1994). In this respect, it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. Further, the Prosecutor has stated that this testimony is important and, for some witnesses, critical[9].

12. The Chamber notes that the Defence provided it with Witness WBNM's *will-say* statement on 7 February 2005. After having reviewed said document, the Chamber finds that the relevance and the importance of Witness WBNM's expected testimony cannot be disputed, fulfilling thus the first criterion.

*Real Fear underscored by an objective Basis*

13. The Chamber now considers the second criterion to Defence Witness WBNM. As mentioned in the above-cited *Bagosora* Decision of 13 September 1999, subjective fear is insufficient and must be underscored by objective considerations. In the *Prosecutor v. Milosevič* case, the ICTY further ruled :

> [F]ears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk[10].

---

Transfer and Appearance of a detained Witness, Froduald Karamira (TC), 26 March 1998, para.7-10; *The Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 19; ICTY, *The Prosecutor v. Brdanin and Talič*, IT-99-36-T, Decision on Motion by Prosecution for Protective Measures (TC), 3 July 2000, para. 16-17.

[8] *The Prosecutor v. Tadič*, IT-94-I-T, (Decision on the Prosecutor's Motion requesting protective Measures for Victims and Witnesses), 10 August 1995.

[9] ICTY, *The Prosecutor v. Tadič*, IT-94-1-T, Decision on the Prosecutor's Motion requesting protective Measures for Victims and Witnesses, 10 August 1995, para. 63; See also *The Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the extremely urgent Request made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999, para. 29.

[10] ICTY, *The Prosecutor v. Milosevic*, IT-02-54-T, Second Decision on Prosecution Motion for Protective Measure for Sensitive Source Witnesses, 18 June 2002, para. 7.

14. The Chamber understands that the security situation of Witness WBNM for whom additional protection is sought can be thus summarized : Firstly, Witness WBNM fears to be arrested either by the Office of the Prosecutor (the "OTP") and might be transferred to Rwanda if he comes to Arusha or by the Rwandan authorities themselves if he leaves Belgium. Secondly, he fears that if he leaves Belgium, his current country of residence, he will be at risk of not being allowed back into that country because of the expulsion order issued against him in 2004.

15. As far as the fear of being arrested either by OTP or Rwandan authorities is concerned, the Chamber notes that it results from his *will-say* statement that he actually held important positions during Habyarimana's regime and that his fear therefore appears to be justified. However, the Chamber recalls that, as stated in the 13 September 1999 Decision in the *Bagosora* case :

> [T]he phrase "in danger or at risk" does not include being subject to lawful acts of a State, *e.g.*, prosecution. For a person to be in danger or at risk, the threat must be of an unlawful act[11].

16. Therefore, the Chamber considers that the risk to be legally arrested and/or prosecuted is not within the scope of protective measures it may grant.

17. As regards the fear of not being allowed back into Belgium, the Chamber recalls the Defence submissions alleging that Witness WBNM has been subject to an expulsion order since 2004 and that for that reason his fear is both real and objectively grounded.

18. The Chamber observes that no proof showing the existence of the alleged expulsion order has been adduced by the Defence. All supplementary documents received so far by the Chamber have dealt with other matters which had no bearing on the expulsion order.

19. Contrary to the Defence, the Chamber finds that the decision issued at first instance by the "*Commissaire Général aux Réfugiés et aux Apatrides*" on 4 May 2000 and confirmed thereafter on appeal by the "*Commission Permanente de Recours aux Réfugiés*" on 3 0ctober 2001, never referred to a notice of expulsion issued against the applicant, Witness WBNM. Both decisions merely deny him refugee status. Apart from these decisions and Counsel's submissions, no further evidence has been adduced on this issue. The Chamber concludes therefore that the Defence has not discharged its burden of proof and that the fear expressed by the witness on the basis of a purported expulsion order issued against him either in 2004 or prior to then, is not substantiated.

20. The Chamber is therefore of the view that Witness WBNM's fear is not underscored by an objective basis and that thus the second criterion is not fulfilled. Since the first two criteria are cumulative, the witness is thus not eligible to any additional protection. The Chamber accordingly denies the measure requested by the Defence, notably Witness WBNM's testimony from Belgium via video-conference.

21. With regard to the Defence request for the non-disclosure to any other party of the information concerning the expulsion order allegedly issued against Witness

[11] *The Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Bernard Ntuyahaga (TC), 13 September 1999, para. 34.

WBNM, the Chamber finds that apart from the fact that the request has no legal basis, the Defence as discussed above has failed to prove the existence of such an order.

22. As regards the Defence request seeking that Witness WBNM be granted immunity from arrest connected to charges of genocide, be it under the jurisdiction of the ICTR, of Rwanda, or any other country; the Chamber recalls that

> "protective measures for witnesses should not hinder due process or be used as a way of providing immunity to the witnesses against possible prosecution"[12]

and

> "the only type of immunity which falls within the jurisdiction of this Tribunal is the kind provided for under Rule 90 (E) whereby witnesses will not be prosecuted by this Tribunal for giving compelled evidence which may incriminate them, excluding perjury"[13].

In accordance with Rule 54, the Chamber may further order safe conduct to a witness whose appearance is necessary and who fears to be arrested. Nevertheless, the Chamber points out that 'an order for safe conduct grants only a very limited immunity from prosecution' and only 'with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal and only for the time during which the witness is present at the seat of the International Tribunal for purpose of giving testimony'[14]. In applying this jurisprudence, the Chamber notes that although Witness WBNM is a potential witness who fears to be arrested, the kind of immunity the Defence seeks for him is too broad and not limited to any timeframe and therefore does not fall within the scope of immunity the Chamber may grant to a witness in conformity with the Rules.

23. The Chamber recalls, however, that the testimony expected from Witness WBNM is important for the case of the Accused and relevant for the ascertainment of the truth. Therefore, the Chamber deems it appropriate to issue *proprio motu*, pursuant to Rule 54, an order of safe conduct for the witness, bearing in mind his fears related to coming to Arusha to testify.

FOR THE ABOVE REASONS THE TRIAL CHAMBER

DENIES the Motion in its entirety,

ORDERS *proprio motu,* that Defence Witness WBNM shall not be prosecuted, detained or subjected to any other restriction of his personal liberty, for acts or convictions falling within the jurisdiction of the Tribunal, during his presence in Tanzania and his travel between that country and his place of residence and, accordingly :

- DECIDES that such immunity shall take effect from the date of the present Decision and shall remain in force for a maximum of seven days following the completion of the testimony of Witness WBNM;

---

[12] *The Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Decision on the Motion for Protection of Defence Witnesses (TC), 6 October 1997; *Prosecutor v. Bagosora*, ICTR-96-7-I, Decision on the extremely urgent Request made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 34-35.

[13] *The Prosecutor v. Ntagerura*, ICTR-96-10A-I, Decision on the Defence Motion for the Protection of Witnesses (TC), 24 August 1998.

[14] *The* ICTY, *Prosecutor v. Dokmanovič*, IT-95-13a-T, Decision regarding Defence Motion to Protect Witness (TC), 27 August 1997.

- DECIDES, moreover, that should illness prevent Witness WBNM from leaving Tanzania or should Witness WBNM be detained for an offence he may have committed during his stay in Tanzania, the seven days time-limit shall start to run from the time he is again able to travel or has been released;
- DECIDES that Witness WBNM may travel only between the country's point of entry and exit and his place of residence, within a limited radius around his place of residence, and between such place and the Tribunal.

Arusha, 17 June 2005.

[Signed] : William H. Sekule ; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Pauline Nyiramasuhuko's* **Ex-Parte –** *Extremely Urgent Motion for reconsideration of Trial Chamber II's Decision on Nyiramasuhuko's strictly confidential* **Ex-Parte –** *Under seal – Motion for additional protective measures for defence Witness WBNM dated 17 June 2005 Or, subsidiary, on Nyiramasuhuko's strictly confidential* **Ex-Parte –** *Under seal – Motion for addtitional protective measures for defence witness WBNM 4 July 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Reconsideration of Trial's Chamber decision, Exceptional measure available only in particular circumstances – Additional protective measure, Criteria of eligibility – Belgium, Refugee Status of the witness – Motion partially granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 69, 73 (A) and 75; Statute, art. 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora, *Decision on the extremely urgent Request made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga, 13 September 1999 (ICTR-96-7); 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); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko*, Decision on Nyiramasuhuko's strictly confidential* Ex-Parte *– Under Seal – Motion for additional protective Measures for Defence Witness WBNM, 17 June 2005 (ICTR-98-42)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dusko Tadic, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 August 1995 (IT-94-1)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 "Pauline Nyiramasuhuko's *Ex-Parte* extremely Urgent Motion For Reconsideration of the Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* Under Seal-Motion For Additional Protective Measures For Defence Witness WBNM or Subsidiarily on Nyiramasuhuko's Strictly Confidential *Ex-Parte*- Under Seal Motion For Additional Protective Measures For Defence Witness WBNM"[1], filed on 20 June 2005 (the "Motion"), and the Addendum filed on 22 June 2005;

NOTING the "Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Defence Witness WBNM" of 17 June 2005 (the "Impugned Decision");

NOTING the "Scheduling Order in the Matter of Pauline Nyiramasuhuko's *Ex-Parte* Extremely Urgent Motion for Reconsideration of the Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under seal – Motion for Additional Protective Measures for Defence Witness WBNM", of 22 June 2005 (the "Scheduling Order");

NOTING "Pauline Nyiramasuhuko's *Ex-Parte* Execution of the Scheduling Order in the Matter of Pauline Nyiramasuhuko's *Ex-Parte* Extremely Urgent Motion For Reconsideration of the Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* Motion for Additional Protective Measures for Defence Witness WBNM", filed on 29 June 2005 (the "Response to the Scheduling Order");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Defence.

[1] This Motion was originally filed in French as "*Requête* ex parte *d'extrême urgence de l'accusée Pauline Nyiramasuhuko en reconsidération de la décision* on Nyiramasuhuko's strictly confidential *ex parte* – Under Seal – Motion for additional protective Measures for Defence Witness WBNM *ou subsidiairement requête de l'accusée Nyiramasuhuko ex parte et strictement confidentielle pour mesures additionnelles de protection pour le témoin à décharge WBNM*".

**Submissions of the Defence**

1. The Defence moves the Chamber to reconsider its decision of 17 June 2005 in order to allow Defence Witness WBNM to testify by means of video-conference from Belgium, where he currently resides. The Defence indicates that it would set an appropriate time for this at a later stage. The Defence further requests that the information concerning the expulsion order against Witness WBNM not be disclosed to any third party including the Prosecutor, the Rwandan State, other accused persons in this trial, or any other State, institution, or organisation.

2. In support of its motion, the Defence submits that by filing further documents annexed to the Response to the Scheduling Order, it has complied with the Chamber's orders contained in the Scheduling Order and discharged its burden of proof as to an objective basis underscoring the Witness's fears of leaving Belgium to come and testify in Arusha.

**Deliberations**

3. The Chamber recalls the Tribunal's jurisprudence on reconsideration, namely the "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)" :

> The fact that the Rules are silent as to reconsideration, however, is not, in itself, determinative of the issue whether or not reconsideration is available in "particular circumstances" and a judicial body has inherent jurisdiction to reconsider its decision in "particular circumstances". Therefore, although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions. However, it is clear that reconsideration is an exceptional measure that is available only in particular circumstances[2].

4. The Chamber recalls that it dismissed the Motion in its Impugned Decision because the Defence had not shown that Witness WBNM's fears of leaving Belgium were underscored by objective elements[3]. The Defence has now filed further documents in support of its Motion, annexed to the Response to the Scheduling Order which, still according to the Defence, justify a further examination of the additional protective measures sought.

5. The Chamber, noting the provisions of Article 21 of the Statute and Rules 69 and 75 of the Rules, reiterates its analysis of the case law regarding requests for extra protective measures enunciated in the *Bagosora* Decision of 13 September 1999 and cited in its Decision of 1 March 2005 :

[2] *The Prosecutor v. Bagosora et al.*, ICTR-98-41-T, 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, para. 7.

[3] *The Prosecutor v. Nyiramasuhuko*, ICTR-98-42-T, Decision on Nyiramasuhuko's strictly confidential *Ex-Parte* – Under Seal – Motion for additional protective Measures for Defence Witness WBNM (TC), 17 June 2005, para. 20.

> To grant protective measures to a witness, pursuant to Rule 75, the following conditions must also apply. Firstly, the testimony of the witness must be relevant and important to the party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied[4].

6. The Chamber further recalls that it has already found that the relevance and importance of Witness WBNM's expected testimony to the Defence case cannot be disputed and that the first criterion is thus fulfilled[5]. As to the second criterion of real fear underscored by an objective basis, the Chamber considers that the Defence has demonstrated, by filing additional documents, that Witness WBNM's fear of being denied re-entry into Belgium because of his status as an illegal immigrant, if he testifies in Arusha, has basis. The documents filed include evidence of an expulsion order issued against Witness WBNM on 5 October 2004 in compliance with the decision of 13 September 2004, and of the two pending appeals lodged with the *Conseil d'Etat*, which have no suspensive effect on either decision or expulsion order. The Chamber further notes the Defence's admission that the Witness is an illegal immigrant in Belgium. The Chamber is therefore satisfied that Witness WBNM's fears have been shown to be underscored by objective elements, and that the second criterion is fulfilled. Accordingly, in reconsidering its Decision of 17 June 2005, the Chamber concludes that Defence Witness WBNM is presently eligible to additional protective measures.

7. The Chamber recalls that the additional protective measure sought for Witness WBNM is his testimony via video-link from Belgium. According to the jurisprudence, protective measures have to be "strictly necessary", in the sense that there is no other "less restrictive measure which can secure the required protection"[6]. The Chamber considers that the Witness's fears of being denied re-entry into the country were he to leave it to testify in Arusha, cannot be allayed by any less restrictive measure of protection and thus grants the measure sought.

8. According to the information provided to the Chamber, the Registry needs at least three weeks to prepare and to make the necessary arrangements for testimony via video-link from Belgium. Accordingly, the Chamber directs the Defence to take all appropriate measures to comply with this administrative requirement.

9. As to the second Defence prayer, namely, the non-disclosure of the Witness's current status with regard to the expulsion order to third parties, the Chamber reiterates its view that there is no legal basis for this request, which furthermore has not been shown to be strictly necessary.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion in part,

---

[4] *The Prosecutor v. Bagosora,* ICTR-96-7-I, Decision on the extremely urgent Request made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga (TC), 13 September 1999, para. 28.

[5] *The Prosecutor v. Nyiramasuhuko*, ICTR-98-42-T, Decision on Nyiramasuhuko's strictly confidential *Ex-Parte* – Under Seal – Motion for additional protective Measures for Defence Witness WBNM (TC), 17 June 2005, para. 12.

[6] *The Prosecutor v. Tadič*, IT-94-I-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (TC), 10 August 1995, para. 66.

ORDERS that Witness WBNM's testimony shall be heard via video-link from Belgium where he currently resides,

ORDERS the Registry to take all administrative and other steps necessary for the implementation of this Decision;

DIRECTS the Defence to diligently assist the Registry in the necessary arrangements;

DISMISSES the request for non-disclosure of the Witness's current status with regard to the expulsion order to third parties;

REITERATES the Decision of 17 June 2005 in all other respects.

Arusha, 4 July 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Scheduling Order*
## *Rule 54 of the Rules of Procedure and Evidence*
## *5 August 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Prejudice to the Defense, Lack of defence witnesses, Calendar*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 54 and 94* bis

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

SITTING as Trial Chamber II ("Chamber"), composed of Judge William H. Sekule, Presiding, pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules"), in consultation with Judge Arlette Ramaroson and Judge Solomy Balungi Bossa;

BEING SEIZED of the Prosecutor's "Motion Pursuant to Rules 54, 73, and 73 *ter* to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobari", filed on 20 July 2005 (the "Motion") and the subsequent "Consolidated Rejoinder to the Responses of the Defence of Nyiramasuhuko, Ntahobali and Nteziryayo to his Motion of 20 July 2005", filed on 28 July 2005 (the "Consolidated Rejoinder");

RECALLING the directions issued by the Chamber at the Status Conference held on 16 June 2005;

CONSIDERING the Responses by the Defence for Ntahobali, filed on 22 July 2005[1], by the Defence for Nyiramasuhuko, filed on 25 July 2005[2], by the Defence for Nteziryayo, filed on 26 July 2005[3], the letter from the Defence for Nyiramasuhuko to the Registrar filed on 25 July 2005, and the Defence for Ntahobali's Response to the Prosecution's Consolidated Rejoinder, filed on 3 August 2005[4];

NOTING that the Defence for Ntahobali disclosed its updated list of witnesses, will-say statements and the proposed order of the first ten witnesses, filed on 2 August 2005[5];

CONSCIOUS that were proceedings to recommence on the date proposed by the Defence of Nyiramasuhuko, Defence for Ntahobali and the Defence for Nteziryayo, namely, 5 September 2005, the Chamber would have lost 37 trial days, since the 17 June 2005, as a result of the lack of defence witnesses;

AFTER TAKING NOTE of the Motion, the Consolidated Rejoinder, all the Defence Responses, and without prejudice to the decision the Chamber shall reach dealing with the specific issues raised;

BEARING IN MIND the fact that the testimony of Witness WBNM via video-link has been scheduled for 29 August 2005;

HEREBY ORDERS

a) That proceedings shall resume on 29 August 2005;

b) That Defence for Nyiramasuhuko shall proceed with its defence on 29 August 2005 with the examination of Witness WBNM;

c) That in the event that Witness WBNM will be unable to testify for any reason, the Defence for Nyiramasuhuko shall put the Accused on the stand to begin her testimony on 29 August 2005 or any date thereafter;

d) The Defence for Nyiramasuhuko to ensure that its defence will be completed in a timely fashion, including the disclosure of the Expert Witness's report no later than two weeks from the date of this Order, to enable all parties to avail themselves of their rights contained in Rule 94 *bis*;

---

[1] This response was filed in French as "*Réponse de Shalom Ntahobali à la requête du Procureur intitulée* 'Prosecutor's Motion to proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali' ", 22 July 2005.

[2] This response was filed in French as "*Réponse à la* 'Prosecutor's Motion to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali' ", 25 July 2005.

[3] This response was filed in French as "*Réponse de Alphonse Nteziryayo à* 'Prosecutor's Motion to proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali' ", 26 July 2005.

[4] See *Duplique de Shalom Ntahobali à la* "Prosecutor's Consolidated Rejoinder to the Responses of Nyiramasuhuko, Ntahobali and Nteziryayo to his Motion of 20 July 2005", 3 August 2005.

[5] See *Requête en modification de la liste et de l'ordre des témoins de la défense d'Arsène Shalom Ntahobali*, 2 August 2005.

e) That Defence for Ntahobali shall continue to comply with all its disclosure obligations.

Arusha, 5 August 2005, done in English.

[Signed] : William H. Sekule

***

## *Decision on Prosecutor's Motion Pursuant to Rules 54, 73, and 73* **ter** *to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobali 19 August 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Disclosure obligations of the parties, Disclosure of an expert witness report, Pending request of adding a witness to the list, Necessity to respect the schedule, Purpose of the Status Conference, Testimony of a witness, Duty of the Trial Chamber to ensure the balance between the competing and respective rights of the Parties, Interests of justice, Withdrawal of the Lead Counsel – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 73 (A), 94* bis *and 94* bis *(B); Statute, art. 20*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Prosecutor's "Motion Pursuant to Rules 54, 73, and 73 *ter* to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to Proceed with the Defence Case of the Accused Ntahobari", filed on 20 July 2005 (the "Motion");

CONSIDERING the subsequent responses and reply :

– the Defence for Ntahobali, filed on 22 July 2005 ("Ntahobali's Response"),[1]
– the Defence for Nyiramasuhuko, filed on 25 July 2005 ("Nyiramasuhuko's Response"),[2]
– the Defence for Nteziryayo, filed on 26 July 2005 ("Nteziryayo's Response"),[3]
– the letter from the Defence for Nyiramasuhuko to the Registrar, filed on 25 July 2005; and,
– the Prosecutor's "Consolidated Rejoinder to the Responses of the Defence of Nyiramasuhuko, Ntahobali and Nteziryayo to his Motion of 20 July 2005", filed on 28 July 2005 (the "Consolidated Rejoinder");

NOTING that the Defence case for Ntahobali began on 11 April 2005 with the evidence of Mr. Edmond Babin;

CONSIDERING IN PART the following :

– the "*Liste des témoins – ordre des 10 premiers témoins de la défence d'Arsène Shalom Ntahobali*", filed on 2 August 2005,
– the "Will-Say et *fiches d'identification des 10 premiers témoins de la défence de Ntahobali*", filed on both 2 and 10 August 2005; and,
– the "*Mémoire préalable amendé à la défense de l'accusé Arsène Shalom Ntahobali (Art. 73* bis *Règlement de procédure et de preuve*)", filed on 10 August 2005, and the list of witnesses therein;

RECALLING the Registrar's Decision to Withdraw the Assignment of Mr. Duncan Mwanyumba as Lead Counsel for Mr. Arsène Shalom Ntahobali, issued on 9 June 2005 (the "Registrar's Decision");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of both the written submissions of the Prosecutor and the responses as filed by the Parties.

## SUBMISSIONS OF THE PARTIES

1. On 20 July, the Prosecutor moved the Chamber to order the Defence for Nyiramasuhuko to call the Accused as a witness from 15 August 2005 or, alternatively, to direct the Defence for Ntahobali to proceed with its defence from 15 August 2005.[4]

2. The Prosecutor requests that the Chamber order the Defence for Nyiramasuhuko to disclose the proposed Expert Witness report as per the Chamber's Oral Order of

[1] "*Réponse de Shalom Ntahobali à la Requête du Procureur intitulée* 'Prosecutor's Motion to proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali'", 22 July 2005.

[2] "*Réponse à la* 'Prosecutor's Motion to proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali'", 25 July 2005.

[3] "*Réponse de Alphonse Nteziryayo à* 'Prosecutor's Motion to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative with the Defence Case of the Accused Ntahobali'", 26 July 2005.

[4] The Motion, paras. 9-10.

16 June 2005[5] and direct the Defence for Ntahobali to comply with its disclosure obligations, primarily to effect the full disclosure of the anticipated witnesses and thus avoiding any further delays to the proceedings.[6]

3. The Defence for Ntahobali, Nyiramasuhuko and Nteziryayo all move for the Motion to be denied; Ntahobali's and Nteziryayo's Defences propose that proceedings recommence on 5 September 2005[7].

### DEFENCE FOR NTAHOBALI

4. The Defence for Ntahobali submits that it is unable to call its witnesses before the completion of Nyiramasuhuko's defence case, for the recently appointed Lead Counsel, Mr. Marquis, is not assisted by a Co-Counsel. Mr. Marquis argues that, as a result of the withdrawal of former Lead Counsel, Mr. Mwanyumba, he is unable to both examine witnesses and prepare his case. The Defence for Ntahobali further submits that even in the event that a Co-Counsel is appointed immediately, s/he can not be expected to be adequately familiar with the case by 15 August 2005.

5. The Defence for Ntahobali argues that the Accused should not pay the price for problems resulting from Witness WBNM's testimony via video-link. For these reasons, the Defence for Ntahobali maintains it will be seriously prejudiced should it be ordered to resume its Defence on 15 August 2005[8].

### DEFENCE FOR NYIRAMASUHUKO

6. The Defence for Nyiramasuhuko submits that the position of the Accused remains as it was on 16 June 2005, save for the Expert Witness having been approved by the Registry on 7 July 2005. This Witness had been authorised to write a report within 14 days and testify before the Chamber. The Defence for Nyiramasuhuko maintains that it will be unable to observe the 21 day disclosure requirement and that in any event, the report can not be generated by 5 August 2005[9].

7. In a letter to the Registrar, also dated 25 July 2005, this Defence proposes to call its remaining witnesses in the following order :

– Witness WBNM (by video-link);

– Expert Witness Mr. Maniragaba Baributsa; and,

– The Accused, Pauline Nyiramasuhuko.

8. In the alternative, the Defence for Nyiramasuhuko submits that should it fail to disclose the report of its proposed Expert in a timely fashion, the Accused will testify before the said Expert Witness[10].

---

[5] *Ibid.,* para. 7.

[6] *Ibid.*, para. 10. The Prosecutor highlighted that 17 trial days had been lost, from 15 June to 15 July 2005, due to the lack of Defence witnesses. Para. 10, footnote 3.

[7] Ntahobali's Response, para. 24; Nteziryayo's Response, paras. 20-22.

[8] Ntahobali's Response, paras. 8-9, 14, 15, 18, and 21.

[9] Nyiramasuhuko's Response, paras. 3-7.

[10] See, letter from the Defence for Nyiramasuhuko to the Registrar, filed on 25 July 2005.

DEFENCE FOR NTEZIRYAYO

9. The Defence for Nteziryayo maintains that a further adjournment of proceedings is the least problematic way of addressing the difficulties faced. It argues that the alternative, namely, that the Accused Nyiramasuhuko testify from 15 August 2005, and thus before Witness WBNM, would result in a far from perfect situation, possibly requiring the Accused Nyiramasuhuko to be recalled[11].

10. Further, the Defence for Nteziryayo submits that the interchanging of Defence cases, namely, between the Defence for Nyiramasuhuko and that for Ntahobali, is incompatible with the proposed defence strategy and would possibly lead to certain witnesses being recalled[12].

PROSECUTOR'S CONSOLIDATED REJOINDER

11. The Prosecutor, in his Consolidated Rejoinder, rejects the argument that the presence of a single Lead Counsel necessarily results in delays, as submitted by the Defence for Ntahobali, noting that the newly appointed Lead Counsel has been an integral member of the Defence team since 24 October 2001. Relying on the Registrar's Decision of 9 June 2005, the Prosecutor draws attention to assurances contained therein, namely, that the "withdrawal of the Lead Counsel would not cause any delay whatsoever in the trial proceedings"[13].

12. Pursuant to Rule 82, the Prosecutor observes that Pauline Nyiramasuhuko is not the only Accused in these proceedings and that the rights of the other Accused must also be respected. In his objections to the Defence of Nyiramasuhuko's submissions, the Prosecutor submits that it is unsatisfactory for a party to seek an adjournment on the basis that an Expert is unable to complete a report within a stipulated timeframe without offering a justifiable explanation for this delay[14].

13. The Prosecutor disagrees with the Defence for Nteziryayo's submissions and argues that the principle that an Accused has the right to be "heard last" is not fixed. The Prosecutor draws attention to current and previous proceedings before this Tribunal, where an Accused has either testified before all or some of his factual Defence witnesses[15]. The Prosecutor argues that the Defence for Nteziryayo has not demonstrated the prejudice its client will suffer should the Defence for Ntahobali proceed with its defence on 15 August 2005 or should the Defences for Nyiramasuhuko and Ntahobali interchange. Accordingly, the Prosecutor submits that the Defence for Nteziryayo is premature in its submissions that should Nyiramasuhuko testify first, this will necessitate her being recalled[16].

[11] Nteziryayo's Response, paras. 10-11.
[12] *Ibid.,* paras. 9-11, 15, 18, and 20.
[13] Consolidated Rejoinder, paras. 17-22.
[14] *Ibid.*, paras. 10-11.
[15] *Ibid.*, paras. 25-27.
[16] *Ibid.*, paras. 30-32.

## Deliberations

14. Recalling the Chamber's Scheduling Order of 5 August 2005, which postponed the resumption of proceedings to 29 August 2005, the question as to whether either the Defence for Nyiramasuhuko or that of Ntahobali will proceed with their evidence on 15 August 2005 has been rendered moot.

15. The Chamber will, however, address several issues at the core of the Motion, raised by both the Prosecutor and contained in the subsequent Defence Responses related to the conduct of this trial.

16. The Chamber recalls that, on 16 June 2005, it adjourned trial proceedings to 15 August 2005 "to enable adequate preparations being made in preparation for the continuation of the proceedings", to be completed, in particular by the Defence teams for Nyiramasuhuko, Ntahobali and Nsabimana.

### (A) *Issues of Disclosure*

17. In its Decision of 18 February 2005, the Chamber addressed the 21 day disclosure requirement, observing that :

> "[i]t expects Counsel to act diligently when disclosing identities of witnesses so that the Trial is conducted in a smooth manner. Recalling its Oral Ruling of 18 October 2004, the Chamber urges Defence Counsel not to be too rigid on the 21 day timeframe but to disclose the identities of a larger number of witnesses at a time so that if a witness becomes unavailable at any given time, the Defence should be in a position to present another witness, who has met the 21 day disclosure deadline"[17].

*Defence for Ntahobali*

18. The Chamber recalls its Order of 16 June 2005 that the Defence for Ntahobali take all necessary steps to prepare its case, particularly to make all the necessary disclosures, given the fact that it has already commenced with the presentation of its case[18].

19. The Chamber notes that on 2 August, the Defence of Ntahobali disclosed its amended list of witnesses, including identifying information and will-say statements of the first 10 witnesses it intended to call. The Chamber observes that of these 10 witnesses, two are the subject of a Motion requesting their addition to the Defence list of witnesses still under consideration. The Chamber further notes that on 10 August, the Defence of Ntahobali filed an Amended Pre-Defence Brief consisting of the summaries of the proposed testimonies of the proposed 32 witnesses it intended to call.

20. In the Chamber's view, the manner in which the Defence for Ntahobali is executing its disclosure obligations is unsatisfactory because, should the Defence for Ntahobali be required to resume its defence on 29 August 2005 as ordered, it will only

[17] Decision of 18 February 2005, para. 23.
[18] Oral Decision, 16 June 2005, paras. 3-4.

be able to proceed with those eight proposed witnesses for whom identities have been disclosed on 2 August 2005.

21. Given that these proceedings are scheduled to resume on 29 August 2005, the Chamber hereby recalls its orders, directions and recommendations, in particular those of 18 October 2004, 18 February, 16 June, and 5 August 2005, respectively, in which it reminded all Defence teams that it expected them to act diligently when disclosing the identities of witnesses, urging them not to be too rigid on the 21 day timeframe, but to disclose the identities of a larger number of witnesses at a time, so that if a witness becomes unavailable at any given time, the Defence is in a position to present another witness who has met the 21 day disclosure deadline.

22. Accordingly, the Chamber directs the Defence for Ntahobali to diligently proceed with all necessary disclosures so as to enable it to proceed with the smooth and uninterrupted conduct of its defence, on or after 29 August 2005.

*Defence for Nyiramasuhuko*

23. The Chamber recalls its Oral Decision of 1 June 2005 following the Defence for Nyiramasuhuko's application to vary its witness list to, *inter alia,* add the proposed Expert Witness, Mr. Baributsa[19].

24. On 16 June 2005, the Chamber ordered the Defence to diligently follow up issues pertaining to the proposed Expert Witness, and in particular the preparation and disclosure of his report.[20]

25. This Expert Witness was accordingly approved by the Registry on 7 July 2005. To date, the Defence for Nyiramasuhuko has not indicated what, if any, progress has been made in the preparation and subsequent disclosure of this report. In the absence of any justification as to why the report could not be prepared in time for the resumption of the trial initially scheduled for 15 August 2005, the Chamber is of the view that the proposed Expert Witness has had more than ample time to prepare a report and to disclose it, affording the other parties the opportunity to avail themselves of their rights contained in Rule 94 *bis* (B).

26. The Chamber reiterates its Scheduling Order of 5 August 2005 in which the Defence for Nyiramasuhuko was directed to disclose its expert report within two weeks of the date of the Order.

### (B) *Presentation of the Defence Cases of Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*

27. The Chamber once again recalls that the purpose of the Status Conference held on 16 June 2005 was to discuss how best to conduct future proceedings[21]. The Chamber recalls that during this Conference, it placed both the Defence for Nyiramasuhuko and for Ntahobali on notice that either Defence, if required, should be in a position to present their respective witnesses when the proceedings resumed.

[19] T. 1 June 2005, pp. 24-25.
[20] T. 16 June 2005, p. 3.
[21] Status Conference, T. 16 June 2005, pp. 5-6 (ICS).

28. The Chamber notes that the Defence alleges inconveniences that will result from tendering its witnesses out of the originally conceived sequence. However, the Chamber finds that the Defence does not provide a cogent argument why the Accused should not testify before Witness WBNM, should the need arise, nor does it demonstrate the prejudice it would suffer

29. The Chamber is of the opinion that the Defence has had ample opportunity to prepare the testimony of the Accused and also the substance of the expected testimony of Witness WBNM is known, as revealed in the Will-Say statement as disclosed.

30. The Chamber underscores that when seeking to give effect to an Accused's rights under Article 20, it has a duty to ensure that there is a balance between the competing and respective rights of all the Parties in the case. The Chamber thus finds that it would not facilitate fairness to the other Parties and/or serve the interests of justice, to postpone the trial merely to allow the Accused to testify at her own convenience.

31. Accordingly, the Chamber rules that should Witness WBNM be unable to commence his testimony as scheduled, on 29 August 2005, for any justifiable reason, the Defence for Nyiramasuhuko should be prepared to call the Accused Nyiramasuhuko to give testimony on her own behalf.

32. The Chamber recalls the submissions of Nyiramasuhuko and Nteziryayo regarding the interchanging of the Defence cases.

33. The Chamber finds that the Defence of Nyiramasuhuko and that of Nteziryayo have not demonstrated the prejudice they would suffer, should the need arise to interchange the presentation of witnesses in either the Nyiramasuhuko or Ntahobali defence case. Further, the Chamber notes that the Defence for Ntahobali has already started. The Chambers accordingly finds no merit in the submissions of the Defence.

### (C) *Mr. Marquis' Difficulties as Counsel for Ntahobali*

34. The Registrar's Decision of 9 June 2005 outlines clear assurances from Mr. Marquis that the withdrawal of Mr. Mwanyumba as Lead Counsel would not "result in any delays whatsoever"[22]. Mr. Marquis was described by the Registrar as the "sole architect of the defence" strategy because of the role he chose to take in handling all witnesses abroad[23]. Moreover, Mr. Marquis has been an integral member of the Ntahobali Defence team from October 2001. He is well acquainted with the case and, according to the Accused Ntahobali, single-handedly defined the defence strategy.[24]

35. Mr. Marquis assured the Chamber that he would be ready to conduct his client's case when the time came.[25]

36. Accordingly, the Chamber cannot accept, at this stage, that Counsel for Ntahobali is unable to continue his client's defence, should it be necessary, on the date this trial resumes, as a result of the withdrawal of Mr. Mwanyumba as Lead Counsel. The

[22] Registrar's Decision, para. 8.
[23] *Ibid.,* paras. 1, 3.
[24] *Ibid.,* para. 8.
[25] *Ibid.,* p. 15.

Chamber expects that Mr. Marquis as Lead Counsel for Ntahobali, shall do everything, as an Officer of the Chamber, to facilitate these proceedings.

(D) *General Observations*

37. Furthermore, the Chamber reminds all Parties that it is for the Chamber, and not either the Defence or the Prosecution teams, to set the agenda for the conduct of this trial.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DECLARES MOOT the Prosecutor's request for the Chamber to proceed with the evidence of the Accused Nyiramasuhuko or, in the alternative, the Defence case for Ntahobali on 15 August 2005; and,

REITERATES its orders made in the Scheduling Order of 5 August 2005, namely :

1. That proceedings shall resume on 29 August 2005;
2. That Defence for Nyiramasuhuko shall proceed with its defence on 29 August 2005 with the examination of Witness WBNM;
3. That in the event that Witness WBNM will be unable to testify for any reason, the Defence for Nyiramasuhuko shall put the Accused on the stand to begin her testimony on 29 August 2005 or any date thereafter;
4. The Defence for Nyiramasuhuko to ensure that its defence will be completed in a timely fashion, including the disclosure of the Expert Witness's report no later than two weeks from the date of this Order, to enable all parties to avail themselves of their rights contained in Rule 94 *bis*;
5. That Defence for Ntahobali shall continue to comply with all its disclosure obligations; and,

DIRECTS the Defence of Nyiramasuhuko to take all the necessary steps to ensure that should the testimony of Witness WBNM be unable to commence for any justifiable reason as scheduled, the Accused Nyiramasuhuko will be in a position to give her testimony on 29 August 2005 or any date thereafter;

DIRECTS the Defence for Ntahobali to diligently continue with all necessary disclosures so as to enable it to proceed with the smooth and uninterrupted conduct of its defence, on or after 29 August 2005; and,

DENIES the Motion in all other respects.

Arusha, 19 August 2005.

[Signed] : William H. Sekule , Arlette Ramaroson, Solomy Balungi Bossa

***

## *Decision on the Prosecutor's Extremely Confidential Motion – Under Seal – in Response to the Motion of Arsene Shalom Ntahobali on the Disclosure of the Identity and will say Statements of Witnesses 23 August 2005 (ICTR-98-42-T)*

(Original : English) Trial Chamber

Judges : William H. Sekule, Presiding Judge ; Arlette Ramaroson ; Solomy Balungi Bossa

*Pauline Nyiramasukuko, Arsène Shalom Ntahobali – Protective measures of witnesses, Pseudonym for witnesses, Disclosure of the identity of witnesses, Disclosure of will say statements of witnesses, Under seal statements, Importance of non-disclosure of protected witnesses' identifying information – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 75*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 "Prosecutor's Extremely Confidential Motion – Under Seal – In Response to the Motion of Arsène Shalom Ntahobali on the Disclosure of the Identity and Will Say Statements of Witnesses" (the "Motion"), filed on 4 August 2005;

CONSIDERING the *"Réplique consolidée de Shalom Ntahobali aux réponses de Joseph Kanyabashi et du Procureur à la requête de Arsène Shalom Ntahobali demandant de modifier sa liste ainsi que l'ordre des témoins de sa défense et à la requête et notification de Arsène Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage"* (the "Response"), filed on 10 August 2005;

FURTHER CONSIDERING the Pre-Defence Brief for the Defence for Ntahobali filed on 31 December 2004 and the "Will-Say *et fiches d'identification des 10 premiers témoins de la défence de Ntahobali",* filed on both 2 and 10 August 2005;

NOTING the Chamber's Decision of 27 March 2001

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), specifically Rule 75 of the Rules;

HEREBY DECIDES the Motion.

## Submissions of the Parties

### THE PROSECUTOR

1. The Prosecutor moves that the Chamber order Ntahobali to withdraw the will-say statements of witnesses H1B14, H1B15, WUNJN, and WUNHF filed on 2 August 2005, and replace them with statements which only identify Prosecution Witnesses by their pseudonyms. In addition, the Prosecutor requests the Chamber to order the Registrar to retrieve all copies of the above offending will-say statements and take remedial action to prevent access to them, including putting them under seal.

2. The Prosecutor submits that the will-say statements disclosed by the Defence for Ntahobali for the following Witnesses, HIB14, HIB15, WUNJN and WUNHF, disclose confidential information about the named Prosecution Witnesses. The Prosecutor contends that anyone with access to the initial Pre-Defence brief of Ntahobali containing the pseudonyms of the Prosecution witnesses and the willsay statements of HIB14, HIB15, WUNJN and WUNHF would be able to establish a link between the pseudonyms and the names disclosed in these will-say statements.

3. The Prosecutor emphasises the particular vulnerability of one or more of the Prosecution Witnesses and stresses the necessity to continue to their identities before, during and after their given testimonies. This is to protect the security of the Witness and the integrity of the proceedings.

4. The Prosecutor maintains that the revelation of these identities violates the Protection Orders issued by the Chamber in its Decision of 27 March 2001.

### NTAHOBALI'S RESPONSE

5. The Defence for Ntahobali submits that it failed to notice the link between its initial Pre-Defence Brief filed on 31 December 2004 and the will-say statements of the above-mentioned witnesses filed on 2 August 2005. However, the Defence for Ntahobali submits that these offending will-say statements were filed "strictly confidential – under seal", guaranteeing the confidentiality of the information contained therein.

6. The Defence does not object to the Prosecutor's move to withdraw the will-say statements of Witnesses H1B14, H1B15, WUNJN and WUNHF and submits it will file new will-say statements for the first 10 witnesses it intends to call, having redacted the identifying information.

## Deliberations

7. The Chamber recalls its Decision of 27 March 2001 in which it granted protective measures pursuant to Rule 75. In this Decision, after evaluating the security situation affecting the concerned witnesses, the Chamber found that there existed exceptional circumstances to warrant non-disclosure orders based on the fears expressed by these witnesses that justified the issuance of protective measures[1].

8. The Chamber stated, *inter alia, :*

> "... [...] ... that the Prosecutor designate a pseudonym for each prosecution witness, which will be used whenever referring to each such witness in Tribunal proceedings, communications and discussions between die parties to the trial, and die public"[2].

9. The Chamber finds that in the present case, the will-say statements of Defence witnesses HIB14, HIB15, WUNJN and WUNHF disclose information which enables the identification of the named Prosecutor witnesses.

10. The Chamber notes the Defence for Ntahobali's argument that the will-say statements were filed "strictly confidential - under seal". The Chamber also observes that the Defence has accepted its mistake and is willing to withdraw the will say statements of Witnesses H1B14, H1B15, WUNJN and WUNHF and file new will say statements having redacted the identifying information.

11. Nevertheless, the Chamber further notes that although the damage and prejudice caused by this particular disclosure may be rectified by recalling the offending will-say statements, the Chamber underscores the importance of non-disclosure of protected witnesses' identifying information. The whole purpose of pseudonyms is to avoid disclosure of identities where such a fear has been expressed and the Chamber has seen fit to protect those witnesses.

12. For these reasons, identifying information of protected witnesses for all Parties is a serious matter and should be handled with extreme caution and only divulged in circumstances approved by the Chamber. It is imperative that all Parties adhere to these rules and remain continuously alert and alive to this issue.

FOR THESE REASONS, THE TRIBUNAL :

GRANTS the Motion;

REITERATES the Chamber's Orders in the Decision of 27 March 2001, namely, that the pseudonym for each Prosecution Witness be used whenever referring to that Witness in Tribunal proceedings, communications and discussions between the Parties to the trial, and the public;

ORDERS the Defence of Ntahobali to file the 10 redacted will-say statements by 24 August 2005;

REQUESTS that the Registrar to make all endeavours to retrieve any outstanding copies of the will-say statements of witnesses H1B14, H1B15, WUNJN and WUNHF; and,

DIRECTS that all Parties continue to treat all Witnesses' identifying information with extreme caution.

Arusha, 23 August 2005.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

***

[1] *Ibid.,* paras. 18, 20.
[2] Decision of 27 March 2001, paras. 21.

## *Decision on the Defence Notice to enter into Evidence the Report of the Investigator Ralph Lake (Article 92* bis*, Rules of Procedure and Evidence) 26 August 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Pauline Nyiramasukuko, Arsène Shalom Ntahobali – Additional witness, Written statement, Criteria of a written statement – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 92* bis

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Defence for Ntahobali's "*Requête et Notification de Arsène Shalom Ntahobali de son Intention de Verser au dossier le rapport de l'enquêteur Ralph Lake en lieu et place de son témoignage*", filed on 3 August 2005 (the "Motion");

having received :

1. The "Prosecutor's response to notice of Arsène Shalom Ntahobali to enter into evidendce (*sic*) the report of investigator Ralph Lake pursuant to Article 92 of the Rules of Procedure and Evidence", filed on 9 August 2005" (the "Prosecutor's Response");

2. The "*Réponse de Joseph Kanyabashi à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoin et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage*", filed on 9 August 2005 ("Kanyabashi's First Response");

3. The "*Réplique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l'enquêteur Ralph Lake en lieu et place de son témoignage et amendement aux dites requêtes et notifications*", filed on 15 August 2005 (the "Reply");

4. The "*Réponse de Joseph Kanyabashi a la replique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage*

*dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l'enquêteur Ralph Lake en lieu et place de son témoignage et amendement aux dites requêtes et notifications*", filed on 22 August 2005 (the "Kanyabashi's second Response");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), in particular Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 92 *bis*;

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

## Submissions by the parties

### Defence for Ntahobali

1. The Defence for Ntahobali submits that the report and photographs of Ralph Lake are of pertinent evidential value to these proceedings[1].

2. The Defence for Ntahobali argues that the photographs and the report go to the proof of a matter other than the acts and conduct of the Accused. The Defence seeks their admittance in lieu of Ralph Lake's testimony to enlighten the Chamber as to the locations in which certain crimes are alleged to have taken place[2].

3. In the alternative, the Defence for Ntahobali seeks leave for Ralph Lake to testify before the Chamber[3].

4. The Defence for Ntahobali attaches, in the Annex, the witness statement for Ralph Lake and the Index to the Photographic Supplement prepared for the Butare Trial team during August 2000.

### The Prosecutor's Response

5. The Prosecutor argues that the Defence for Ntahobali has failed to establish how the proposed Witness Ralph Lake fits within the requisite criteria of Rule 92 *bis*. Neither, the Prosecutor submits, has the Defence for Ntahobali demonstrated what matter would be proved by admission of the report by Ralph Lake. On this basis, the Prosecutor moves the Chamber to deny the Defence Motion.

6. The Prosecutor argues that the report and supplemental photographs do not satisfy the requisite criteria under Rule 92 *bis.* He argues that, apart from the Defence for Ntahobali's opinion, there is no demonstration that the report goes to the proof of a matter other than the acts and conduct of the Accused, draws the Chamber's attention to the fact that the witness statement of Ralph Lake has not been attested

[1] The Motion, para. 4.
[2] *Ibid.,* paras. 5-6.
[3] *Ibid.,* para. 7.

to or signed by the proposed witness, and notes that the report does not satisfy any of the exceptions contained within Rule 92 *bis* (C) or Sub-Section (D)[4].

7. Further the Prosecutor submits that the report by Ralph Lake is, in any case, rendered superfluous considering the photographs entered into evidence by Prosecution Witness Ghandi Shukry. The Prosecutor objects to the use of the report and corresponding photographs if their purpose is to contradict the evidence of Ghandi Shukry. The Prosecutor invites the Chamber to exercise its discretion and visit the sites in question[5].

8. The Prosecutor takes issue with the late stage in which this application has been made considering the Defence for Ntahobali has been in possession of the said report and photographs from 13 June 2001. He argues that Rule 92 *bis* is only applicable to statements that have "just become available" and the Defence for Ntahobali should provide an explanation as why they did not seek to use the report prior to this occasion[6].

9. The Prosecutor submits that there is no option available under Rule 92 *bis* to permit the alternative the Defence for Ntahobali seeks, namely to call Ralph Lake for cross-examination, particularly considering the Defence for Ntahobali has failed to invoke the provisions of Rule 98 which provides for a Trial Chamber to summon a witness[7].

10. Should the Chamber choose to admit the report, the Prosecutor poses no objections to the admissibility of the photographs of Ralph Lake, but only to the merit of the photographs themselves[8].

*Defence for Kanyabashi's Responses*

11. In his response, the Defence for Kanyabashi argues that the request to admit the report and photographs of Ralph Lake into evidence does not comply with the requirements of Rule 92 *bis.* The Defence for Kanyabashi moves the Chamber to dismiss the Motion both for the tendering of the report into evidence and the alternative request to call Ralph Lake as a witness for cross-examination under Rule 92 *bis*[9].

12. The Defence for Ntahobali notes that the Defence for Ntahobali acknowledges that the report and photographs are inadmissible under Rule 92 *bis* at paragraphs 38-41 of its Reply. However, the Defence for Kanyabashi takes issue with the reliance by the Ntahobali Defence on Rule 89 (C) in this Reply. Whilst it is of the view that the Defence for Ntahobali should properly seek leave to vary its witness list to have this witness added, the Defence for Kanyabashi objects to the Ntahobali Defence seeking leave to call a witness for cross-examination that it has included in its list of witnesses, when there is nothing to indicate that this is a hostile witness[10].

[4] Prosecutor's Response, para. 5.
[5] *Ibid.,* para. 6.
[6] *Ibid.,* para 7.
[7] *Ibid.,* para 8.
[8] *Ibid.,* para 9.
[9] Kanyabashi's Second Response, 22 August 2005, paras.23-26.
[10] *Ibid.*, paras 16-25.

*Defence for Ntahobali's Reply*

13. The Defence for Ntahobali affirms that proposed Witness Ralph Lake does not meet the requisite criteria under Rule 92 *bis*. It submits that because the said report was communicated to the Defence in 2000, there was no requirement to obtain a statement of truth as required by Rule 92 *bis*. It was the Defence for Ntahobali's assumption that the Prosecutor would not object to a report compiled by an investigator in his Office[11].

14. The Defence for Ntahobali submits in reply that in spite of the number of photographs Prosecution Witness Ghandi Shukry has filed, the Ralph Lake report is more precise, in particular in relation to photographs 11 and 13, which are allegedly the ruins of the Accused Nyiramasuhuko's former residence[12]. Furthermore, the Defence for Ntahobali submits that the photographs of Ralph Lake are much closer to the period in the Indictment than those taken by Ghandi Shukry.

15. The Defence for Ntahobali argues that despite the fact that has had the report of Ralph Lake in its possession since 2001, the failure to use it is attributed to Orders of the Chamber. The Defence for Ntahobali states that it has attempted to use the report in the cross-examination of both Prosecution witnesses and for the Nyiramasuhuko Defence but has been prevented from doing so by the Chamber[13].

16. The Defence for Ntahobali submits that should the Chamber find that Ralph Lake does not meet the requisite criteria of Rule 92 *bis*, it amends its notice and motion and seeks leave to admit the said report and photographs under Rule 89 (C)[14].

17. In the alternative, should the Chamber conclude that the Ralph Lake report and photographs do not qualify under both Rules 89 and 92 *bis*, the Defence for Ntahobali amends the Motion and moves the Chamber to submit Ralph Lake to cross-examination under Rule 98[15].

## Deliberations

18. The Chamber recalls its Decision of 26 August 2005 in connection with the modification of the Defence for Ntahobali's witness list, where it granted the Defence for Ntahobali Motion to call Ralph Lake as an additional witness to testify specifically to the location of the Accused's residence/house.

19. Notwithstanding the Chamber's Decision of 26 August 2005, the evidence of a witness in the form of a written statement may be admitted, in *lieu* of oral testimony, if the statement satisfies the conditions laid out in Rule 92 *bis*. Taking these criteria into consideration, the Chamber finds that this Motion would not have satisfied the

[11] The Reply, paras. 38-41.
[12] *Ibid.*, paras. 28-31.
[13] *Ibid.*, paras. 32-39.
[14] *Ibid.,* paras. 40-46. The Defence for Ntahobali relies on : *Nyiramasuhuko et al.,* Decision on the Prosecutor's Motion to remove from her Witness List five deceased Witnesses and to admit into Evidence the Witness Statements of Four of said Witnesses, 22 January 2003, para. 19; *Muhimana,* Decision on the Prosecution Motion for Admission of Witness Statements, 20 May 2004, para. 20.
[15] *Ibid.,* para. 46.

requirements of Rule 92 *bis*. Furthermore, the Chamber takes note that the Defence for Ntahobali accepts that the Ralph Lake report and photographs do not meet the necessary conditions under Rule 92 *bis*.

20. For the above reasons, the Chamber denies this Motion in its entirety.

THE CHAMBER HEREBY DENIES THE MOTION.

Arusha, 22 September 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on the Prosecutor's Motion to unseal Documents seized from Pauline Nyiramasuhuko 29 August 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Pauline Nyiramasuhuko – Unsealing of material seized, Purpose of the seals, Testimony of the Accused – Irregularity of the use of the property of the Accused, Premature Motion – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rule 73 (A)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Nyiramasuhuko's oral Motion regarding Prosecution's Use of Material under Seal, 27 April 2004 (ICTR-98-42)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 "Prosecutor's Motion to Unseal Documents Seized from Pauline Nyirümasuhuko", filed on 2 August 2005 (the "Motion");

CONSIDERING the "*Réponse de l'accusée Pauline Nyiramasuhuko à la* 'Prosecutor's Motion to Unseal Documents Seized from Pauline Nyiramasuhuko'", filed on 16 August 2005 (the "Nyiramasuhuko's Response"); and "Prosecutor's Rejoinder to

the Defence Response – Prosecutor's Motion to Unseal Documents Seized from Pauline Nyiramasuhuko", filed on 18 August 2005 (the "Prosecution's Reply"); and 'Duplique de l'accusée Pauline Nyiramasuhuko à la "Prosecutor's Rejoinder to the Defence Response – Prosecutor's Motion to Unseal Documents Seized from Pauline Nyiramasuhuko'", of 23 August 2005 ("Nyiramasuhuko's Rejoinder"); and "Prosecutor's Response to the Defence Response to his Rejoinder – Prosecutor's Motion to Unseal Documents Seized from Pauline Nyiramasuhuko", of 24 August 2005 (the "Prosecution Rejoinder");

RECALLING the "Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized", of 12 October 2000 (the "Decision of 12 October 2000");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion, pursuant to Rule 73 (A), on the basis of the written briefs filed by the Parties.

## SUBMISSIONS OF PARTIES

### *Prosecution Submissions*

1. The Prosecution requests the Chamber to order the lifting of the seals on the property of the Accused Nyiramasuhuko seized during her arrest in Kenya on 18 July 1997, so that it may study it with a view to determining what use it may make of it during the cross-examination of the Accused. It maintains that the seized property was sealed in order to secure its safe-keeping and therefore it was never the intention of the Chamber to exclude either party in the proceedings from using it[1]. The Prosecution additionally submits that it is aware of its duties under Rule 41 and that at this stage it is not making any submissions as to the authenticity of the documents under seal, and that it reserves its rights to make submissions on the admissibility and/or authenticity of the documents, should the need arise.

### *Defence Submissions*

2. The Defence for Nyiramasuhuko objects to the Motion and requests the Chamber to reject the sealed property that does not appear on the Proposed Modified Prosecutor's Exhibit List of 27 September 2001 and 12 October 2001. It essentially argues; following the inventory of the seized property made between 30 January and 9 February 2001, there were irregularities that resulted in both the Defence and the Prosecution not signing a record of the proceedings. Because the Prosecution added some of the seized müterial to its List of Exhibits of 27 September 2001, the Defence was

[1] *Prosecutiotz v. Nyiramasuhuko et al,* Case n° ICTR-98-42-T, Decision on Nyiramasuhuko's Oral Motion Regarding Prosecution's Use of Material Under Seal, of 27 April 2004, (the "Nyiramasuhuko Decision in the Butare Trial") at pp. 27; *Prosecution v. Nyiramasuhuko et al.,* Case n° ICTR-98-42-T, Decision on Nyiramasuhuko's Urgent Motion to Forbid the Parties in the "Government I" Trial and any Other Trial From Using the Alleged Diary of Pauline Nyiramasuhuko, of 27 April 2004, (the "Nyiramasuhuko Decision in the Government 1 Trial") at pp. 21

thus not put on notice regarding the other documents which the Prosecution did not include on its List of Exhibits, particularly as some of it was in Kinyarwanda. In the Defence's view, the Prosecution cannot now seek to use indirectly the seized property during cross-examination when it should have been diligent and added them to its list of exhibits. It will cause irreparable damage to the Accused, as well as the other Accused who do not have any knowledge of it, should the said seized property be unsealed and used in cross-examination. The Defence maintains that had it known that the Prosecution intended to use the sealed material, it would have prepared itself by interrogating witnesses as to the said seized property and asked its experts to analyse them.

*Prosecution Reply*

3. The Prosecution, maintaining its application, further submits that the Defence Response be denied because it was filed out of time in violation of the provisions of Rule 73 (E). It argues, relying on the Chamber's Oral Ruling of 7 June 2005 at page 23, that the onus of disclosure at the cross-examination stage differs from that at the Prosecutor's case-inchief, which is governed by Rules 66 and 73 *bis*. It submits that Rule 90 (G) (i) - (iii) governs the cross-examination of witnesses before the Trial Chamber. The Prosecution maintains that some of the documents currently sealed will faIl within the provisions of Rule 90 (G). Notwithstanding the above submissions, the Prosecution maintains that given that the Defence for Nyiramasuhuko inspected the sealed documents between 30 and 31 January 2001 and 5 and 9 February 2001, its submissions regarding the prejudice it would suffer were the Prosecution to use the documents are without merit.

*Nyiramasuhuko's Rejoinder*

4. In its rejoinder, the Defence explains that it was unable make a timely Response to the Motion due to circumstances beyond its control. The Defence rejects the Prosecution's submissions at paras. 7 to 9 regarding Rule 90 (G) (i) - (iii) and makes reference to the text by the late Judge R. May[2] and an ICTY Decision in the Case of *Krstic*[3]. The Defence submits that it is not in possession of the seized property, which is presumed to belong to the Accused, because it was confiscated from Nyiramasuhuko's home and later on sealed. The Defence submits that the seized property should be given back to the Accused. The Defence argues that even if these "inventory proceedings" took place, this cannot be relied upon to have been proceedings that informed the Defence of the various documents the Prosecution intended to use during the trial. Finally, the Defence stresses the h c t that the "inventory proceedings", which were oral, were never signed by the Parties. The Defence also adds that after having verified the transcripts of the "inventory proceedings", it has found that certain envelopes which were on the Prosecution's list of exhibits contained only documents that had been given back to the Accused[4].

[2] Judge R. MAY, M. Wierda, *International Criminal Evidence; International and Comparative Law Series*, Transnational Publishers, Inc, New York, 2002, para. 5.25, pp. 151

[3] *Prosecutor v. Krstic,* Case n° IT-98-33-T, Decision on Defence Motions to Exclude cxhibits in rebuttal and motion for continuance of 4 May 2001 at paras. 25-26.

[4] This concerns in particular the envelopes numbered KA00-0262 (pages 65 etc in the trnnscript of 30 January 2001 ) and KA00-0263 (pages 78-80 of the transcript of 30 January 2001).

*Prosecution's Rejoinder*

5. In its Rejoinder, the Prosecution mainly submits with regard to the ICTY *Krstic* Decision relied upon by the Defence, that the issues in the instant Molion are distinguishable from those that gave rise to the Decision in Krstic because in that Decision the request was for admission of evidence during the rebuttal stage of the proceedings.

HAVING DELIBERATED

6. The Chamber has, in the interests of justice, considered all the submissions of the Parties, in this Motion.

7. The Chamber notes, that in its Motion, the Prosecution requests that the seals on the property seized from the Accused during her arrest in Kenya be lifted so that it may examine it with a view to determining what use it can make of it during the proposed testimony of the Accused Nyiramasuhuko.

8. In the Chamber's opinion, the only issue for consideration, at this stage, is whether or not it should grant the Prosecution request to have the seals lifted off the seized property.

9. The Chamber recalls that it made rulings[5] concerning the unsealing of at least one of the properties seized from the Accused during her arrest - the diary allegedly belonging to the Accused Nyiramasuhuko.

10. In its Decisions[6], the Chamber recalled the Decision of 12 October 2000, which ordered the Defence and the Prosecution to,

> "[e]xamine, inventory all property seized, return to the Accused any part of the said property that both parties agree is not necessary for the purposes of the Prosecution, then seal the remaining property seized and to prepare a record to be signed by the Parties pertaining to all these operations"[7]

11. Following the above-mentioned order, the Chamber notes that proceedings were held between 30 January and 9 February 2001 wherein the Parties examined, inventoried, returned to the Accused the unnecessary property and then sealed the remaining property[8].

12. The Chamber recalls that the seized property was sealed in the presence of the Parties during the inventory proceedings and that the purpose of the seals was to preserve it from loss or damage[9] and thereby preserve its integrity.

13. The Chamber notes that the lifting of the seals is to enable the Prosecution to study the seized property with a view to determining what use to make of any of it

[5] See the Nyiramasuhuko Decision in the Government I Trial and the Nyiramasuhuko Decision in the Butare Trial.

[6] See Nyiramasuhuko Decision in the Government I Trial and the Nyiramasuhuko Deasion in the Butare Trial.

[7] See the Nyiramasuhuko Decision in the Government I Trial and the Nyiramasuhuko Decision in the Butare Trial which were issued on 27 April 2004.

[8] Herein the referenced proceedings will be called the "inventory proceedings".

[9] See Nyiramasuhuko Decision in the Butare Trial at para. 4, and 20 (d) and 21; Nyiramasuhuko's Decision in the Government I Trial at para. 26 (d) and 27.

during cross-examination of the Accused Nyiramasuhuko. At this stage, no item has been identified and it is not indicated what use the Prosecution will put to it during cross-examination of the Accused. The Chamber therefore finds that al1 the submissions regarding use of the said property, its admissibility and alleged irregularities, are premature. Such submissions can only be raised at an appropriate time, for the Chamber's determination, as and when the need arises.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Prosecution Motion; and

ORDERS that the seals be lifted from the seized property;

DIRECTS the Registry to, as soon as is practicable;

Facilitate the arrangements for the lifting of the seal; on he seized property in the presence of the Prosecution and the Defence, including any other Defence Counsel in the case who wishes to be present;

Make an inventory of the unsealed seized property;

Make copies of the unsealed seized property, whcre possible, and provide these to all the Parties;

If the unsealed seized property cannot be copied, fa :ilitate the Parties to study them;

ORDERS the re-sealing of the originals of the unsealed properly, in the presence of the Parties in order to preserve their integrity.

Arusha, 29 August 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Arsène Shalom Ntahobali's Notice of Intention to File on the Record Written Statements of Witnesses and the Transcripts of their Testimony before the ICTR in Lieu of Oral Testimony (Article 92* bis*, Rules of Procedure and Evidence) 30 August 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Credibility of Witnesses, Written Statement, Criteria of a written statement, Statements referring to the acts and conduct of the Accused – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 54, 73 (A), 92* bis *and 98; Statute, art. 19 and 20*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Defence for Ntahobali's "*Requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage*", filed on 3 August 2005 (the "Motion");

*Having received :*

i. The "Prosecutor's Response to Arsène Shalom Ntahobali's Notice of Intention to File on the Record Written Statements of Witnesses and the Transcripts of their Testimony before the ICTR in Lieu of Oral Testimony – (Rule 92 *bis* of the Rules of Procedure and Evidence)", filed on 9 August 2005 (the "Prosecutor's Response");

ii. The "*Réponse de Joseph Kanyabashi à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage*", filed on 9 August 2005 ("Kanyabashi's First Response");

iii. The "*Réplique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l'enquêteur Ralph Lake en lieu et place de son témoignage et amendement auxdites requêtes et notifications*", filed on 15 August 2005 (the "Reply");

iv. The "*Réponse de Joseph Kanyabashi à la réplique sur la réponse du Procureur à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage et réplique à la réponse du Procureur sur la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier le rapport de l'enquêteur Ralph Lake en lieu et place de son témoignage et amendement auxdites requêtes et notifications*", filed on 22 August 2005 ("Kanyabashi's Second Response");

v. The "*Réponse de Joseph Kanyabashi à la réplique consolidée de Shalom Ntahobali aux réponses de Joseph Kanyabashi et du Procureur à la requête de Arsène Shalom Ntahobali demandant de modifier sa liste ainsi que l'ordre des témoins de sa Défense et à la requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage*", filed on 23 August 2005 ("Kanyabashi's Third Response");

vi. The "*Réplique à la réponse de Joseph Kanyabashi sur la réplique et requête amendé de Arsène Shalom Ntahobali*", filed on 25 August 2005 ("Ntahobali's Second Reply");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), in particular Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 92 *bis*;

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

## SUBMISSIONS BY THE PARTIES

### *Defence for Ntahobali*

1. The Defence for Ntahobali moves the Chamber to admit into evidence, pursuant to Rule 92 *bis*, the written statements made by Prosecution Witnesses QY and QBQ, together with the transcripts of the testimony of Witness QY in the Muvunyi proceedings, in lieu of both witnesses' testimonies. In the alternative, the Defence for Ntahobali seeks leave to recall both witnesses for cross-examination under Rule 92 *bis*[1].

2. In both cases the Defence for Ntahobali submits that the conditions stipulated in Rule 92 *bis* are satisfied for the statements and transcripts it seeks to have admitted[2].

3. The Defence for Ntahobali argues that the matters contained in the statements and transcripts subject of this Motion go to the proof of a matter other than the acts and conduct of the Accused, namely, the test of the credibility of both Witnesses QBQ and QY. According to the Defence, both witnesses have made statements and testified to sexual violence, without having been consistent in their accounts[3].

4. In the alternative, the Defence for Ntahobali seeks leave for both witnesses to testify before the Chamber under Rule 92 *bis*[4].

5. The Defence for Ntahobali attaches, in the Annexes to the Motion, both witnesses' statements, dated 2 September 2004. In addition, the Defence has submitted the relevant transcripts from the *Muvunyi* proceedings.

### *The Prosecutor's Response*

6. The Prosecutor argues that Defence for Ntahobali has not satisfied the necessary criteria under Rule 92 *bis* (A) for either of these witnesses and on this basis, the Prosecutor moves the Chamber to deny the Motion in its entirety.

7. The Prosecutor submits that these witnesses' statements and the transcripts go to the proof of the acts and conduct of the Accused Ntahobali [5].

---

[1] See The Motion, paras. 9-10, 19, 23.
[2] The Motion, paras. 10, 20.
[3] *Ibid.,* paras. 8,-9, 18-19.
[4] *Ibid.,* para. 23.
[5] Prosecutor's Response, paras. 4 and 12. The Prosecutor relies on the *Brdanin,* Decision on the Prosecutor's Motion for the Admission of Statements Pursuant to Rule 92 *bis*-Bosansiki Novi Municipality, Case No. IT-99-36-T, 17 January 2003, p. 2.

8. In the alternative, the Prosecutor submits that should the Chamber deem it necessary to admit the said statements and relevant transcripts pursuant to 92 *bis* (A) (ii), the evidence should be specifically limited to issues raised with respect to rape[6].

9. In addition, the Prosecutor submits that the credibility issues raised by the Defence for Ntahobali need to be tested before the Chamber in an oral hearing. As the statements the Defence for Ntahobali wishes to admit under Rule 92 *bis* are of critical importance to the Prosecutor's case against the Accused in proving individual criminal responsibility under Articles 6 (1) and 6 (3) of the Statute, the Prosecutor seeks that the Chamber recall both Witnesses QBQ and QY for cross-examination and re-examination on the particular issues raised by the Defence for Ntahobali in relation to rape. The Prosecutor argues that this will give the Chamber the opportunity to assess their credibility as submitted by the Defence for Ntahobali[7].

10. Further, the Prosecutor invites the Chamber to invoke its powers under Rules 54 and 98 to recall the said witnesses[8].

*Defence for Kanyabashi's Responses*

11. The Defence for Kanyabashi raises no objections to the Chamber admitting both witness statements, dated 2 September 2004[9].

12. However, the Defence for Kanyabashi objects to the admission of the transcripts of Witness QY's testimony from the *Muvunyi* proceedings[10]. It argues that the transcripts do not prove any point other than acts and conduct of the Accused Ntahobali. Furthermore, the Defence for Kanyabashi contends that the transcripts also refer to strip-searches, *conseillers*, the *bourgmestre*, Rango Forest, and Nyange which indirectly refer to the Accused Kanyabashi[11]. The Defence for Kanyabashi also submits that the only possible solution would be to recall Witness QY and subject her to cross-examination, limited to issues of rape[12].

13. The Defence for Kanyabashi further notes that whilst the Defence for Ntahobali has indicated an intention to file a motion in perjury, this had not been served on the parties. It submits that it is necessary for the Defence for Ntahobali to indicate within reasonable time the elements it wishes to raise in this perjury motion[13].

[6] Prosecutor's Response, para. 5.

[7] *Ibid.,* paras. 14-17. The Prosecutor relies on the *Bagasora et al.,* Decision on the Prosecutor's Motion for the Admission of Written Witnesses Statements Under Rule 92 *bis*, 9 March 2004, para. 9; *Muhimana* Decision on the Prosecutor's Motion for the Admission of Witness Statements (Rules 89 (c) and 92 *bis*) 20 May 2004, pp. 5-6.

[8] Prosecutor's Response, para. 6.

[9] Kanyabashi's First Response, paras. 10-11; Kanyabashi's Second Response, paras. 16-17.

[10] Kanyabashi's Second Response, para. 17.

[11] *Ibid.,* paras. 18-20.

[12] *Ibid.,* para. 21.

[13] Kanyabashi's First Response, paras. 7, 9.

*Defence for Ntahobali's Replies*[14]

14. The Defence for Ntahobali reiterates that the reason for seeking to admit the relevant witness statements and the transcripts is to challenge the credibility of Witnesses QBQ and QY[15].

15. The Defence for Ntahobali corrects their previous submissions regarding Witness QBQ and submit that this witness testified in the *Bizimungu,* and not *Muvunyi,* proceedings as it had previously submitted. Accordingly, the Defence amends their submissions with respect to this witness[16]. Furthermore, subsequent receipt of the transcripts in relation to Witness QY has enabled the Defence to amend the Motion with respect to this witness to include all of the transcripts, of 8, 9, and 13-15 June 2005[17].

16. In response to the Prosecutor's objection, namely, that the statements and transcripts of these witnesses go to the acts and conduct of the Accused, rendering Rule 92 *bis* inapplicable, the Defence for Ntahobali submits that these documents challenge the credibility of the witnesses. The Defence argues that the first statements by these witnesses, which were tendered into evidence by the Prosecutor during these proceedings, go to the acts and conduct of the Accused. However, the Defence for Ntahobali submits that the latter statements, dated 2 September 2004, do not concern acts or conduct of the Accused[18]. Moreover, the Defence maintains that the excerpts in the relevant transcripts referring to the Accused were purely for the purpose of confronting the witness with her former statements in the *Muvunyi* proceedings and that these excerpts have already been admitted into evidence. Therefore, according to the Defence for Ntahobali, the documents relative to both Witnesses fall within the boundaries of Rule 92 *bis*[19].

17. With respect to the Defence for Kanyabashi's objections that the transcripts indirectly goes to the proof of the acts and conduct of its Accused, the Defence for Ntahobali maintains that neither the Accused Kanyabashi nor any acts or behaviour of any of the other Accused, bar Ntahobali, are mentioned in the said transcripts[20].

18. The Defence for Ntahobali further contends that the purpose of Rule 92 *bis* is to protect the right of the Accused to cross-examine witnesses against him[21]. It maintains that the Prosecutor has had the opportunity to examine Witness QY to provide explanations with respect to the alleged inconsistencies during the *Muvunyi* proceedings and is thus in possession of all the information the Defence for Ntahobali seeks to have admitted[22].

---

[14] This section refers to the Defence for Ntahobali's replies dated 15 August and 25 August 2005.
[15] Ntahobali's First Reply, paras. 13, 18, 27; Ntahobali's Second Reply, para. 9.
[16] Ntahobali's First Reply, paras. 6-7.
[17] *Ibid.,* paras. 8-10.
[18] *Ibid.,* paras. 13-15.
[19] *Ibid.,* paras. 16-20; Ntahobali's Second Reply, para. 10.
[20] Ntahobali's Second Reply, paras. 7, 8.
[21] *Ibid.,* para. 21-23. The Defence relies upon : *Nyiramasuhuko et al.,* "Decision on the Prosecutor's Motion to remove from her Witness List five deceased Witnesses and to admit into Evidence the Witness Statements of four of said Witnesses", 22 January 2003, para. 19; *Muhimana,* Decision of 20 May 2004, para. 20.
[22] Ntahobali's First Reply, paras. 25-26.

*Deliberations*

19. The Chamber notes that the Defence for Ntahobali seeks admission of the additional statements of Witnesses QBQ and QY dated 2 September 2004 and the transcripts of Witness QY's testimony in the *Muvunyi* proceedings, dated 8, 13, 14, and 15 June 2005 in lieu of oral testimony, pursuant to Rule 92 *bis*, to assess the credibility of Witnesses QY and QBQ. The Chamber also notes that the transcripts of 9 June 2005 relates to a different witness. Whilst the Chamber takes note that the Defence for Ntahobali has corrected its submissions with respect to Witness QBQ, there is no application to admit the transcripts into evidence. The Prosecutor objects to the admission of both the statements and the transcripts, and the Defence for Kanyabashi to the admission of the said transcripts. Both parties submit that their objections are based on the premise that the statements and/or transcripts go towards the acts and conduct of the Accused and as such cannot be admitted under Rule 92 *bis*.

20. The Chamber recalls its Decision of 26 August 2005 where it held :

> 70. The Chamber recalls that both Witnesses QY and QBQ testified for the Prosecution on 19 to 26 March 2003 and on 3 to 4 February 2004, respectively. The Chamber notes that during the course of their testimony, the Defence was given ample opportunity to fully cross-examine them.
>
> 71. The Parties may therefore wish to make the proper application to recall the witnesses for further cross-examination on the alleged specific issues that may have arisen from either the additional statements and/or the testimony given in the *Muvunyi* proceedings[23].

21. In light of the above ruling, the Chamber has therefore indicated the course of action open to the Defence for Ntahobali, should it wish to examine these witnesses. The matter is therefore moot.

22. In addition, the Chamber finds that the said written statements and transcripts appear to refer to the acts and conduct of the Accused and therefore do not meet the requirements as outlined in Rule 92 *bis*.

23. The Chamber has considered the Prosecutor's submission, inviting it to invoke its inherent discretion under Rules 54 and 98.

24. The Chamber notes that it has ruled upon the options available to the Parties should they wish to either further cross-examine or re-examine these witnesses.

For the Above reasons, the Chamber

Denies the Motion in all respects.

Arusha, 30 August 2005.

[Signed] : William H. Sekule ; Arlette Ramaroson ; Solomy Balungi Bossa

***

[23] *Nyiramasuhuko et al.,* Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali (Rule 73 *ter* (E), Rules of Procedure and Evidence), 26 August 2005, paras. 70-71.

## *Decision on Arsène Shalom Ntahobali's Motion for Certification to appeal the "Decision on the Defence Motion to modify the List of Defence Witnesses for Arsène Shalom Ntahobali" (Article 73 of the Rules of Procedure and Evidence) 21 September 2005 (ICTR-97-21-T; Joint Case : ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Arsène Shalom Ntahobali – Late filing of the Defence's Motion, Right to present a defence of alibi – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 67, 67 (B), 73 (A), 73 (B) and 73 (C)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Defence Motion to modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73* ter *(E), Rules of Procedure and Evidence, 26 August 2005 (ICTR-98-42)*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson, and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Defence for Ntahobali's "*Requête d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la décision intitulée* 'Decision on the Defence Motion to Modify the List of Denfence (*sic*) Witnesses for Arsène Shalom Ntahobali'", filed on 2 September 2005 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Modify the List of Witnesses", filed on 8 September 2005 (the "Prosecutor's Response") and the Defence for Ntahobali's "*Réplique de Arsène Shalom Ntahobali a la* 'Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Modify the List of Witnesses' *(Article 73 Règlement de procédure et de preuve)*" filed on 12 September 2005 (the "Defence Reply");

NOTING the "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", issued on 26 August 2005 (the "impugned Decision");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) and (C);

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

SUBMISSIONS BY THE PARTIES

*Defence for Ntahobali*

1. The Defence for Ntahobali moves the Chamber for certification to appeal the impugned Decision, of which it was notified on 29 August 2005. In particular, the Defence seeks certification to appeal the decision in relation to Witnesses WQMJP, MJ110, WDUSA, and NTN. The Defence takes issue with the impugned Decision because it denies the addition of Witnesses WDUSA and NTN to Ntahobali's witness list, and, whilst admitting Witnesses WQMJP and MJ110, restricts their respective testimonies to specific issues[1].

2. The Defence submits that had it been able to meet Witnesses WQMJP, MJ110, WDUSA, and NTN, prior to 31 December 2004, they would have been included in Ntahobali's witness list and the Chamber would not have had discretion to limit or deny the inclusion of their proposed testimonies. Consequently, the narrow approach taken by the Chamber in the impugned Decision seems altogether inequitable, at odds with the spirit of the Statute, and contrary to the guaranteed rights of the Accused[2].

3. Primarily, the Defence for Ntahobali argues that the impugned Decision has grave consequences on the fair and expeditious conduct of the proceedings and the subsequent outcome of this trial, particularly where an Accused is deprived of presenting a defence of alibi because of a non-existent criterion or obligation[3]; that the fairness of proceedings are compromised if the Prosecutor is allowed a large number of witnesses while the Defence is restricted which denies the Defence the opportunity to provide an adequate Defence[4]; and, that the Chamber's Decision is in total contradiction with earlier decisions on similar motions, in particular those where the Chamber has permitted the Prosecutor to add witnesses of no great significance to his case, at a late stage of proceedings, and without restrictions[5].

4. The Defence submits that it will be unable to respond adequately and completely to the Prosecution case if the witnesses it wishes to call and their testimony is significantly restricted. The Defence submits that the Chamber therefore risks issuing an erroneous conclusion in its final deliberations[6].

---

[1] The impugned Decision, paras. 47, 55, 64, and 68.

[2] *Ibid.*, paras. 1 6- 1 7.

[3] *Ibid.,* paras. 8, 14, 39-42 and refers to *Prosecutor v. Bagosora et al.,* Decision on Request for Certification Concerning Sufficiency of Defence Witnesses' Summaries (TC), 21 July 2005, para. 5; *Prosecutor* v. *Simba,* Decision on the Prosecutor's Request for Certification to Appeal Decision dated 14 July 2004 denying the Admission of Testimony of an Expert Witness (TC), 16 August 2004, paras. 3-4; *Prosecutor v. Karemera et al.,* Decision on the Request for Certification to Appeal the Decision on the Defence Motion for Subpoena to Witness G rendered on 20 October 2003 (TC), 17 February 2004, para. 7. The Defence recalls that the Prosecutor presented 11 witnesses who testified to Ntahobali's presence at the *Bureau préfectoral,* 10 witnesses who testified to the existence of the alleged roadblock, and the witnesses testifying to Ntahobali's presence at EER.

[4] *Ibid.,* paras. 39-42.

[5] *Ibid.,* paras. 47-58. The Defence cites the addition of Witnesses FAW, RV, QBX, FA FCC, an expert in linguistics, and a handwriting expert.

[6] *Ibid.*, paras. 71-74.

5. The Defence submits that simply because witnesses for the Defence for Nyiramasuhuko mention certain facts should not deprive her Co-Accused Ntahobali of the right to present his Defence case in his own way. The Defence argues that Ntahobali is in no way bound to content himself with evidence previously presented by the Accused Nyiramasuhuko[7].

6. The Defence specifically argues the importance of the aforementioned witnesses to Ntahobali's defence strategy[8].

– Despite being the twelfth Defence witness to testify to the alleged erection of a roadblock where Ntahobali is accused of having committed crimes from 20 or 21 April 1994, the Defence submits that to prevent Witness WQMJP from testifying on this issue will deprive the Chamber of the opportunity to appraise whether particular Prosecution witnesses have either erred or lied. Moreover, it is both inequitable and unusual to prevent the witness from testifying whether he knew the Accused and the nature of their relationship[9];
– Witness MJ110 would have given evidence of life at, and around, Ihuliro hotel, to the alibi of the Accused during some days in April and May 1994, and to the Accused's departure to Cyangugu and subsequent exile from Rwanda[10];
– Witness WDUSA was the only proposed witness without family ties with the Accused Ntahobali and whose testimony would have been able to account for the Accused at Cyangugu[11];
– Witness NTN was the only proposed witness who could demonstrate how he differs both physically and physiologically from the Accused Ntahobali; matters crucial to the issue of identification, for the transcripts do not reveal the physical characteristics of the wrongly identified witness[12].

7. In relation to Witness WDUSA, the Defence stresses that this witness provides the Accused with a defence of alibi. Considering the Defence is not obliged to provide notice pursuant to Rule 67, the Defence submits that it does not understand how the absence of the non-obligatory notice poses an obstacle to adding such witnesses to its list. However, if required, this notice will obviously affect the expeditiousness of proceedings and the resources of the Tribunal. The Defence suggests efficiency would be best served by adding Witness WDUSA to the Defence witness list, and to determine the weight of that testimony at the appropriate time[13].

8. The Defence accepts that the addition of the remaining three witnesses will affect the expeditiousness of proceedings. However, the Defence argues that a more liberal interpretation of Rule 73 (B) is required, suggesting that in this context, the Rule only demands that proceedings not be significantly affected. Considering that this trial has been running for over four years, the Defence for Ntahobali maintains that some extra hours are insignificant when weighed against the Accused's rights[14].

---

[7] *Ibid*., paras. 44-45.
[8] *Ibid.,* para. 24.
[9] *Ibid.,* paras. 25-28.
[10] *Ibid.*, para. 29.
[11] *Ibid.*, paras. 30-31.
[12] *Ibid.*, paras. 33-37.
[13] *Ibid.,* paras. 59-62.
[14] *Ibid.,* paras. 63-70. The Defence submits that Rule 73 (B) was not drafted with the intention of totally excluding this type of decision from being appealed.

9. In conclusion, the Defence submits that an intervention by the Appeals Chamber is necessary and urgent in order to clarify the above questions, to enable Ntahobali to take the appropriate decisions with regard to his defence prior to the conclusion of the defence for Nyiramasuhuko. Further, a favourable decision by the Appeals Chamber will allow Ntahobali to present a more convincing, efficient, and expeditious defence[15].

*The Prosecutor's Submissions*

10. Relying on the criteria for certification under Rule 73 (B) and the *Bagosora et al.* Decision of 5 December 2003, the Prosecutor submits that the Defence for Ntahobali has failed to meet any of the crucial requirements set forth in Rule 73 (B) and that the motion is unfounded and lacks merit[16].

11. The Prosecutor relies upon the Chamber's Decisions of 4 October 2004 and 30 November 2004 in its submissions on the scope of Rule 73 (B), according to which certification of an appeal has to be an absolute exception when deciding on the admissibility and the materiality of the evidence sought to be presented. Furthermore, on the issue of applications for adding witnesses or modifying a witness list, the Prosecutor submits that it is the responsibility of the Trial Chamber, as trier of fact, to determine which evidence to admit during the course of the trial, and in this case, afler reviewing the materiality of the evidence the proposed witnesses are expected to address[17].

12. The Prosecutor submits that should a witness wrongly identify, an Accused, it is not essential in law for the discrepancies to be reflected in the court record. The Chamber, the Prosecutor submits, has indicated that it has observed the mistaken identity and should the description not be reflected in the court records, the video recordings of the proceedings can be utilised[18].

13. The Prosecutor maintains that the Defence, despite arguing infringement of the Accused's rights, does not demonstrate how the impugned Decision will affect the fair and expeditious conduct of proceedings and the hypothesis that the witnesses would have been on the original list is irrelevant to the present motion[19].

14. The Prosecutor maintains that the seriousness, complexity and magnitude of the current case is based on quality and substance of the evidence provided and not the quantity of witnesses called. For this reason, the Prosecutor submits that a comparison of the number of witnesses the Prosecutor called is inappropriate and misleading, for

[15] *Ibid.,* paras. 75-78.

[16] The Prosecutor's Response, paras. 4, 5, relying upon *Bagosora et al,* Decision on the Certification of Appeal Concerning Will-Say Statements of Witnesses DPQ, DP, and DA (TC), 5 December 2003, para. 10.

[17] *Ibid.,* paras. 7, 8, 10-16, 25, relying upon Rule 73 *ter* and the following Decisions : *Nyiramasuhuko et al.*, Decision of Nyiramasuhuko's Appeal on the Admissibility of Evidence (TC), 4 October 2004, para. 5; Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 (TC), 30 November 2004, para. 11; Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the Decision on the Defence Urgent Motion to Declare Parts of the Evidence of Witness RV and QBZ Inadmissible (TC), 18 March 2004, paras. 14-17, 20-22.

[18] *Ibid.*, para. 20.

[19] *Ibid.*, para. 17.

the Prosecution witnesses added were relevant, essential, and material to the indictment and the Chamber deemed their addition necessary in the interests of justice[20].

15. In relation to the defence of alibi, the Prosecutor submits that the Defence for Ntahobali has misconstrued the impugned Decision with respect to Witness WDUSA, for the denial to add this witness was not for lack of an alibi notice[21].

16. The Prosecutor submits that the Defence for Ntahobali should not have based part of its defence on witnesses that may or may not be called by another Party in the proceedings. The only common witness was Edmond Babin, and thus the Prosecutor submits that this submission by the Defence for Ntahobali is irrelevant[22].

17. In conclusion, the Prosecutor submits that the Defence has failed to specifically demonstrate fulfilment of the criteria in Rule 73 (B), instead re-litigating its submissions contained in the previous motions of 2 and 10 August 2005[23]. The Prosecutor further submits that the Defence for Ntahobali makes speculative submissions on the interpretation of Rule 73 (B) without supporting them with any jurisprudence. The addition of the proposed Defence witnesses will significantly affect the expeditiousness of the proceedings, the Prosecutor maintains, particularly when the proposed evidence is not material to the Indictment or other witnesses have testified to the same issues. According to the Prosecutor, the Defence for Ntahobali has failed to meet the crucial and stringent Rule 73 (B) criteria, especially as the matters challenged are matters to determine for the Chamber as trier of fact, and not the subject of appellate review[24].

*The Defence Reply*

18. The Defence for Ntahobali reiterates its plea for certification of appeal and addresses the arguments put fonvard by the Prosecutor. It submits that the Prosecutor errs when he criticizes the motion for stressing issues regarding the fairness of proceedings, as this is at the core of Rule 73 (B)[25]. Further, the reiteration of certain arguments previously raised in the motion to modify the Defence's list of witnesses is necessary to recall the context of the motion to the Chamber[26].

19. The Defence further stresses the importance Witnesses MJ110 and WDUSA – the former because of the withdrawal by the Defence of Nyiramasuhuko of Witness WFMG, the latter as a result of the Accused's proposed defence of alibi[27].

20. The Defence acknowledges that the calling of additional witnesses will inevitably delay proceedings, but maintains that a delay of three days is not significant in comparison to the full length of the trial. The Defence suggests that this must be seen

[20] *Ibid.,* para. 21, 22, 23, referring to *Nyiramasuhuko et al.,* Decision on Prosecutor's Motion to Drop and Add Witnesses (TC), 30 March 2004, para. 28.
[21] *Ibid*., para. 24.
[22] *Ibid.*, para. 18.
[23] *Ibid.,* paras. 6.9, 19, 22, 27.
[24] *Ibid.,* para. 25-27.
[25] Defence Reply, paras. 12, 14, 15.
[26] *Ibid.,* para. 17.
[27] *fbid.,* paras. 27-3 1.

in relation to the time gained as a result of the previous withdrawal of the Defence's three expert Witnesses[28].

21. The Defence reiterates that Ntahobali has the right to present his defense case in the manner he judges necessary, independently of his Co-Accused's defence cases[29].

DELIBERATIONS

22. The Chamber recalls the relevant provisions of Rule 73, in particular, the following sub-Rules :

> (B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
>
> (C) Requests for certification shall be filed within seven days of the filing of the impugned decision. [...]

23. The Chamber notes that the impugned decision was rendered on 26 Augiist 2005. Upon application of Rule 73 (C), the Chamber observes that the Defence should have filed its Motion for certification of appeal on 1 September 2005 to fall within the time-limits provided. The Defence does not provide the Chamber with an explanation for the delay in the submission of this Motion for certification to appeal, save that it received the impugned Decision on 29 August 2005. Given that Rule 73 (C) is clear and unambiguous, the Chamber finds that this Motion has been filed out of time and is therefore time barred.

24. The Chamber reminds the Defence for Ntahobali of its Decision of 26 August 2005, where it drew the Defence's attention to Rule 67 in full, and in particular Rule 67 (B)[30]. The Defence for Ntahobali is not limited by the Chamber's Decision of 26 August 2005 if it wishes to avail itself of its right to present a defence of alibi.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion for certification to appeal the impugned Decision in its entirety.

Arusha, 21 September 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

[28] *Ibid.,* paras. 21-22.

[29] *Ibid.,* para. *32.*

[30] *Nyiramasuhuko et al.,* Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 *ter* (E), Rules of Procedure and Evidence, 26 August 2005 (TC), para. *65.*

***Decision on the "Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence d'un représentant du Procureur et du Greffe" (Article 20, Statute of the Tribunal and Rule 73, Rules of Evidence and Procedure) 22 September 2005 (ICTR-97-21-T ; Joint Case : ICTR-98-42-T)***

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Georges Rutaganda – Meeting with detained witness, Willingness of detained witness to meet the Defence in absence of the Prosecution, Presence of both parties while meeting, Protection of other witnesses, Neutral position of the Registry – Interpretation, Distinguishable case – Motion granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, rules 73, 73 (A) and 75 (F); Statute, art. 20*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion to Vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access to Jean Kambanda, 24 August 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision On Prosper Mugiraneza's Extremely Urgent Motion To Vary Conditions Of Interview With Jean Kambanda, 19 January 2005 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Arsène Shalom Ntahobali, *The President's Decision on the Appeal filed Against the Registrar's Refusal to Permit a Confidential Interview with Georges Rutaganda, 6 June 2005 (ICTR-98-42)*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED OF the Defence for Ntahobali's "*Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence d'un représentant du Procureur et du Greffe (Art. 20, Statut du TPIR et 73, Règlement de procédure et de preuve*)", filed on 23 August 2005 (the "Motion");

HAVING RECEIVED :

1. The "Prosecution's Response to the Defence "*Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence d'un représentant du Procureur et du Greffe (Art. 20, Statut du TPIR et 73, Règlement de procédure de preuve*)", filed on 26 August 2005 (the "Prosecution's Response");

2. The "Registrar's submissions under Rule 33 (B) of the Rules of Procedure and Evidence to the Defence '*Requête d'Arsène Shalom Ntahobali en autorisation de rencontrer le détenu Georges Rutaganda en l'absence d'un représentant du Procureur et du Greffe (Art. 20, Statuts du TPIR et 73, Règlement de procédure et de prevue*)'", filed on 8 September 2005 (the "Registry's Response");

3. The "*Réponse de Arsène Shalom Ntahobali au* 'Registrar's Submissions under Rule 33 (B) of the Rules of Procedure and Evidence to the Defence'", filed on 12 September 2005 (the "Defence Reply");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), in particular Article 20, and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73;

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

Introduction

1. On the basis of the Defence for Ntahobali's submissions, the Chamber notes the following chronology of events.

2. On 17 January 2005, the Defence for Ntahobali wrote to the Defence Counsel and Detention Management Section (the "DCDMS"), seeking an interview with Georges Rutaganda. Georges Rutaganda's consent to this meeting was confirmed[1].

3. On 17 February 2005, DCDMS responded to this request informing the Defence for Ntahobali that the Prosecution, in its response dated 10 February 2005, did not support the Defence request to meet with Georges Rutaganda. DCDMS stated that the Prosecution feared that Georges Rutaganda has in his possession certain disclosures that could prejudice the Prosecution and thus a representative from his Office should be present at the meeting should it be granted. DCDMS, nevertheless, granted the request, on the condition that a representative of the Prosecution is present[2].

4. The Defence for Ntahobali wrote to the Deputy Registrar on 21 February 2005, drawing attention to the DCDMS's decision. The Defence for Ntahobali questioned the basis upon which the Prosecution could interfere with the Defence's request to interview a detained person. In addition, the Defence addressed the Prosecution's concerns, and drew the Registrar's attention to prior meetings between Counsel for the Accused and other detained persons in other proceedings before this Tribunal. In conclusion, the Defence for Ntahobali appealed to the Registrar to intervene and allow the Defence for Ntahobali to meet with Georges Rutaganda without the presence of a member of the Office of the Prosecutor[3].

5. The Deputy Registrar responded to this communication on 25 February 2005, outlining the procedure for the meeting of detainees under Rule 64. However, he added

[1] The Motion, Annex R-1.
[2] *Ibid.,* Annex R-2.
[3] *Ibid.,* Annex R-3.

that if the Defence for Ntahobali was of the opinion that the impending visit was communicated to the Prosecution in an improper manner, it was within the Defence's prerogative to challenge DCDMS' decision before the President of the Tribunal. Secondly, the Deputy Registrar informed the Defence for Ntahobali that under Rule 64, he was unable to intervene on behalf of the Defence in the DCDMS decision. The Deputy Registrar explained that only the detainee Georges Rutaganda could appeal a decision by the Prosecution that requested the presence of a representative of his Office during a meeting between the detainee and the relevant Defence Counsel. Further, such an appeal could only be made to the President of the Tribunal, not to the Registrar. The Registrar added that this appeal could be made by Counsel on the Accused's behalf[4].

6. On 28 February 2005, pursuant to Rule 64, the Defence for Ntahobali wrote to the President of the Tribunal, seeking to appeal the Registrar's Decision of 25 February 2005[5].

7. The President issued a Decision on 6 June 2005, holding that it was not the Registry's role to consider the validity of the Prosecution's objections. Rather, this was the prerogative of the President at the request of the detainee Georges Rutaganda. At the time, the concerned detainee had not expressed his willingness to participate in such an interview or challenged the Prosecution's objection. Considering the above and the fact that Trial Chamber II had recognised that this matter was subject to review and due process needed to be observed, the appeal was rejected[6]. The President suggested that the Accused may

> "consider seeking appropriate relief from Trial Chamber II. This Chamber would be best placed to determine the merits of his request and the Prosecution's objection to this request"[7].

8. On 15 August 2005, the Defence for Ntahobali communicated with Georges Rutaganda, seeking a confidential interview, with a view to calling him as a possible Defence witness. This letter also sought confirmation of the detainee's opinion as to whether a member of the Office of the Prosecutor and/or the Registry may be present at the interview[8].

9. The Deputy Registrar, on 16 August 2005, sent a letter to Mr Peter Robinson of the International Criminal Law, who had sought to meet with Georges Rutaganda on 26 August 2005. The Deputy Registrar stated that the request had been granted and all communication would be treated as confidential pursuant to Tribunal practice[9].

10. On 23 August 2005, Georges Rutaganda responded to the Defence for Ntahobali, stating his willingness to be interviewed by the Defence for Ntahobali, but categorically opposing the presence of a member of the Office of the Prosecutor or the Registry at such a meeting[10].

---

[4] *Ibid.,* Annex R-4.
[5] *Ibid.,* Annex R-5.
[6] *Ntahobali,* The President's Decision on the Appeal filed Against the Registrar's Refusal to Permit a Confidential Interview with Georges Rutaganda (TC), 6 June 2005.
[7] *Ibid.*
[8] The Motion*,* Annex R-6.
[9] *Ibid.,* Annex R-8.
[10] *Ibid.,* Annex R-7.

SUBMISSIONS BY THE PARTIES

*Defence for Ntahobali*

11. The Defence for Ntahobali seeks authorisation from the Chamber to meet with Georges Rutaganda privately and without a representative of OTP or the Registry, within five days of this Chamber's decision. In the alternative, the Defence moves to be authorised to meet Georges Rutaganda as above, but with the additional condition that Georges Rutaganda does not attend the interview with any documents. Further, the Defence reminds the Chamber that the Defence for Ntahobali remains bound by Rule 75 (F) with respect to any individuals mentioned in the documents Rutaganda has in his possession and details he may reveal in the course of the intended interview.

12. The Defence for Ntahobali submits that whilst it has been authorised to meet with Georges Rutaganda, it can only do so in the presence of a member of the Office of the Prosecutor pursuant to the Registry's Decision.

13. The Defence for Ntahobali submits that Georges Rutaganda, having been member of the Lead Council of the "*Interahamwe za MRND*", possesses necessary information to counter allegations that Ntahobali was a leader of *Interahamwe*. For this reason, Georges Rutaganda is best placed to enlighten the Defence for Ntahobali and has been added to the amended Defence witness list.

14. The Defence for Ntahobali maintains that Rutaganda is willing to meet with the Defence for Ntahobali but refuses to do so in the presence of the Office of the Prosecutor or the Registry. This is equivalent to the position previously taken by Rutaganda when he agreed to meet with Counsel for Nzirorera.

15. The Defence for Ntahobali argues that the fundamental rights of the Accused Ntahobali, pursuant to Article 20 of the Statute, guarantee that the Accused will be heard equitably, that he will be awarded the necessary time and facilities to prepare his Defence, that he will obtain the appearance and examination of Defence Witnesses under the same conditions as those for the Prosecution, and, finally, that he cannot be forced to incriminate himself.

16. In elaboration of those rights, the Defence for Ntahobali submits that the Accused Ntahobali will not receive a fair hearing if he cannot prepare his Defence case independently and in confidence. The Defence further argues that both the independence and confidentiality of its preparation would be compromised if Counsel has to meet with Rutaganda in the presence a member of the Office of the Prosecutor, particularly if the Defence cannot meet a potential Defence witness due to the imposition of conditions beyond its control.

17. The Defence for Ntahobali contends that the information Georges Rutaganda possesses is potentially exculpatory. Accordingly, the prohibition of a confidential meeting between him and the Defence for Ntahobali would harm the Accused Ntahobali's right to a fair trial. In addition, the Defence argues that it cannot be said that it has been granted the necessary facilities for its Defence, if these facilities are under the control and supervision by its adversary, the Office of the Prosecutor. The Defence for Ntahobali argues that it has not been granted the same conditions for the Defence witnesses as the Prosecution had for Prosecution witnesses, since the latter is able to meet all his witnesses independently and in confidence.

18. In this context, the Defence relies on *Bizimungu et al*., where it was held that a witness is not the property of either the Office of the Prosecutor or the Defence[11]. Consequently, the Defence for Ntahobali sees no reason why the Prosecution should be able to dictate the conditions of the meeting with Georges Rutaganda. In conclusion, the Defence for Ntahobali submits that meeting with Georges Rutaganda in the presence of a member of the Office of the Prosecutor would violate the Accused Ntahobali's right against self-incrimination, since the questions put to the potential witness by Counsel would reveal the content and strategy of his defence.

19. The Defence for Ntahobali notes that the objection of the Office of the Prosecutor is based on the fact that Rutaganda has in his possession documents that should not be communicated to the Accused[12]. The Defence submits that this explanation is both vague and arbitrary and argues that it is difficult to believe that documents that allegedly contain compromising information would have been left in Georges Rutaganda's possession. The Defence draws the Chamber's attention to the meeting between Counsel for Nzirorera and Georges Rutaganda in the absence of the Prosecution or of an objection raised with respect to these documents[13].

20. The Defence for Ntahobali submits that Rule 75 (F) clearly stipulates that protective measures continue to apply, rendering the Prosecution's fears groundless. Should Rutaganda reveal confidential information relating to protected witnesses, the Defence for Ntahobali invites the Chamber to issue a Directive in its Decision to the effect that Counsel will have to respect the previous protective measures granted.

21. Distinguishing the *Bizimungu* Decision in part, the Defence recalls that the Prosecution was present at the meeting between Counsel for Mugiraneza and the detained Kambanda because this detainee was listed as a Prosecution witness. The Defence submits that Georges Rutaganda is not a Prosecution witness, and as such should have no condition attached to the requested meeting. The fact that Georges Rutaganda may testify for the Defence is a further reason why no member of Prosecution's office should be present.

22. In conclusion, the Defence states that the presence of a member of the Office of the Prosecutor or the Registry would in all probability prevent the interview being conducted in a manner conducive to the Defence for Ntahobali and infringe the Accused's rights. Moreover, Georges Rutaganda's refusal to be interviewed under these conditions is categorical. The Defence adds that it will abide by a condition prohibiting Georges Rutaganda to have in his possession any documents whatsoever at the time of interview.

*The Prosecution's Response*

23. Pursuant to Rules 53 (A) and 75 (F), and considering that Georges Rutaganda has since confirmed his wish to meet with the Defence for Ntahobali, the Prosecution does not object to a meeting between the Defence for Ntahobali and this detainee. The Prosecution requests that the Chamber grants the request, on the condition that Georges Rutaganda is not in possession of any documents at the said meeting.

---

[11] *Bizimungu et al.,* Decision on Prosper Mugiraneza's Motion to Vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 Related to Access to Jean Kambanda (TC), 24 August 2004.

[12] The Motion, Annex R-2.

[13] *Ibid.*, para. 20.

24. The Prosecution takes no position should the Registrar deem it necessary to be present at the meeting.

*The Registrar's Response*

25. The Registrar submits he is neutral in such matters and will abide by the decision of the Chamber. The Registrar reminds the Chamber of .the Decision of 19 January 2005 in *Bizimungu et al*, where the Chamber ordered that the meeting between Counsel for Mugiraneza and the detainee Kambanda be conducted in the presence of the Registry to protect the integrity, fairness and transparency of the process[14].

*The Defence Reply*

26. The Defence for Ntahobali submits that both the Counsels for Bagosora and Kajelijeli were afforded the opportunity to meet with detained witnesses without the presence of the Registrar.

27. The Defence notes that unlike Georges Rutaganda who has exhausted all his appellate avenues, both the aforementioned detainees were at the time of the requested meetings still in the process of conducting their trials.

28. Moreover, the Defence for Ntahobali maintains that Georges Rutaganda is not a Prosecution witness rendering it unnecessary to have a representative of the Registry's Office present to 'preserve the equity of the parties and the integrity of the process' when the Prosecution does not deem this to be necessary.

29. In conclusion, the Defence for Ntahobali submits that considering Georges Rutaganda has categorically stated that he wishes to conduct the interview in the absence of the Registry, the condition that a member of the Registrar's Office be present will deprive the Accused of the necessary time and facilities for the presentation of the Defence case pursuant to the Statute.

*Deliberations*

30. The Chamber notes that the detainee Georges Rutaganda has confirmed his willingness to meet with the Defence for Ntahobali in the absence of both the Prosecution and the Registry, and the fact that the Prosecution raises no objections, to the meeting between the Defence and Georges Rutaganda. The Chamber also notes that the Registry maintains a neutral position in this matter and draws the Chamber's attention to the *Bizimungu et al.* Decision of 24 August 2004.

31. The Chamber observes that this case is distinguishable from that of *Bizimungu et al* cited by both the Defence and the Registrar, in that Georges Rutaganda is not a listed witness for any of the other Parties. Thus the conditions in that case that representatives of either the Office of the Prosecutor or the Registry must be present are not applicable in the present situation[15].

[14] *Supra*, footnote 11.

[15] *Bizimungu et al.,* Decision On Prosper Mugiraneza's Motion to require the Registrar to allow Access to a Witness, (TC) 2 October 2003, 50-T, Decision on Prosper Mugiraneza's Motion to vary the Restrictions in the Trial Chamber's Decision of 2 October 2003 related to Access to Jean Kambanda (TC), 24 August 2004, Decision On Prosper Mugiraneza's extremely urgent Motion to vary Conditions of Interview with Jean Kambanda, (TC) 19 January 2005.

32. However, the Chamber notes the submissions of the Prosecution, namely his concern for protected witnesses, and orders that the detainee Georges Rutaganda shall not have any documents in his possession during the meeting.

33. The Chamber reminds the Defence for Ntahobali of its obligations under Rule 75 (F) in relation to any information it may receive during this meeting.

For the Above reasons, the Chamber

Grants the Motion that the Defence of Ntahobali and Mr. Georges Rutaganda meet in the absence of the Registry and in the absence of any Representative of the Prosecution; and

REMINDS the Defence for Ntahobali of its obligations under Rule 75 (F)

DIRECTS the Registry to facilitate the above-mentioned meeting

I. Ensuring that the above-mentioned meeting takes place as soon as possible;

II. Ensuring that Georges Rutaganda shall not have in his possession any documentation at the above-mentioned meeting;

Arusha, 22 September 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Pauline Nyiramasuhuko's Motion to extend the Time within which to file the Expert Report of proposed Expert Witness Balibusta Maniaragaba 22 September 2005 (ICTR-97-21-T; Joint Case No. ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Extension of time, Expert witness report, Lack of diligence, Interests of justice – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A) and 94* bis

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 the "*Requête de l'accusée Pauline Nyiramasuhuko en extension de délais afin de communiquer le rapport du témoin expert Monsieur Balibutsa Maniaragaba*," filed on 2 September 2005 (the "Motion");

CONSIDERING

(i) The "*Réponse de Shalom Ntahobali à la 'Requête de l'accusée Pauline Nyiramasuhuko en extension de délais afin de communiquer le rapport du témoin expert Monsieur Balibutsa Maniaragaba'*", filed on 5 September 2005 ("Ntahobali's Response");

(ii) The "Prosecutor's Joint Response to the '*Requête de l'accusée Pauline Nyiramasuhuko en extension de délais afin de communiquer le rapport du témoin expert Monsieur Balibutsa Maniaragaba*'", filed on 7 September 2005;

(iii) The «*Réponse de Shalom Ntahobali à la 'Requête de l'accusée Pauline Nyiramasuhuko en extension de délais afin de communiquer le rapport du témoin expert*'", filed on 7 September 2005 (the "Prosecutor's Joint Response");

(iv) The "*Réplique de Pauline Nyiramasuhuko à la 'Prosecutor's Joint Response to the Requête de l'accusée Pauline Nyiramasuhuko en extension de délais afin de communiquer le rapport du témoin expert Monsieur Balibutsa Maniaragaba*'", filed on 12 September 2005 ("Nyiramasuhuko's Reply to the Prosecutor's Joint Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion, pursuant to Rule 73 (A), on the basis of the written briefs filed by the Parties.

## SUBMISSIONS OF THE PARTIES

### *The Defence for Nyiramasuhuko*

1. The Defence requests an extension of three weeks within which to file the expert report of its proposed expert Mr. Maniaragaba. It recalls that on 7 July 2005, when Mr. Maniaragaba was accorded the status of an expert by the Representative of the Witnesses and Victims Support Section (the "WVSS"), he was given 12 days to conduct his research and prepare a report. However, Mr. Maniaragaba informed the Defence that he could only commence his research in mid-July 2005 because of his duties at the University of Gabon and other commitments with UNESCO.

2. The Defence recalls the Chamber's Scheduling Order of 5 August 2005 where the Chamber ordered the Defence of Nyiramasuhuko to file the expert report within two weeks of the said Scheduling Order. The Defence submits that it has received the official contract for the proposed expert from WVSS on 26 August 2005.

3. The Defence submits that the problems encountered in acquiring an unofficial contract for its proposed expert on 7 July 2005, the qualification and remuneration problems of Witness Edmond Babin, as well as the allegations levelled against the Accused by four Prosecution experts, two of whom have filed voluminous reports, could not prompt Mr. Maniaragaba to prepare a report within the deadlines set by WVSS.

4. The Defence recalls that during their testimonies, Prosecution Expert Guichaoua testified to having taken a long time to conduct his research and to prepare his report

and that Prosecution Expert Alison Des Forges testified that a large part of her report was taken from her book. For this reason, the Defence submits that it cannot be expected that Mr. Maniaragaba will conduct his research and prepare a report – in answer to the numerous and serious allegations levelled against the Accused – within the span of 12 days, as directed by WVSS.

5. The Defence submits that it would be prejudicial to the Accused Nyiramasuhuko not to be granted a further extension of time within which to file the report of the proposed expert Mr. Maniaragaba, whose testimony is indispensable to her Defence strategy, particularly to counter the allegations of Prosecution Experts Professor Guichaoua and Dr DesForges.

6. The Defence recalls that the proposed expert testimony of Professor Guichaoua was announced in the Pre-Trial Brief, but that the expert report was filed on 12 April 2004, including various errata filed thereafter. It further recalls that even after the close of the Prosecution case, the Chamber authorised the calling of a handwriting expert.

7. The Defence submits that the extension of three weeks requested for the filing of the report of its proposed expert would not cause further delays to the proceedings, since the Accused Nyiramasuhuko has yet to conclude her testimony and since Witness WBNM would testify before the proposed expert. The Defence submits that should both the Accused and Witness WBNM have concluded their testimony, the Defence of Ntahobali could step in and resume presentation of its case to cover the 21 day disclosure deadlines required under Rule 94 *bis*.

8. The Defence submits that on 12 August 2005, it received a first part/draft of Mr. Maniaragaba's report. On 25 August 2005, the Defence contacted Mr. Maniaragaba regarding the time required to prepare a second draft and on 29 August 2005, upon resumption of trial, the Defence informed the Chamber of its wish to request an extension of time within which to file the report of its proposed expert.

*The Defence of Ntahobali*

9. The Defence of Ntahobali requests the Chamber to grant Nyiramasuhuko's Motion.

10. The Defence submits that following the grant of the addition of Mr. Maniaragaba to the list of witnesses for the Accused Nyiramasuhuko on 1 June 2005, it filed a Motion on 1 August 2005 requesting, *inter alia,* the removal of Mr. Maniaragaba from its list of witnesses. This Defence Motion was granted on 26 August 2005.

11. On or about 1 September 2005, the Defence realised that Mr. Maniaragaba's report has not been filed within the timeframes given by the Chamber. On the same date, the Defence of Ntahobali also received Nyiramasuhuko's Motion requesting an extension of time within which to file Mr. Maniaragaba's report.

12. The Defence submits that the series of events outlined above, have caused serious prejudice to the Accused Ntahobali, while it was the intention of his Defence, when withdrawing Mr. Maniaragaba from the list of witnesses, to facilitate the smooth conduct of the trial.

13. The Defence submits that should the Motion be denied, the Accused Ntahobali would face the risk of not being able to present the evidence intended because his own expert witness has been withdrawn.

14. The Defence reserves Ntahobali's right to add the proposed expert witness Mr. Maniaragaba to Ntahobali's list of witnesses, although it argues that it would be in the interests of judicial economy to grant Nyiramasuhuko's Motion. The Defence for Ntahobali offers to call its witnesses after the conclusion of the testimonies of the Accused Nyiramasuhuko and of Witness WBNM, should the expert witness be unable to begin his testimony upon conclusion of the Defence of Nyiramasuhuko.

*The Prosecution Reply*

15. The Prosecution objects to the Motion for extension of time within which to file Mr. Maniaragaba's report.

16. The Prosecution recalls the chronology of events, in particular the Scheduling Order of 5 August 2005 and the Chamber's Decision of 19 August 2005[1]. The Defence was required to file the expert report of its proposed expert within two weeks after the issuing of the Scheduling Order, i.e., by 19 August 2005, taking into account the provisions of Rule 7 (B). The Prosecution submits that if the Defence envisaged problems in making the timely filing, it should have made a request for extension before the deadlines had elapsed. The Prosecution notes that the Defence filed its request for extension on 2 September 2005, two weeks after the deadlines have elapsed.

17. The Prosecution recalls that on 1 June 2005, when the Defence requested the addition of Mr. Maniaragaba, it submitted that, "that expert witness told me this very morning that he is now ready"[2]. The Prosecution submits that from 1 June 2005 until the two weeks given under the Scheduling Order, the Defence had more than adequate time in which to file the report of the expert.

18. The Prosecution accepts that the granting of an extension falls within the discretionary powers of the Chamber. However, the Prosecution maintains that, in the instant case, the Defence has not sufficiently demonstrated why such an extension should be granted. The Prosecution notes that the 12 days given by WVSS, when it accorded Mr. Maniaragaba an expert status, is "customary," and it would have taken Mr. Maniaragaba up to 20 July 2005 to complete his report[3]. The Prosecution argues that when the Defence submitted on 1 June 2005 that the expert was ready, it was aware of the problems faced by the expert in preparing his report.

19. The Prosecution notes that pursuant to the jurisprudence of the Tribunal, where extensions of time within which to file expert reports have been granted, sufficient justification had been demonstrated by the requesting Party[4].

[1] *The Prosecutor v. Nyiramasuhuko et al.,* ICTR-98-42-T, Decision on the Prosecutor's Motion pursuant to Rules 54, 73 and 73 *ter* to Proceed with the Evidence of the Accused Nyiramasuhuko as a Witness on 15 August 2005 or in the Alternative to proceed with the Defence case of the Accused Ntahobali, 19 August 2005.

[2] Transcript 1 June 2005, p. 8.

[3] See the Prosecutor's Response at para. 9.

[4] See the Prosecutor's response at para. 11, citing the Media Trial "Decision on the Prosecution's request for an Extension of time in which to file and disclose the report of expert witness Alison Des Forges of 21 February 2002; and Decision on the Prosecutor's Request for an extension of time in which to file and disclose the reports of expert witnesses of 21 November 2001.

20. In response to the submissions regarding the problems faced during the qualification of Mr. Edmond Babin, the Prosecution submits that that situation cannot be used as one that would occasion the delay in filing Mr. Maniaragaba's report. In any case, the Prosecution recalls that when the Chamber granted the addition of Mr. Maniaragaba it stated that it

> "does not in any way amount to a formal qualification of the witness as an expert witness or granting this witness to testify as an expert"[5].

21. Regarding the Defence submissions that the testimony of the proposed expert is crucial to countering the testimonies of Prosecution witnesses and that a denial of the requested extension would infringe upon the Accused's rights under Article 20, the Prosecution submits that during its case-in-chief, it filed the reports of its experts in a timely fashion affording the Defence ample opportunity to prepare the cross-examination of the Prosecution experts.

22. The Prosecution takes issue with the Defence of Ntahobali's reservations of its right to add Mr. Maniaragaba as an expert witness to its list of witnesses having previously relied upon the Defence of Nyiramasuhuko's intention to present Mr. Maniaragaba as an expert witness. The Prosecution submits that the submission is premature for the Chamber has yet to rule upon the current motion.

23. It would not be in the interests of justice to add Mr. Maniaragaba to the list of Ntahobali's witnesses, the Prosecution submits, when the only common witness in the Defence cases of Nyiramasuhuko and Ntahobali was Mr. Edmond Babin. The Prosecution therefore argues that the Defence of Ntahobali does not possess an automatic right to add Mr. Maniaragaba to its list of witnesses should he not testify for the Defence of Nyiramasuhuko.

24. In conclusion, the Prosecution prays that the Chamber deny both the Motion for extension of time within which to file Mr. Maniaragaba's report and Ntahobali's request to add Mr. Maniaragaba to its list of witnesses.

*The Defence of Nyiramasuhuko's Reply*

25. In its Reply, the Defence reiterates the submissions made in the Motion. Considering the Defence of Nyiramasuhuko made its oral submissions of 1 June 2005 in French, it submits that the French transcripts of 1 June 2005 are authoritative. On this basis, the Defence submits that it never gave an undertaking that Mr. Maniaragaba was "ready," as submitted by the Prosecution, rather, the Defence had submitted that Mr. Maniaragaba was now "available," and could be called to testify in Nyiramasuhuko's Defence[6].

HAVING DELIBERATED

26. The Chamber has considered all the submissions of the Parties.

[5] Transcript of 1 June 2005, p. 21.

[6] See Nyiramasuhuko's Reply at paras. 2-5, where reference is made to the French Transcripts of 1 June 2005, p. 10.

27. In particular, the Chamber notes that Mr. Maniaragaba was added to the Defence for Nyiramasuhuko's list of witnesses on 1 June 2005 and that the Defence now seeks an extension of three weeks within which to file his expert report.

28. The Chamber recalls that when it granted the addition of this proposed expert to the Defence of Nyiramasuhuko's witness list, it directed the Defence to,

> "[d]eal with the procedural aspects with regard to enlisting of this intended witness as an expert […] with the necessary speed with the Registry […] hoping that the Registrar will follow up this matter with the necessary dispatch"[7].

29. The Chamber notes the Defence for Nyiramasuhuko submission alleging that on 7 July 2005 it was informed by WVSS that the proposed expert Mr. Balibutsa Maniaragaba[8] had been accorded expert status and would have 12 days to conduct his research and prepare a report[9].

30. The Chamber recalls its Scheduling Order of 5 August 2005, where it ordered

> "[t]he Defence of Nyiramasuhuko to ensure that its defence will be completed in a timely fashion, including the disclosure of the Expert Witness' report no later than two weeks from the date of this Order, to enable the parties to avail themselves of their rights contained in Rule 94 *bis*"[10].

This Order was reiterated in the Chamber's Decision of 19 August 2005.

31. The Chamber notes that not only has the Defence for Nyiramasuhuko failed to honour the deadlines for filing its expert's report as set by the Registry, but also the Defence has failed to honour the deadlines set by the Chamber in its Scheduling Order of 5 August 2005 and subsequent Decision of 19 August 2005. The Chamber further notes that in filing its request for extension of time exactly two weeks after the expiration of the deadlines set by the Chamber, the Defence for Nyiramasuhuko has exhibited a lack of diligence contrary to the interests of justice and to its obligations to the Tribunal.

32. For the above reasons, the Chamber finds that the Defence of Nyiramasuhuko's Motion for extension of time within which to file the expert report is without merit and must fail given that the stipulated timeframes for such filing had already expired.

33. However, the Chamber considers that it would be in the interests of justice to *proprio motu* grant the Defence for Nyiramasuhuko two weeks from the date of this Decision within which to file the expert report of its proposed expert Mr. Balibutsa Maniaragaba.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety;

ORDERS *proprio motu* that within two weeks from the date of this Decision, the Defence for Nyiramasuhuko shall file the expert report of its proposed expert Mr. Balibutsa Maniaragaba.

---

[7] Transcripts of 1 June 2005, pp. 20, 21.

[8] In some instances he is referred to as Baributsa and in others he is referred to as Balibutsa.

[9] See the Motion at para. 3. According to the WVSS Representative's directions, the expert report of the proposed expert should have been filed by 19 July 2005.

[10] See Order (d) of the Scheduling Order of 5 August 2005, according to which the expert report of the proposed expert should have been filed by 22 August 2005.

Arusha, 22 September 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated (Article 91 of the Rules of Procedure and Evidence) 23 September 2005 (ICTR-97-21-T ; Joint Case No. ICTR-98-42-T )*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Perjury of a witness, Discrepancies between Witnesses' testimonies – Duties of the Counsel as an Officer of the Court to facilitate proceedings, Frivolous motion – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 46, 73 (A), 73 (F), 91 and 91 (B)*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Defence for Ntahobali's "*Requête de Arsène Shalom Ntahobali en parjure à l'encontre du témoin du Procureur nommé 'QY'* ", filed on 25 August 2005 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to the *"Requête de Arsène Shalom Ntahobali en parjure à l'encontre du témoin du Procureur nommé QY,*'" filed on 30 August 2005 (the "Prosecutor's Response");

NOTING THAT both the Motion and the Prosecutor's Response were filed as confidential pleadings;

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute"), specifically Articles 19 and 20, and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 91;

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

**Submissions by the parties**

*Defence for Ntahobali*

1. The Defence for Ntahobali moves the Chamber to order that an independent prosecutor be nominated to conduct the investigation of false testimony allegedly given by Prosecution Witness QY and to prepare an indictment for perjury against her.

2. The Defence relies on the Appeals Chamber's decision in *Musema* that allowed the Parties to file a motion pursuant to Rule 91 if they wished to raise the issue of false testimony[1]. The Defence recalls that according to the Tribunal, "the giving of false testimony may consist of the affirmation of a false fact or the negation of a true fact"[2].

3. The Defence recalls the criteria for the commission of perjury as follows :

– "The witness must make a solemn declaration;
– The false statement must be contrary to the solemn declaration;
– The witness must believe at the time the statement was made that it was false;
– And there must be a relevant relationship between the statement and a material matter within the case"[3].

4. The Defence for Ntahobali argues that Witness QY's testimony fulfils the above criteria, for not only are there contradictions between her statements and the testimony given in these proceedings and in *Muvunyi*, respectively, but this false testimony was given knowingly and deliberately[4]. The Defence for Ntahobali cites four examples of alleged false testimony[5].

5. The Defence for Ntahobali concludes that, based on the testimony given in the *Muvunyi* proceedings, it is clear that Witness QY lied several times about important issues raised during her testimony in the *Butare* proceedings. The Defence submits that the witness demonstrated an intention to refuse to truthfully report the facts every time she was confronted with earlier inconsistent statements, a voluntary act in order to unjustly incriminate Tharcisse Renzaho, as well as the Accused Arsène Ntahobali and Pauline Nyiramasuhuko[6]. The Defence for Ntahobali argues that despite being under oath, the witness' testimonies frequently vary and upon confrontation with these alleged discrepancies, the witness either denied ever having made the statements in question, refused to answer the questions, or gave totally harebrained explanations[7].

6. The Defence submits that the conditions of Rule 91 have been fulfilled with respect to this witness and that considering the importance of these criminal proceed-

[1] The Motion, para. 5, relying on *Alfred Musema v. The Prosecutor*, Judgement (AC), 16 November 2001.

[2] *Ibid.*, para. 6, relying on *The Prosecutor v. Jean-Paul Akayesu*, Decision on the Defence Motion to Direct the Prosecutor to Investigate the False Testimony by Witness "R" (TC), 9 March 1998.

[3] *Ibid.*, para. 7, relying on *Akayesu*, Decision of 9 March 1998.

[4] *Ibid.*, para. 8.

[5] *Ibid.*, paras. 10-12, 14-15, 17-18, 20-23.

[6] *Ibid.*, paras. 23-25.

[7] *Ibid.*, paras. 26-28.

ings, a clear and public sanction is necessary to deter other potential witnesses from following this course of action[8].

*The Prosecution's Response*

7. The Prosecution argues that the Defence for Ntahobali has not satisfied the necessary criteria under Rule 91 and accordingly moves the Chamber to deny the Motion in its entirety[9]. Whilst it does not dispute that the Accused may bring a motion before the Chamber in this matter, it points out that the Musema Decision the Defence for Ntahobali relies upon, also states that whether or not such a motion is filed, it is still incumbent upon the Chamber to assess the evidence and reliability of the witnesses[10]. The Prosecution recalls the Chamber's decision of 26 August 2005 where the Chamber stated that the

> "Parties may therefore wish to make the proper application to recall the witnesses for further cross-examination on the alleged specific issues that may have arisen from either the additional statements and/or the testimony given in the *Muvunyi* proceedings" [11].

8. The Prosecution submits that pursuant to Rule 91, the onus rests on the Defence to prove to the Chamber that Witness QY knowingly intended to use false testimony or was reckless as to whether or not her testimony was false[12].

9. The Prosecution relies on the findings in the *Musema* Decision, that for Rule 91 to apply,

> "it is insufficient to raise only doubt as to the credibility of the statements made by the witness. The Chamber affirms its opinion that inaccurate statements cannot, on their own, constitute false testimony; an element of wilful intent to give false testimony must exist. […] The testimony of a witness may, for one reason or another, lack credibility even if it does not amount to false testimony within the meaning of Rule 91"[13].

10. The Prosecution responds to the four instances given by the Defence for Ntahobali as examples of alleged false testimony. The Prosecution submit that considering that trauma may have played a role in the recantation of this witness' testimony in both the *Butare* and *Muvunyi* proceedings, this is a case of the witness possibly being confused. Rather than being indicative of false testimony, the Prosecution maintains that the alleged discrepancies were the result of honest mistakes by the witness. In conclusion, the Prosecution submits that the witness' answers on this issue go to her credibility and are not instances of false testimony[14].

---

[8] *Ibid.*, paras. 8, 29, 31-32.

[9] Prosecutor's Response, para. 18.

[10] *Ibid.*, para. 7.

[11] *Ibid.*, para. 8, relying upon *Nyiramasuhuko et al.*, Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali, ICTR-98-42-T, 26 August 2005, para. 71.

[12] *Ibid.,* para. 6. The Prosecutor relies upon *Blackstone Criminal Practice* (2003), p. 28.

[13] *Musema*, Judgment and Sentence (AC), 27 January 2000, para. 99.

[14] The Prosecutor's Response, paras. 9, 11-15.

*Deliberations*

11. The Chamber has carefully considered the submissions of the Parties. The Chamber does not find that the alleged discrepancies between Witness QY's testimony in these proceedings, in the statements of 2 September 2005 and/or the testimony in the *Muvunyi* proceedings warrant the action the Defence for Ntahobali seeks in this Motion pursuant to Rule 91 (B).

12. The Chamber is of the opinion that any alleged disparities in the testimony of the witness in these proceedings will be addressed as part of the Chamber's evaluation and consideration of the evidence at a later stage. The Chamber will thus not comment further on this matter.

13. The Chamber notes that Witness QY has already been the subject of two earlier motions filed by the Defence for Ntahobali[15]. The Chamber recalls the provisions of Articles 46 and 73 (F) and stresses, considering the sequence of events regarding this witness, that the filing of frivolous motions can be sanctioned by the non-payment of fees. The Chamber reminds Counsel of his duties as an Officer of the Court to facilitate proceedings.

For the Above reasons, the CHAMBER denies the Motion in its entirety.

Arusha, 23 September 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Arsène Shalom Ntahobali's Motion for Certification to appeal the "Decision on the Defence motion to modify the List of Defence Witnesses for Arsène Shalom Ntahobali" (Article 73 of the Rules of Procedure and Evidence) 26 September 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

[15] See, *Requête en modification de la liste et de l'ordre des témoins de la défense d'Arsène Shalom Ntahobali, filed on 2 August 2005, and Requête et notification de Arsène Shalom Ntahobali de son intention de verser au dossier les déclarations écrites de témoins et les transcriptions de leur témoignage dans un procès au TPIR en lieu et place de leur témoignage*, filed on 3 August 2005.

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Time to file a request for certification of appeal, Right to present a defence of alibi – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 67, 67 (B), 73, 73 (A), 73 (B) and 73 (C)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Defence Motion to modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73* ter *(E), Rules of Procedure and Evidence, 26 August 2005 (ICTR-98-42)*

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson, and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the Defence for Ntahobali's "*Requête d'Arsène Shalom Ntahobali afin d'obtenir la certification d'appel de la décision intitulée '*Decision on the Defence Motion to Modify the List of Denfence (*sic*) Witnesses for Arsène Shalom Ntahobali'", filed on 2 September 2005 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Modify the List of Witnesses", filed on 8 September 2005 (the "Prosecutor's Response") and the Defence for Ntahobali's "*Réplique de Arsène Shalom Ntahobali à la* 'Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Certification to Appeal the Decision to Modify the List of Witnesses' *(Article 73 Règlement de procédure et de preuve)*", filed on 12 September 2005 (the "Defence Reply");

NOTING the "Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali", issued on 26 August 2005 (the "Impugned Decision");

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 73 (B) and (C);

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, on the basis of the written submissions of the Parties.

**Submissions by the parties**

*Defence for Ntahobali*

1. The Defence for Ntahobali moves the Chamber for certification to appeal the impugned Decision, of which it was notified on 29 August 2005. In particular, the Defence seeks certification to appeal the decision in relation to Witnesses WQMJP, MJ110, WDUSA, and NTN. The Defence takes issue with the impugned Decision

because it denies the addition of Witnesses WDUSA and NTN to Ntahobali's witness list, and, whilst admitting Witnesses WQMJP and MJ110, restricts their respective testimonies to specific issues[1].

2. The Defence submits that had it been able to meet Witnesses WQMJP, MJ110, WDUSA, and NTN prior to 31 December 2004, they would have been included in Ntahobali's witness list and the Chamber would not have had discretion to limit or deny the inclusion of their proposed testimonies. Consequently, the narrow approach taken by the Chamber in the impugned Decision seems altogether inequitable, at odds with the spirit of the Statute, and contrary to the guaranteed rights of the Accused[2].

3. Primarily, the Defence for Ntahobali argues that the impugned Decision has grave consequences on the fair and expeditious conduct of the proceedings and the subsequent outcome of this trial, particularly where an Accused is deprived of presenting a defence of alibi because of a non-existent criterion or obligation[3]; that the fairness of proceedings are compromised if the Prosecutor is allowed a large number of witnesses while the Defence is restricted which denies the Defence the opportunity to provide an adequate Defence[4]; and, that the Chamber's Decision is in total contradiction with earlier decisions on similar motions, in particular those where the Chamber has permitted the Prosecutor to add witnesses of no great significance to his case, at a late stage of proceedings, and without restrictions[5].

4. The Defence submits that it will be unable to respond adequately and completely to the Prosecution case if the witnesses it wishes to call and their testimony is significantly restricted. The Defence submits that the Chamber therefore risks issuing an erroneous conclusion in its final deliberations[6].

5. The Defence submits that simply because witnesses for the Defence for Nyiramasuhuko mention certain facts should not deprive her co-Accused Ntahobali of the right to present his Defence case in his own way. The Defence argues that Ntahobali is in no way bound to content himself with evidence previously presented by the Accused Nyiramasuhuko[7].

6. The Defence specifically argues the importance of the aforementioned witnesses to Ntahobali's defence strategy[8].

---

[1] The impugned Decision, paras. 47, 55, 64, and 68.

[2] *Ibid.*, paras. 16-17.

[3] *Ibid.*, paras. 8, 14, 39-42 and refers to *The Prosecutor v. Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witnesses' Summaries (TC), 21 July 2005, para. 5; *The Prosecutor v. Simba*, Decision on the Prosecutor's Request for Certification to Appeal Decision dated 14 July 2004 denying the Admission of Testimony of an Expert Witness (TC), 16 August 2004, paras. 3-4; *The Prosecutor v. Karemera et al.*, Decision on the Request for Certification to Appeal the Decision on the Defence Motion for Subpoena to Witness G rendered on 20 October 2003 (TC), 17 February 2004, para. 7. The Defence recalls that the Prosecutor presented 11 witnesses who testified to Ntahobali's presence at the *Bureau préfectoral*, 10 witnesses who testified to the existence of the alleged roadblock, and five witnesses testifying to Ntahobali's presence at EER.

[4] *Ibid.*, paras. 39-42.

[5] *Ibid.*, paras. 47-58. The Defence cites the addition of Witnesses FAW, RV, QBX, FA FCC, an expert in linguistics, and a handwriting expert.

[6] *Ibid.*, paras. 71-74.

[7] *Ibid.*, paras. 44-45.

[8] *Ibid.*, para. 24.

b. Despite being the twelfth Defence witness to testify to the alleged erection of a roadblock where Ntahobali is accused of having committed crimes from 20 or 21 April 1994, the Defence submits that to prevent Witness WQMJP from testifying on this issue will deprive the Chamber of the opportunity to appraise whether particular Prosecution witnesses have either erred or lied. Moreover, it is both inequitable and unusual to prevent the witness from testifying whether he knew the Accused and the nature of their relationship[9];

c. Witness MJ110 would have given evidence of life at, and around, Ihuliro hotel, to the alibi of the Accused during some days in April and May 1994, and to the Accused's departure to Cyangugu and subsequent exile from Rwanda[10];

d. Witness WDUSA was the only proposed witness without family ties with the Accused Ntahobali and whose testimony would have been able to account for the Accused at Cyangugu[11];

e. Witness NTN was the only proposed witness who could demonstrate how he differs both physically and physiologically from the Accused Ntahobali; matters crucial to the issue of identification, for the transcripts do not reveal the physical characteristics of the wrongly identified witness[12].

7. In relation to Witness WDUSA, the Defence stresses that this witness provides the Accused with a defence of alibi. Considering the Defence is not obliged to provide notice pursuant to Rule 67, the Defence submits that it does not understand how the absence of the non-obligatory notice poses an obstacle to adding such witnesses to its list. However, if required, this notice will obviously affect the expeditiousness of proceedings and the resources of the Tribunal. The Defence suggests efficiency would be best served by adding Witness WDUSA to the Defence witness list, and to determine the weight of that testimony at the appropriate time[13].

8. The Defence accepts that the addition of the remaining three witnesses will affect the expeditiousness of proceedings. However, the Defence argues that a more liberal interpretation of Rule 73 (B) is required, suggesting that in this context, the Rule only demands that proceedings not be significantly affected. Considering that this trial has been running for over four years, the Defence for Ntahobali maintains that some extra hours are insignificant when weighed against the Accused's rights[14].

9. In conclusion, the Defence submits that an intervention by the Appeals Chamber is necessary and urgent in order to clarify the above questions, to enable Ntahobali to take the appropriate decisions with regard to his defence prior to the conclusion of the defence for Nyiramasuhuko. Further, a favourable decision by the Appeals Chamber will allow Ntahobali to present a more convincing, efficient, and expeditious defence[15].

---

[9] *Ibid.*, paras. 25-28.
[10] *Ibid.*, para. 29.
[11] *Ibid.*, paras. 30-31.
[12] *Ibid.*, paras. 33-37.
[13] *Ibid.*, paras. 59-62.
[14] *Ibid.*, paras. 63-70. The Defence submits that Rule 73 (B) was not drafted with the intention of totally excluding this type of decision from being appealed.
[15] *Ibid.*, paras. 75-78.

*The Prosecutor's Submissions*

10. Relying on the criteria for certification under Rule 73 (B) and the *Bagosora et al.* Decision of 5 December 2003, the Prosecutor submits that the Defence for Ntahobali has failed to meet any of the crucial requirements set forth in Rule 73 (B) and that the motion is unfounded and lacks merit[16].

11. The Prosecutor relies upon the Chamber's Decisions of 4 October 2004 and 30 November 2004 in its submissions on the scope of Rule 73 (B), according to which certification of an appeal has to be an absolute exception when deciding on the admissibility and the materiality of the evidence sought to be presented. Furthermore, on the issue of applications for adding witnesses or modifying a witness list, the Prosecutor submits that it is the responsibility of the Trial Chamber, as trier of fact, to determine which evidence to admit during the course of the trial, and in this case, after reviewing the materiality of the evidence the proposed witnesses are expected to address[17].

12. The Prosecutor submits that should a witness wrongly identify an Accused, it is not essential in law for the discrepancies to be reflected in the court record. The Chamber, the Prosecutor submits, has indicated that it has observed the mistaken identity and should the description not be reflected in the court records, the video recordings of the proceedings can be utilised[18].

13. The Prosecutor maintains that the Defence, despite arguing infringement of the Accused's rights, does not demonstrate how the impugned Decision will affect the fair and expeditious conduct of proceedings and the hypothesis that the witnesses would have been on the original list is irrelevant to the present motion[19].

14. The Prosecutor maintains that the seriousness, complexity and magnitude of the current case is based on quality and substance of the evidence provided and not the quantity of witnesses called. For this reason, the Prosecutor submits that a comparison of the number of witnesses the Prosecutor called is inappropriate and misleading, for the Prosecution witnesses added were relevant, essential, and material to the indictment and the Chamber deemed their addition necessary in the interests of justice[20].

---

[16] The Prosecutor's Response, paras. 4, 5, relying upon *Bagosora et al.,* Decision on the Certification of Appeal Concerning Will-Say Statements of Witnesses DPQ, DP, and DA (TC), 5 December 2003, para. 10.

[17] *Ibid.,* paras. 7, 8, 10-16, 25, relying upon Rule 73 *ter* and the following Decisions : *Nyiramasuhuko et al.,* Decision of Nyiramasuhuko's Appeal on the Admissibility of Evidence (TC), 4 October 2004, para. 5; Decision on Prosecutor's Motion for Certification to appeal the Decision of the Trial Chamber Dated 30 November 2004 (TC), 30 November 2004, para. 11; Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to appeal the Decision on the Defence urgent Motion to declare Parts of the Evidence of Witness RV and QBZ inadmissible (TC), 18 March 2004, paras. 14-17, 20-22. *Ibid.,* paras. 7, 8, 10-16, 25, relying upon Rule 73 *ter* and the following Decisions : *Nyiramasuhuko et al.,* Decision of Nyiramasuhuko's Appeal on the Admissibility of Evidence (TC), 4 October 2004, para. 5; Decision on Prosecutor's Motion for Certification to appeal the Decision of the Trial Chamber dated 30 November 2004 (TC), 30 November 2004, para. 11; Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the Decision on the Defence urgent Motion to declare Parts of the Evidence of Witness RV and QBZ inadmissible (TC), 18 March 2004, paras. 14-17, 20-22.

[18] *Ibid.*, para. 20.

[19] *Ibid.*, para. 17.

[20] *Ibid.*, para. 21, 22, 23, referring to *Nyiramasuhuko et al.,* Decision on Prosecutor's Motion to Drop and Add Witnesses (TC), 30 March 2004, para. 28.

15. In relation to the defence of alibi, the Prosecutor submits that the Defence for Ntahobali has misconstrued the impugned Decision with respect to Witness WDUSA, for the denial to add this witness was not for lack of an alibi notice[21].

16. The Prosecutor submits that the Defence for Ntahobali should not have based part of its defence on witnesses that may or may not be called by another Party in the proceedings. The only common witness was Edmond Babin, and thus the Prosecutor submits that this submission by the Defence for Ntahobali is irrelevant[22].

17. In conclusion, the Prosecutor submits that the Defence has failed to specifically demonstrate fulfilment of the criteria in Rule 73 (B), instead re-litigating its submissions contained in the previous motions of 2 and 10 August 2005[23]. The Prosecutor further submits that the Defence for Ntahobali makes speculative submissions on the interpretation of Rule 73 (B) without supporting them with any jurisprudence. The addition of the proposed Defence witnesses will significantly affect the expeditiousness of the proceedings, the Prosecutor maintains, particularly when the proposed evidence is not material to the Indictment or other witnesses have testified to the same issues. According to the Prosecutor, the Defence for Ntahobali has failed to meet the crucial and stringent Rule 73 (B) criteria, especially as the matters challenged are matters to determine for the Chamber as trier of fact, and not the subject of appellate review[24].

*The Defence Reply*

18. The Defence for Ntahobali reiterates its plea for certification of appeal and addresses the arguments put forward by the Prosecutor. It submits that the Prosecutor errs when he criticizes the motion for stressing issues regarding the fairness of proceedings, as this is at the core of Rule 73 (B)[25]. Further, the reiteration of certain arguments previously raised in the motion to modify the Defence's list of witnesses is necessary to recall the context of the motion to the Chamber[26].

19. The Defence further stresses the importance Witnesses MJ110 and WDUSA – the former because of the withdrawal by the Defence of Nyiramasuhuko of Witness WFMG, the latter as a result of the Accused's proposed defence of alibi[27].

20. The Defence acknowledges that the calling of additional witnesses will inevitably delay proceedings, but maintains that a delay of three days is not significant in comparison to the full length of the trial. The Defence suggests that this must be seen in relation to the time gained as a result of the previous withdrawal of the Defence's three expert witnesses[28].

21. The Defence reiterates that Ntahobali has the right to present his defense case in the manner he judges necessary, independently of his co-Accused's defence cases[29].

[21] *Ibid.*, para. 24.
[22] *Ibid.*, para. 18.
[23] *Ibid.*, paras. 6, 9, 19, 22, 27.
[24] *Ibid.*, paras. 25-27.
[25] Defence Reply, paras. 12, 14, 15.
[26] *Ibid.*, para. 17.
[27] *Ibid.*, paras. 27-31.
[28] *Ibid.*, paras. 21-22.
[29] *Ibid.*, para. 32.

*Deliberations*

22. The Chamber recalls the relevant provisions of Rule 73, in particular, the following sub-rules :

> (B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals chamber may materially advance the proceedings.
>
> (C) Requests for certification shall be filed within seven days of the filing of the impugned decision. […]

23. The Chamber notes that the impugned decision was rendered on 26 August 2005. Upon application of Rule 73 (C), the Chamber observes that the Defence should have filed its Motion for certification of appeal on 1 September 2005 to fall within the time-limits provided. The Defence does not provide the Chamber with an explanation for the delay in the submission of this Motion for certification to appeal, save that it received the impugned Decision on 29 August 2005. Given that Rule 73 (C) is clear and unambiguous, the Chamber finds that this Motion has been filed out of time and is therefore time barred.

24. The Chamber reminds the Defence for Ntahobali of its Decision of 26 August 2005, where it drew the Defence's attention to Rule 67 in full, and in particular Rule 67 (B)[30]. The Defence for Ntahobali is not limited by the Chamber's Decision of 26 August 2005 if it wishes to avail itself of its right to present a defence of alibi.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion for certification to appeal the impugned Decision in its entirety.

Arusha, 26 September 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Arsène Shalom Ntahobali's Motion for reconsideration of the "Decision on Arsène Shalom Ntahobali's Motion for Certification to appeal the "Decision on the Defence Motion to modify the List of Defence Witnesses for Arsène Shalom Ntahobali" 12 October 2005 (ICTR-97-21-T; Joint Case N° ICTR-98-42-T)*

(Original : English)

[30] *Nyiramasuhuko et al.,* Decision on the Defence Motion to modify the List of Defence Witnesses for Arsène Shalom Ntahobali, Rule 73 *ter* (E), Rules of Procedure and Evidence, 26 August 2005 (TC), para. 65.

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Certification of appeal, Inherent discretionary power of the Trial Chamber to revisit its own previous decision, Distinction between reconsideration and review procedure, Principle of finality of litigation, Special circumstances warranting reconsideration, New fact previously unknown to the Chamber, New circumstances, Error of law, Abuses of discretionary power, Injustice, Erroneous computation of the time-limits – Interpretation, Jurisprudence of the Tribunal – Motion denied*

*International Instrument cited :*

*Practice Direction on Procedure for Filing of Written Submissions in Appeal Proceedings before the Tribunal, art. 13 ; Rules of Procedure and Evidence, rules 73 (A), 73 (B), 73 (C) and 120*

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Joseph Kanyabashi, *Decision (Motion for Review or Reconsideration) of 12 September 2000 (ICTR-96-15); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for Reconsideration of the Decisions rendered on 29 November 2001 and 5 December 2001 and for Declaration of Lack of Jurisdiction, 28 March 2002 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Joseph Nzirorera et al., *Decision on the Defence Motion for Reconsideration of Sanctions imposed on the Defence Request for Leave to interview potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, 10 October 2003 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Eliézer Niyitegeka, *Decision on Defence extremely urgent Motion for Reconsideration of Decision dated 16 December 2003, 19 December 2003 (ICTR-96-14); Appeals Chamber,* The Prosecutor v. Eliézer Niyitegeka, *Decision on Eliezer Niyitegeka's urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003, 4 February 2004 (ICTR-96-14); 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); Appeals Chamber,* The Prosecutor v. Hassan Ngeze et al., *Decision on Ngeze's Motion for Reconsideration of the Decision denying an Extension of Page Limits his Appellant Brief, 11 March 2004 (ICTR-99-52); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Nyiramasuhuko's Motion for Certification to Appeal" etc., 20 May 2004 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on the Defence Motions for Reconsideration of protective Measures for Prosecution Witnesses, 29 August 2005 (ICTR-98-44)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 the "*Demande de Arsène Shalom Ntahobali en reconsidération de la «*Decision on Arsène Shalom Ntahobali's Motion for Certification to Appeal the Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Ntahobali»" filed on 28 September 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to the Request for Reconsideration of the Decision on Arsène Shalom Ntahobali's Motion for Certification to Appeal the Decision on the Defence Motion to Modify the List of Defence Witnesses under Article 73 of the Rules of Procedure and evidence" filed on 3 October 2005 (the "Prosecution Response");

RECALLING the "Decision on the Defence Motion to Modify the List of Witnesses for Arsène Shalom Ntahobali" filed on 26 August 2005 (the "Modification Decision of 26 August 2005");

RECALLING the "Decision on Arsène Shalom Ntahobali's Motion for Certification to Appeal the 'Decision on the Defence Motion to Modify the List of Witnesses for Arsène Shalom Ntahobali'", filed on 21 September 2005 (the "Certification Decision of 21 September 2005");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion, pursuant to Rule 73 (A), on the basis of the written briefs filed by the Parties.

## SUBMISSIONS OF THE PARTIES

*The Defence*

1. The Defence requests the Chamber to reconsider the Certification Decision of 21 September 2005. The Defence submits that the sole reason for rejection of its Motion for Certification of the Modification Decision of 26 August 2005 is found at paragraph 23 of the Certification Decision of 21 September 2005, which reads :

> The Chamber notes that the impugned decision was rendered on 26 August 2005. Upon application of Rule 73 (C), the Chamber observes that the Defence should have filed its Motion for certification of appeal on 1 September 2005 to fall within the time-limits provided. The Defence does not provide the Chamber with an explanation for the delay in the submission of this Motion for certification to appeal, save that it received the impugned Decision on 29 August 2005. Given that Rule 73 (C) is clear and unambiguous, the Chamber finds this Motion has been filed out of time and is therefore time barred.

2. Recalling the provisions of Rule 73 (C), the Defence accepts that the time for filing a Motion for certification starts running 7 days following the filing of the impugned decision and not following the time when a Party receives the impugned decision.

3. The Defence argues that in filing its Motion for certification on 2 September 2005, it was within the time limits set under Rule 73 (C) because computation of the time-limits should have begun the day after the filing of the Modification Decision of 26 August

2005, i.e. on 27 August 2005. It maintains that such a computation of the time-limits set in Rule 73 (C) arises from principles of interpretation of law as found in a number of national jurisdictions, as well as in Article 33 of the Vienna Conventions.

4. The Defence submits that Article 13 of the *Directive pratique relative à la procédure de dêpot des écritures en appel devant le Tribunal* provides *inter alia* that the time-limits set start running from the day following the filing[1]. Therefore, the Defence submits that where the Rules are silent regarding when commencement of time-limits start, the manner of computing the running of the time-limits should be similar to that provided under Article 13 of the above-mentioned Directive. The Defence argues that since the Rules are silent then the Chamber should have favoured the Defence when interpreting the Rule.

5. In arguing for a reconsideration of the Certification Decision of 21 September 2005, the Defence makes reference to the jurisprudence of the Tribunal and the International Criminal Tribunal for the Former Yugoslavia (ICTY). The Defence submits that the Accused has suffered prejudice as a result of the Chamber's rejection of its Motion to Certify following an erroneous computation of the time-limits under Rule 73 (C) for the filing of such a Motion.

6. The Defence thus prays that the Chamber reconsider its Certification Decision of 21 September 2005 and grant the Certification to appeal the Modification Decision of 26 August 2005.

*The Prosecution Response*

7. The Prosecution objects to the Defence Motion, submitting that the Motion is procedurally wrong and that the Defence should have filed a request for certification to appeal the Decision they deem erroneous. Regarding reconsideration, the Prosecution makes reference to the jurisprudence of the Tribunal, submitting that it takes no position on the interpretation of the Rules governing the computation of the time-limits within which to file motions because this is a matter for the determination by the Chamber. The Prosecution thus prays that the Chamber deny the Motion and make any other orders it deems fit in the circumstances.

HAVING DELIBERATED

8. The Chamber has considered all the submissions of the Parties.

9. The Chamber notes that it possesses an inherent discretionary power to revisit its own previous decision, distinct from the review procedure provided for under Rule 120 and that this power should be used sparingly in order to maintain the principle of finality of litigation[2].

[1] See paras. 10 and 13 of the Motion.

[2] See *The Prosecutor v. Kanyabashi,* Case N° ICTR-96-15-T, (AC) Decision (Motion for Review or Reconsideration) of 12 September 2000; *The Prosecutor v. Karemera et al.* ICTR-98-44-T, (TC) Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005 (the "*Karemera* Decision of 29 August 2005") at para. 8; *The Prosecutor v. Bagosora et al.* Case N° ICTR-98-41-T, (TC) Decision on Defence Motion for Reconsideration of the Decisions rendered on 29 November 2001 and 5 December 2001 and for Declaration of Lack of Jurisdiction, filed on 28 March 2002 at para. 21.

10. The Chamber recalls the jurisprudence of the Tribunal on reconsideration of a decision : a party seeking reconsideration must demonstrate special circumstances warranting such reconsideration[3]. The special circumstances that may warrant a reconsideration include; (i) where a new fact has been discovered that was not previously known to the Chamber; (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision; (iii) or where a Party shows an error of law or that the Chamber has abused its discretion, and an injustice has been occasioned[4].

11. In the instant case, the Chamber notes that the Defence essentially argues that the Chamber ought to have commenced counting the time-limits for filing the Defence Motion under Rule 73 (B) from the day after the filing of the Modification Decision of 26 August 2005, in conformity with Article 13 of the *Directive pratique relative à la procédure de dêpot des écritures en appel devant le Tribunal,* and not from the very day when the Modification Decision of 26 August 2005 was filed with the Registry. The Defence submits that this erroneous computation of the time-limits lead to the dismissal of the request for certification to appeal the said Modification Decision of 26 August 2005 thus denying the Defence the opportunity to have the Appeals Chamber decide on the matter, were the Chamber to have granted certification to appeal.

12. The Chamber recalls the provisions of Rule 73 (C) which reads as follow : "Requests for certification shall be filed within seven days of the filing of the impugned decision […]." The Chamber reiterates its opinion as stated in the Modification Decision of 26 August 2005 : "Rule 73 (C) is clear and unambiguous […]" as to the time-limits within which Motions filed under it should be filed, i.e., within seven days of the filing of the impugned decision.

13. In light of the foregoing, the Chamber is of the opinion that reliance by the Defence on Article 13 of the *Directive pratique relative à la procédure de dêpot des écritures en appel devant le Tribunal* in the instant case, is simply erroneous. The Chamber is therefore not convinced by the Defence submission that the time-limit

[3] See *The Prosecutor v. Nzirorera et al.* ICTR-98-44-T, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago, of 10 October 2003 at para. 6.

[4] The *Karemera* Decision of 29 August 2005 at para. 8; *The Prosecutor v. Nyiramasuhuko et al.,* ICTR-98-42-T, (TC) Decision on Nyiramasuhuko Motion for Reconsideration of the "Decision on Defence Motion for Certificate to Appeal the 'Decision on Defence Motion for Stay of Proceedings and Abuse of Process'" of 20 May 2004; *The Prosecutor v. Bagosora,* ICTR-98-41-T (TC), Decision on Defence Motion for reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, of 18 July 2003; *Ngeze et al v. The Prosecutor* (ICTR-99-52-A) (AC), Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits His Appellant Brief (AC), 11 March 2004, p. 2; *Niyitegeka v. The Prosecutor,* Case N° ICTR-96-14-A (AC), Decision on Defence Extremely Urgent Motion for Reconsideration of Decision dated 16 December 2003 of 19 December 2003; *Niyitegeka v. The Prosecutor,* Case N° ICTR-96-14-A (AC), Decision on Eliezer Niyitegeka's Urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003 of 4 February 2004; *The Prosecutor v. Bagosora,* Case N° ICTR-98-41-T (TC) Decision on Reconsideration of Order to reduce Witness List and on Motion for Contempt for Violation of that order of 1 march 2004 at para. 11.

under Rule 73 (C) should start to run on the day after the filing of the impugned decision. Accordingly, the Chamber denies the request for reconsideration of the Certification Decision of 21 September 2005 as there was no error made in computing the time-limits which thereby occasioned an injustice upon the Accused.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 12 October 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

## *Decision on Pauline Nyiramasuhuko's Urgent Motion to extend the time within which to file the expert report of Balibusta Maniaragaba 13 October 2005 (ICTR-97-21-T; Joint Case N° ICTR98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Time-limits to file expert witness report, Extension of time – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 73 (A) and 94 bis*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Motion to extend the Time within which to file the Expert Report of Proposed Expert Witness Balibutsa Maniaragaba, 22 September 2005 (ICTR-98-42)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "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 the "*Requête urgente de l'accusée Pauline Nyiramasuhuko en extension de délai aux fins de production du rapport d'expert Monsieur Balibutsa Maniaragaba*," filed on 6 October 2005 (the "Motion");

CONSIDERING :

The "Prosecutor's Response to the "*Requête Urgente de l'Accusée Pauline Nyiramasuhuko en Extension de Délais aux Fins de Production du Rapport d'expert Balibutsa Maniaragaba*", filed on 11 October 2005 (the "Prosecutor's Response");

That the Defence has indicated that it does not intend to file a reply;

NOTING the " Decision on Pauline Nyiramasuhuko's Motion to Extend the Time within which to File The Expert Report of Proposed Expert Witness Balibutsa Maniaragaba" issued on 22 September 2005 (the "Decision of 22 September 2005");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion, pursuant to Rule 73 (A), on the basis of the written briefs filed by the Parties.

**Submissions of the Parties**

*The Defence*

1. The Defence requests the Trial Chamber to accept the filing of the Expert Report of its proposed expert Balibutsa Maniaragaba on 6 October 2005. It recalls the Trial Chamber's Decision issued on 22 September 2005, according to which the Defence had the obligation to file the Expert Report of expert Maniaragaba within two weeks from the date of that decision. Accordingly, the Defence for Pauline Nyiramasuhuko considers that it has filed the expert report within the fixed timeframe.

2. However, if the Trial Chamber considers that the deadline expired on Wednesday 5 October 2005, the Defence moves the Trial Chamber to allow it an additional timeframe of less than 24 hours to file the proposed Expert Report of Mr. Maniaragaba. In support of its request, the Defence submits that it has only received the final version of the expert report on 5 October 2005 in the evening and has been able to read it only in the morning of 6 October 2005.

*The Prosecution*

3. The Prosecution notes that the initial motion of the Defence for an extension of time in which to file the Expert Report was already found late and that the Chamber said so in very strong terms in its Decision of 22 September 2005. The Prosecution further notes that the Trial Chamber had however, in its said Decision, granted the Defence of Pauline Nyiramasuhuko an extra two weeks from the date of that decision for the filing of the Expert Report, acting on the basis of its inherent jurisdiction and in the interests of justice.

4. In essence, the Prosecution submits that the party requesting the extension must show sufficient justification and that the Defence cannot be allowed to seek a further suspension of the time frames when such a request is already out of time.

5. Notwithstanding the foregoing, the Prosecution requests the Trial Chamber to exercise its discretion as to whether it would accept the Report of proposed Expert Witness Balibutsa Maniaragaba.

HAVING DELIBERATED

4* The Chamber has considered all the submissions of the Parties.

5. The Chamber recalls its decision of 22 September 2005 [1] in which it allowed the Defence for Pauline Nyiramasuhuko to file the Expert Report of its proposed Expert Witness Balibutsa Maniaragaba within two weeks from the date of that decision.

6. The Chamber points out that the timeframe of two weeks that it prescribed in the aforesaid decision amounts to 14 days which expired on Wednesday 5 October 2005. Given that the Defence filed the Report of the proposed Expert Witness Balibutsa Maniaragaba only on 6 October 2005, the Chamber finds such filing out of time and denies the extension of time requested by the Defence.

7. However, taking into account that the Report was filed together with this Motion, the Chamber, in the interests of justice *proprio motu* again, extends the time within which to file this Report to the time when it was filed together with this Motion on 6 October 2005. The Parties are advised to take note of the effective date of filing of the Report, which is 6 October 2005, and for those who wish to respond and have not done so, to do so in a timely fashion, in conformity with Rule 94 *bis*.

8. Finally, the Chamber issues a formal warning to the Defence for exceeding the timeframes again and this conduct should not be repeated.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety;

EXTENDS *proprio motu* the time of the filing of the Report of the proposed Expert Witness Balibutsa Maniaragaba to 6 October 2005;

ADVISES the Parties to take note of the effective date of filing and act diligently in conformity with Rule 94 *bis*;

ISSUES a formal warning to the Defence for the Accused Pauline Nyiramasuhuko.

Arusha, 13 October 2005.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

***

*The numbering is the work of the Tribunal. In order to ensure the coherence of the file, the authors have decided to leave the misnumbering.

[1] *The Prosecutor v. Nyiramasuhuko et al.,* ICTR-98-42-T, Decision on Pauline Nyiramasuhuko's Motion to extend the Time within which to file the Expert Report of Proposed Expert Witness Balibutsa Maniaragaba, 22 September 2005, para. 33.

## *Oral decision on Ntahobali's motion on the presence of defence investigators during proceedings in closed session 30 November 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Defence investigators present in the public gallery during proceedings in open session – Interpretation, Special court for Sierra Leon – Motion granted*

Mr. PRESIDENT :

Yes. Oral ruling, on the presence of Defence investigators in closed session :

"On the 28th of November 2005, this Chamber was seized with an oral motion from counsel for Ntahobali – the Accused Ntahobali, to allow the presence of Defence investigators in closed session. Learned Counsel submitted that the presence of a Defence investigator at all times, would enhance the speed of proceedings, because messages regarding further investigations and other matters coming up would not have to be passed on to him or her by another member of the Defence team.

2. Learned Counsel referred to the practice at the ICTY, to three recent decisions of this Tribunal and to a decision of the special court for Sierra Leon, which has allowed Defence investigators to follow, closely, session proceedings. He also submitted that Defence investigators are not members of the public, but of the Defence team, and stressed lead counsel's responsibility for the Defence team. Counsel for four more Defence teams supported the motion and requested the Trial Chamber to extend its decision to their Defence investigators.

Counsel for the Prosecution opposed the motion, since the presence of Defence investigators was unnecessary. He pointed out that there were three members of the Defence team present, and said that one of them could surely inform the Defence investigator should this become necessary. He further stressed that at this stage of the proceedings all investigations could be expected to have been completed. Also, the Prosecutor submitted that the Defence investigators might, then, be in contact with the remaining witnesses whose testimony might be tainted. He submitted that Defence investigators were not subject to Rule 47 of the Rules of Procedure and Evidence.

The Chamber has carefully considered the submissions made by the parties. It notes that there has been no submission by the Registry. The Chamber also notes that as

## *Décision orale sur la requête d'Arsene Shalom Ntahobali pour la présence des investigateurs de la Défense pendant les audiences à huis clos 30 novembre 2005 (ICTR-98-42-T)*

(Original : Anglais)

Chambre de première instance II

Juges : William H. Sekule, Président de chambre; Arlette Ramaroson; Solomy B. Bossa

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Enquêteurs de la défense présents aux débats dans la galerie du public lors d'audiences publiques – Interprétation, Cour spéciale de Sierra Léone – Requête acceptée*

M. LE PRÉSIDENT :

Décision orale concernant la présence des enquêteurs des équipes de la défense aux audiences à huis clos :

«Le 28 novembre 2005, la Chambre de céans a été saisie d'une requête orale du Conseil de Ntahobali, demandant la présence des enquêteurs de l'équipe de la défense aux audiences à huis clos. Le Conseil de la défense a déclaré que la présence des enquêteurs de la défense à tout moment permettrait d'accélérer les procédures, parce que les messages concernant de nouvelles enquêtes ou d'autres questions qui sont soulevées ne peuvent pas être communiqués aux enquêteurs par un autre membre des équipes de la défense.

2. Le Conseil de la défense a parlé de la pratique au TPIY, il a parlé également des trois décisions de ce Tribunal et de la Cour spéciale de Sierra Léone, qui ont permis aux enquêteurs des équipes de la défense de suivre les audiences à huis clos. Il a également soutenu que les enquêteurs des équipes de la défense ne sont pas membres du public mais des équipes de la défense; et il a souligné la responsabilité du Conseil principal dans le cadre de la gestion des équipes de la défense.

Les Conseils des quatre autres équipes de la défense ont soutenu la requête et ont demandé à la Chambre d'étendre sa décision à leurs enquêteurs. Le Procureur s'est opposé à la requête, étant donné que la présence des enquêteurs de la défense n'était pas nécessaire. Il a indiqué qu'il y avait trois membres des équipes de la défense présents et que l'un des représentants pouvait informer les enquêteurs si cela s'avérait nécessaire. Il a, par ailleurs, indiqué qu'à ce stade des procédures, toutes les enquêtes devraient être terminées. Le Procureur a également fait valoir que les enquêteurs de la défense peuvent être en contact avec le reste des témoins dont les dépositions pourraient être influencées. Il a estimé que les enquêteurs n'étaient pas subordonnés aux dispositions de l'Article 47 du Règlement.

La Chambre a examiné les arguments des différentes parties, elle note que le Greffe n'a fait aucune observation. La Chambre note également qu'à date, les enquêteurs de

of now, Defence investigators have been present in the public gallery during proceedings in open session. The Chamber, therefore, is of the opinion that the presence of the Defence investigators concerned during the proceedings in open and closed session may assist in conducting proceedings efficiently and swiftly. The Chamber thus grants the oral motion, and allows the Defence investigators to be present during proceedings conducted in both open and closed sessions.

If the Defence investigators are sitting in the public gallery, on going into closed session, they may remain when the public is taken out. This is the ruling of the Trial Chamber."

[Signed] : Unspecified

***

la défense participent aux débats dans la galerie du public, dans le cas des audiences publiques. La Chambre estime donc que la présence des enquêteurs de la défense concernés, pendant les débats en audience en public et en audience à huis clos, pourrait contribuer à la bonne conduite des procédures. La Chambre fait donc droit à la requête orale et permet aux enquêteurs de la défense d'être présents aux audiences, à la fois publiques et à huis clos.

Si les enquêteurs de la défense sont installés dans la galerie du public lorsque le huis clos est décrété, ils peuvent rester dans la galerie lorsque le public est exclu. Voilà donc la teneur de la décision de la Chambre.»

[Signé] : Non signé

***

## *Scheduling Order*
## *Rule 54 of the Rules of Procedure and Evidence*
## *14 December 2005 (ICTR-98-42-T)*

(Original : English)

Trial Chamber II

Judge : William H. Sekule, Presiding Judge

*Joseph Kanyabashi, Elie Ndayambaje, Pauline Nyiramasukuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo – Schedule, Disclosure obligations of the Defence, List of defence witnesses, Will-say statements for witnesses, Reduction of the number of witnesses*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 54 and 73* ter *(D)*

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

SITTING as Trial Chamber II (the "Chamber"), composed of Judge William H. Sekule, Presiding, pursuant to Rule 54 of the Rules of Procedure and Evidence (the "Rules"), in consultation with Judge Arlette Ramaroson and Judge Solomy Balungi Bossa;

NOTING that the proceedings in this case shall resume on Monday 23 January 2006 with the continuation of the Defence case for Arsène Shalom Ntahobali;

RECALLING the directions issued by the Chamber at the hearing of 13 December 2005;

HEREBY ORDERS

1. The Defence for Ntahobali to continue to comply with all its disclosure obligations in a timely fashion;

2. The Registry to ensure that all subsequent filing by the Defence for Ntahobali are translated as a matter of priority;

3. The Defence for Ntahobali to file with the Registry its list of witnesses to be heard during the next trial session no later than Thursday 23 December 2005, indicating for each witness the number of will-say statements and corrigendum thereof with the corresponding filing dates for purposes of clarity;

4. The Defence for Ntahobali to ensure that its Defence will be completed in a timely fashion;

5. The Defence for Ntahobali and for Nyiramasuhuko to liaise with respect to the scheduling of the hearing of Witness Maniaragaba and to keep the Chamber informed;

6. The Defence for Sylvain Nsabimana to continue its disclosure obligations in a timely fashion with a view to being ready to start their Defence case immediately after the close of the case for Ntahobali;

7. The Defences for Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje to file concise, precise and complete will-say statements for the witnesses they intend to call;

8. The Defences for Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje to seriously review their witness list with a view to reducing the total number of witnesses as well as reducing the number of witnesses who are being called to prove the same facts and to file an updated precise list of witnesses by Monday 23 January 2006 pursuant to Rule 73 *ter* (D) of the Rules.

Arusha, 14 December 2005.

[Signed] : William H. Sekule

***

# *The Prosecutor v. Gaspard KANYARUKIGA*

# Case N° ICTR-2002-78

***Case History***

- Name : KANYARUKIGA
- First Name : Gaspard
- Date of Birth : 1945
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Businessmen in Kigali and Kivumu *commune*

- Date of Indictment's Confirmation : 4 March 2002
- Counts : Genocide, Complicity in Genocide, Conspiracy to Commit Genocide, and Crimes against Humanity for Extermination
- Date and Place of Arrest : 16 July 2004 in South Africa
- Date of Transfer : 19 July 2004
- Date of Initial Appearance : 22 July 2004
- Pleading : Not guilty
- Date Trial Began : 31 August 2009

# *Le Procureur c. Gaspard KANYARUKIGA*

# Affaire N° ICTR-2002-78

***Fiche technique***

- Nom : KANYARUKIGA
- Prénom : Gaspard
- Date de naissance : 1945
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Homme d'affaires à Kigali et Kivumu commune
- Date de la confirmation de l'acte d'accusation : 4 mars 2002
- Chefs d'accusation : Génocide, complicité dans le génocide, entente en vue de commettre le génocide et crimes contre l'humanité-extermination
- Date et lieu de l'arrestation : 16 juillet 2004, en Afrique du Sud
- Date du transfert : 19 juillet 2004
- Date de la comparution initiale : 22 juillet 2004
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 31 août 2009

## *Decision on prosecution motion for protective measures 3 June 2005 (ICTR-2002-78-I)*

(Original : English)

Trial Chamber I

Judge : Erik Møse

*Gaspard Kanyarukiga – Protection measures for Prosecution witnesses : Delaying disclosure of the identity of witnesses to the Defence, Permanent non-disclosure of the witnesses' identity to the public, Diligence of Defence Counsel in notifying and reminding the Accused not to disclose witnesses' identities, Necessity of the proof of a specific showing of misconduct by the Accused – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 69 (C) and 73 (A)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and Their Family Members, 20 March 2001 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 27 March 2001 (ICTR-98-42); Trial Chamber,* The Prosecutor v. Tharcisse Muvunyi et al., *Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 25 April 2001 (ICTR-2000-55); Trial Chamber,* The Prosecutor v. Samuel Musabyimana, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 19 February 2002 (ICTR-2001-62); Trial Chamber,* The Prosecutor v. Eliezer Niyitegeka, *Decision (Defence Motion for Protective Measures for Defence Witnesses), 14 August 2002 (ICTR-96-14); Trial Chamber,* The Prosecutor v. Hormisdas Nsengimana, *Decision on Prosecutor's Motion for Protective Measures for Witnesses, 2 September 2002 (ICTR-2001-69); Trial Chamber,* The Prosecutor v. Emmanuel Rukundo, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 24 October 2002 (ICTR-2001-70); Trial Chamber,* The Prosecutor v. Protais Zigiranyirazo, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 25 February 2003 (ICTR-2001-73); Trial Chamber,* The Prosecutor v. Sylvestre Gacumbitsi, *Decision on Prosecution Motion for Protective Measures for Victims and Witnesses, 20 May 2003 (ICTR-2001-64); Trial Chamber,* The Prosecutor v. Athanase Seromba, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003 (ICTR-2001-66); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The

Prosecutor v. Théoneste Bagosora et al., *Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Decision on the Defence Motion for Protection of Witnesses, 15 September 2003 (ICTR-2001-71); Trial Chamber,* The Prosecutor v. Jean-Baptiste Gatete, *Decision on Prosecution Request for Protection of Witnesses, 11 February 2004 (ICTR-2000-61); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision on Prosecution Request for Protection of Witnesses, 4 March 2004 (ICTR-2001-76); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Ntabakuze Motion for Protection of Witnesses, 15 March 2004 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision on Defence Request for Protection of Witnesses, 25 August 2004 (ICTR-2001-76)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Judge Erik Møse, designated by Trial Chamber I in accordance with Rule 73 (A) of the Rules of Procedure and Evidence[1];

BEING SEIZED OF the Prosecution "Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 28 April 2005;

CONSIDERING that the Defence has filed no response;

HEREBY DECIDES the motion.

1. The Prosecution requests an order for the protection of its witnesses, arguing that they face a real and substantial risk of harassment and intimidation. This risk is said to affect witnesses residing inside or outside Rwanda, whether in Africa or elsewhere in the world. Voluminous documentation is annexed to the motion in support of this claim. The measures requested include delaying disclosure of the identity of witnesses to the Defence until twenty-one days before their testimony (ie. "rolling disclosure"); permanent non-disclosure of the witnesses' identity to the public; and requiring that protected information only be shared with the Accused while in the presence of Defence counsel.

2. Measures for the protection of witnesses are granted on a case by case basis. The jurisprudence of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia requires that the witnesses for whom protective measures are sought must have a real fear for their safety or that of their family, and that there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. A further consideration is trial fairness, which favours similar or identical protection measures for Defence and Prosecution witnesses[2].

[1] The motion was addressed to Trial Chamber III, perhaps because the initial appearance of the Accused was before a Judge of that Trial Chamber. However, the case was subsequently assigned to Trial Chamber I for determination of pre-trial matters and is, accordingly, properly decided by this Chamber.

[2] *Simba,* Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 5; *Bagosora et al.*, Decision on Ntabakuze Motion for Protection of Witnesses (TC), 15 March 2004, p. 2; *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, p. 2; *Bagosora, et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, p. 2; *Niyitegeka*, Decision (Defence Motion for Protective Measures for Defence Witnesses) (TC), 14 August 2002, p. 4.

3. In light of the Prosecution submissions, the Chamber follows prior decisions in finding that witnesses, wherever they may reside, do justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security[3].

4. Most of the measures requested by the Prosecution are well-established and uncontroversial. There are two exceptions. Proposed measure "xi" is a prohibition on

> the Accused both individually or through any person working for the Defence, from personally possessing any material that contains any Identifying Information, including but not limited to, any copy of a witness statement even if the witness statement is in redacted form, unless the Accused is, at the time in possession, in the presence of counsel.

The aim of this prohibition is said to be to ensure that protected information is not transmitted between accused persons at the United Nations Detention Facility (UNDF) or elsewhere. While the Chamber is concerned by the examples cited in the motion, it is not persuaded that the measure would achieve the desired objective. A more effective remedy is the diligence of Defence Counsel in notifying and reminding the Accused that witness identities may not be shared with other accused persons, and that any violation of this requirement is a serious matter. Furthermore, depriving the Accused of the statements of witness's against him could interfere with the preparation of the defence. Previous decisions have rejected this measure in the absence of a specific showing of misconduct by the Accused.[4]

5. Proposed measure "iv" is that the witness's identity be disclosed to the Defence twenty-one days before the date that the witness is expected to testify. The Prosecution asserts that this "rolling disclosure" has crystallised as the ordinary practice of the Tribunal.[5] The Chamber disagrees. Numerous decisions have required that the identity of all witnesses disclosed before the start of trial, particularly in the trials of a single Accused, where there is little likelihood of a long delay between disclosure

[3] *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 6; *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, para. 14; *Musabyimana*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 19 February 2002; *Nyiramasuhuko et al.,* Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their Family Members (TC), 20 March 2001, para. 13.

[4] See *e.g*. *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para. 8; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004, para. 8; *Gacumbitsi*, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 19; *Zigiranyirazo*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 25 February 2003, paras. 15-16; *Rukondo*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 24 October 2002; *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002 para. 14; *Muvunyi et al.*, Decision on the Prosecutor's Motion for Orders for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (TC), 25 April 2001, para. 27; *Nyiramasuhuko et al.,* Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 27 March 2001, para. 24.

[5] Motion, para. 31.

of the witness's identity and their testimony.[6] The Chamber considers, in light of Rule 69 (C), that an appropriate deadline is that witness identities, and unredacted witness statements, be disclosed to the Defence thirty days before the start of trial.

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that :

6. The Prosecution shall be permitted to designate pseudonyms for each of the witnesses for whom it claims the benefits of this Order, for use in trial proceedings, and during discussions between the Parties in proceedings.

7. Names, addresses, whereabouts, and other information concerning the protected witnesses shall be sealed by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public.

8. Names, addresses, locations and other identifying information of the protected witnesses which may appear in the Tribunal's public records shall be expunged.

9. The names and identities of the protected witnesses shall be forwarded from the Prosecution to the Registry in confidence, and shall not be disclosed to the Defence unless otherwise ordered.

10. No person shall make audio or video recordings or broadcasts, or take photographs or make sketches of protected witnesses, in relation to their testimony, without leave of the Chamber or the witness.

11. The Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to any contact any protected witness and, if the witness consents, the Prosecution shall facilitate such contact.

12. The Defence team in this case shall keep confidential to itself any information identifying a witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information.

13. The Defence shall provide the Registry with a designation of all persons working on the Defence team in this case who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any such person leaving the Defence team and to confirm in writing that such person has remitted all material containing identifying information.

[6] *Simba,* Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003 ("Seromba Decision"); *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, p. 7. See also *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003 (requiring immediate disclosure of identifying information of all Prosecution witnesses). Similarly, disclosure of the identity of all Defence witnesses is frequently required before the start of the Defence case. *Ndindabahizi,* Decision on the Defence Motion for Protection of Witnesses (TC), 15 September 2003, p. 4; *Bagosora et al.,* Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, p. 4. These decisions were all rendered after 6 July 2002 when Rule 69 (C), which had formerly required disclosure before trial, was amended to permit rolling disclosure at the Chamber's discretion. The numerous decisions prior to that date requiring disclosure before trial are omitted.

14. The Prosecution may withhold disclosure to the Defence of the identity of the witness and temporarily redact their names, addresses, locations and other identifying information from material disclosed to the Defence, in accordance with paragraph 11 below.

15. The information withheld in accordance with paragraph 10 shall be disclosed by the Prosecution to the Defence thirty days prior to commencement of the Prosecution case, in order to allow adequate time for the preparation of the Defence pursuant to Rule 69 (C) of the Rules.

Arusha, 3 June 2005.

[Signed] : Erik Møse

***

# *The Prosecutor v. Edouard KAREMERA, Mathieu NGIRUMPATSE and Joseph NZIRORERA*

## Case N° ICTR-98-44

***Case History : Edouard Karemera***

- Name : KAREMERA
- First name : Edouard
- Date of birth : Unknown
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Minister of Interior of interim Government and Vice-President of MRND
- Date of Indictment's Confirmation : 29 August 1998 [1]
- Counts : Genocide, Conspiracy to Commit Genocide and Complicity in 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 : 5 June 1998, in Togo
- Date of Transfer : 10 July 1998
- Date of Initial Appearance : 21 March 2005
- Date Trial Began : 19 September 2005 (joint. trial, *Karemera* and al., 3 accused, in progress)

***

***Case History : Mathieu Ngirumpatse***

- Name : NGIRUMPATSE
- First Name : Mathieu
- Date of Birth : Unknown
- Sex : Male
- Nationality : Rwandan

[1] The text of the indictment is reproduced in the *1998 Report*, p. 868. The text of the Decision to confirm the indictment is reproduced in the *1998Report*, p. 950.

# *Le Procureur c. Edouard KAREMERA, Mathieu NGIRUMPATSE et Joseph NZIRORERA*

## Affaire N° ICTR-98-44

***Fiche technique : Edouard Karemera***

- Nom : KAREMERA
- Prénom : Edouard
- Date de naissance : Inconnue
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Ministre de l'intérieur du gouvernement intérimaire et vice-président du MRND
- Date de la confirmation de l'acte d'accusation : 29 août 1998 [1]
- Chefs d'accusation : Génocide, entente en vue de commettre le génocide et complicité de génocide, incitation publique et directe 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 : 5 juin 1998, au Togo
- Date du transfert : 10 juillet 1998
- Date de la comparution initiale : 21 mars 2005
- Date du début du procès : 19 septembre 2005 (procès joint, Karemera et al., 3 accusés, procès en cours)

***

***Fiche technique : Mathieu Ngirumpatse***

- Nom : NGIRUMPATSE
- Prénom : Mathieu
- Date de naissance : Inconnue
- Sexe : Masculin
- Nationalité : Rwandaise

[1] Le texte de cet acte d'accusation est reproduit dans le *Recueil 1998*, p. 868. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1998*, p. 950.

- Former Official Function : Director General of the Ministry for Foreign Affairs and President of MRND
- Date of Indictment's Confirmation : 6 April 1999 [2]
- Counts : Genocide, Conspiracy to Commit Genocide and Complicity in Genocide, Crimes against Humanity and Serious Violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

- Date and Place of Arrest : 11 June 1998, in Mali
- Date of Transfer : 10 July 1998
- Date of Initial Appearance : 21 March 2005
- Date Trial Began : 19 September 2005 (joint trial Karemera and al., 3 accused in progress)

***

***Case History : Joseph Nzirorera***

- Name : NZIRORERA
- First Name : Joseph
- Date of Birth : 1950
- Sex : Male
- Nationality : Rwandan
- Former Official Function : President of the National Assembly and Secretary-General of the MRND
- Date of indictment's Confirmation : 6 April 1999
- Counts : Genocide, Complicity in Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Genocide, Complicity in Genocide, Crimes against Humanity and Serious Violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest : 5 June 1998, in Benin
- Date of transfer : 10 July 1998
- Date of initial appearance : 21 March 2005
- Pleading : Not guilty
- Date Trial Began : 19 September 2005, joint trial *Karemera and al.* (3 accused)

[2] The text of the indictment is reproduced in the *1995-1997 Report*, p. 8. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 14.

- Fonction occupée au moment des faits incriminés : Directeur général au ministère des affaires étrangères et président du MRND
- Date de la confirmation de l'acte d'accusation : 6 avril 1999 [2]
- Chefs d'accusation : Génocide, entente en vue de commettre le génocide et complicité de 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 juin 1998, au Mali
- Date du transfert : 10 juillet 1998
- Date de la comparution initiale : 21 mars 2005
- Date du début du procès : 19 septembre 2005 (procès joint *Karemera et al.*, 3 accusés, procès en cours)

***

***Fiche technique : Joseph Nzirorera***

- Nom : NZIRORERA
- Prénom : Joseph
- Date de naissance : 1950
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Président de l'assemblée nationale et secrétaire général du MRND
- Date de la confirmation de l'acte d'accusation : 6 avril 1999
- Chefs d'accusation : Génocide, complicité dans le génocide, entente en vue de commettre le génocide, incitation publique et directe 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 : 5 juin 1998, au Bénin
- Date du transfert : 10 juillet 1998
- Date de la comparution initiale : 21 mars 2005
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 19 septembre 2005 (procès joint *Karemera et al.,* 3 accusés, procès en cours)

[2] Le texte de cet acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 8. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 14.

Augustin Bizimana, Félicien Kabuga and Callixte Nzabomina were severed from the original Indictment in 2003.

Since 8 October 2003, Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba were the remaining co-Accused in the case number ICTR-98-44.

On the 9th June 2005, a new indictment was emitted for André Rwamakuba who was consequently severed with the new ICTR number ICTR-9844C. From the severance decision of the 14th February 2005, the decisions related to André Rwamakuba are exclusively in its file.

Augustin Bizimana, Félicien Kabuga et Callixte Nzabomina ont été disjoints au cours de l'année 2003.

A partir du 8 octobre 2003, seuls restent poursuivis sous le numéro d'affaire ICTR-98-44, Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba.

Le 9 juin 2005, un nouvel acte d'accusation fut émis pour André Rwamakuba qui se vit attribuer comme nouveau numéro de dossier ICTR-98-44C. A partir de la décision de disjonction du 14 février 2005, toutes les ddécisions concernant André Rwamakuba se trouvent exclusivement dans son dossier.

## *Decision Granting Extension of Time Rule 73 (E) of the Rules of Procedure and Evidence 5 January 2005 (ICTR-98-44-R73)*

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba – Severance of an accused, Separate amended indictments – Extension of time, Reply to Prosecution's Motion, Departing delay on the date on which Counsel received the Motion, Translation – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73 and 73 (E)*

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

SITTING as Trial Chamber III composed of Judge Dennis C. M. Byron;

CONSIDERING André Rwamakuba's Motion requesting extension of time to respond to Prosecution Motion to sever Rwamakuba and for leave to file separate amended indictments against Rwamakuba and against Karemera, Ngirumpatse and Nizorera, or alternatively for leave to amend the indictment against Karemera, Ngirumpatse, Nzirorera and Rwamakuba ("Defence"), filed on 29 December 2004;

CONSIDERING that the Prosecution has not filed any response within the time-limit prescribed by the Rules;

HEREBY DECIDES the Motions, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

1. On 20 December 2004, the Prosecution filed a "Consolidated Motion to Sever Rwamakuba from the Joint Indictment and to Try Him Separately, For Leave to a Separate Amended Indictment against Rwamakuba, and For Leave to File a Separate Amended Indictment Against Karemera, Ngirumpatse and Nizorera", or alternatively, "for Leave to Amend the Indictment against Karemera, Ngirumpatse Nzirorera and Rwamakuba" ("Prosecution Motion").

2. The Defence request an extension of time until 10 January 2005 to respond to the Prosecution Motion. The Defence recognizes that, on 20 December 2004, the Prosecution send it a document, by email, described as "a preview and courtesy copy" of the "latest motion" seeking severance of Rwamakuba and amendment of the indictment. However, in the Defence's view, since that copy was not intended to constitute official service, as indicated by the Prosecution in its email, it cannot be considered as a motion 'received within the meaning of the Rules". Up to and including

## *Décision portant prorogation de délai Article 73 (E) du Règlement de procédure et de preuve 5 janvier 2005 (ICTR-98-44-R73)*

(Original : Anglais)

Chambre de première instance III

Juge : Dennis C. Byron, Président

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba – Disjonction d'un accusé, Actes d'accusation amendés distincts – Prorogation du délai, Réponse à la requête du Procureur, Départ du délai à la réception de la requête par le conseil de la défence, traduction – Requête acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73 et 73 (E)*

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

SIÉGEANT en la Chambre de première instance III et en la personne du juge Dennis C. M. Byron,

VU la requête d'André Rwamakuba tendant à la prorogation du délai imparti pour répondre à celle formée par le Procureur aux fins d'obtenir la disjonction de l'instance de Rwamakuba et l'autorisation de déposer un acte d'accusation modifié distinct contre lui et un autre contre Karemera, Ngirumpatse et Nzirorera ou, à défaut, de modifier l'acte d'accusation dressé contre Karemera, Ngirumpatse, Nzirorera et Rwamakuba (la «Défense»), déposée le 29 décembre 2004,

ATTENDU que le Procureur n'a pas déposé de réponse dans le délai prescrit par le *Règlement de procédure et de preuve* (le «Règlement»),

STATUE sur ladite requête, conformément à l'article 73 du Règlement.

1. Le 20 décembre 2004, le Procureur a déposé des écritures qu'il a demandé de considérer comme une «Requête actualisée du Procureur aux fins de faire disjoindre la cause de Rwamakuba de celles des autres coaccusés pour le juger séparément et d'obtenir l'autorisation de déposer une acte d'accusation modifié distinct contre lui et un autre contre Karemera, Ngirumpatse et Nzirorera» ou, à défaut, comme une «Requête du Procureur en modification de l'acte d'accusation établi contre Karemera, Ngirumpatse, Nzirorera et Rwamakuba» (la «Requête du Procureur»).

2 La Défense demande de proroger jusqu'au 10 janvier 2005 le délai imparti pour répondre à la requête du Procureur. Elle reconnaît que le 20 décembre 2004, le Procureur lui a envoyé par courriel un document qualifié d'«exemplaire préliminaire de convenance» de sa «dernière requête» en disjonction de la cause de Rwamakuba et en modification de l'acte d'accusation. Toutefois, la communication de cet exemplaire n'ayant pas été envisagée comme une notification officielle, d'après les renseignements fournis par le Procureur dans son message électronique, la Défense estime que

23 December 2004,the Defence claims that contends that a responding party cannot be expected to file a reply until it has received a signed and stamped or "otherwise unambiguously filed" motion. The Defence indicates further that, as from 24 December 2004 and up until 5 January 2005, due to the Christmas holiday period, neither Lead nor Co-Counsel are present in the locations where they would normally receive notice of official filing by fax. The Defence emphasizes the significant matter raised by the Prosecution Motion and concludes that time is principally required to review the position among Counsel and with the client.

3. The Chamber recalls that, pursuant to Rule 73 (E) of the Rules and in principle, a responding party has to file any reply within five days "from the date on which Counsel *received the Motion*" (emphasis added).

4. The Chamber observes that although the Defence was informed, by email sent on 20 December 2004 by the Registrar, of the filing of the Prosecution Motion, the hard copies of the annexes thereto (mainly the supporting material) were only recently delivered to the Defence. It is therefore only a few days ago that the Defence was able to compare those documents with the allegations in the proposed amended indictments. The Chamber notes further that the Decision of 7 December 2004 authorizes the Defence teams, if they need the French Translation of the Prosecution Motion and Annexes thereto, to file their responses five days from the date of the service of the translation. Until now, it appears that the translation of those documents is not yet available to the francophone Defence. The denial of the Defence Motion is therefore not likely to save any time.

5. Considering those factual particular circumstances of the case, the Chamber considers that the extension requested shall not seriously affect the schedule of the Trial's beginning. The Chamber is of the view that in the interest of justice and fair trial, the motion should be granted.

FOR THE ABOVE REASONS,

THE CHAMBER

GRANTS the motion

AND AUTHORIZES Defence Counsel for Rwamakuba to file its Response no latter than 10 January 2005.

Arusha, 5 January 2005, done in English.

[Signed] : Dennis C. Byron

***

le document ne peut être considéré comme une «"requête reçue" au sens du Règlement». La Défense déclare qu'au 23 décembre 2004 elle ne savait pas si le Procureur avait officiellement dépos6 la requête prévue. Selon elle, on ne saurait s'attendre à ce que la partie défenderesse produise une réponse tant qu'elle n'a pas reçu une requête revêtue de la signature et du sceau du demandeur ou «déposée sans ambiguïté de toute autre manière». La Défense indique en outre que du 24 décembre 2004 au 5 janvier 2005, en raison des vacances de Noël, ni le conseil principal ni le co-conseil ne se trouveront là où ils doivent en principe recevoir, par télécopie, notification du dépôt officiel de la requête. Elle souligne l'importance de la question soulevée par la requête du Procureur et conclut que les conseils ont absolument besoin de temps pour examiner la situation entre eux et avec leur client.

3. La Chambre rappelle qu'aux termes de l'article 73 (E) du Règlement et en principe, la partie défenderesse doit déposer sa réponse au plus tard cinq jours «après la date à laquelle elle a *reçu la requête*» (non souligné dans le texte).

4. Elle relève que même si le Greffier a informé la Défense du dépôt de la requête du Procureur par courriel envoyé le 20 décembre 2004, les tirages papier des annexes de ladite requête (qui sont surtout des pièces justificatives) n'ont été communiqués à la Défense que tout récemment. Il y a donc quelques jours seulement que la Défense a pu comparer la teneur de ces documents avec les allégations portées dans les projets d'acte d'accusation modifié. La Chambre relève en outre que la décision du 7 décembre 2004 autorise les équipes de défense, si elles ont besoin de la version française de la requête du Procureur et de ses annexes, à déposer leurs réponses cinq jours après la date de la communication de la traduction. À ce jour, il s'avère que la traduction de ces documents n'a toujours pas été communiquée aux équipes de défense francophones. Par conséquent, le rejet de la requête de la Défense n'est pas de nature à faire gagner du temps.

5. Vu ces circonstances factuelles particulières de l'espèce, la Chambre considère que la prorogation de délai sollicitée n'aura pas de graves effets sur la fixation de la date d'ouverture du procès. Qui plus est, elle estime que l'intérêt de la justice et le souci de l'équité du procès commandent de faire droit à la requête.

PAR CES MOTIFS,

LE TRIBUNAL

FAIT DROIT à la requête

ET AUTORISE le conseil de Rwamakuba à déposer sa réponse au plus tard le 10 janvier 2005.

Arusha, le 5 janvier 2005.

[Signé] : Dennis C. Byron

***

## *Order for the Transfer of Detained Witnesses from Rwanda Rule 90* bis *of the Rules of Procedure and Evidence 9 January 2005 (ICTR-98-44C-R90bis)*

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba – Detained witnesses, Transfer of Witnesses, Conditions to authorize a transfer of witness, United Nations Detention Unit*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73 (A), 90* bis*, 90* bis *(A) and 90* bis *(B)*

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, ("Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules");

BEING SEIZED of the "Defence Motion for Order for Transfer of Witnesses Detained in Rwanda", pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence ("Motion"), filed on 3 January 2006;

NOTING the resumption of the present trial scheduled on 16 January 2005;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules :

### INTRODUCTION

1. The Defence requests the Chamber, pursuant to Rule 90 *bis* of the Rules, to order the temporary transfer of Witnesses with the pseudonyms 7.3, 4.16 and 9.22 from Rwanda, where they are currently detained, to the United Nations Detention Unit (UNDF) in Arusha, Tanzania, so that they can testify in the present case.

### DELIBERATIONS

2. Rule 90 *bis* (A) of the Rules gives the Chamber power to make an order to transfer a detained person to the Detention Unit of the Tribunal if his or her presence has been requested. Rule 90 *bis* (B) lays out the conditions to be met, as shown by the applicant, before such an order can be made :

> 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;

3. The Defence has exhibited a letter from the Minister of Justice in Rwanda dated 28 December 2005 confirming the availability of Witnesses 7.3, 4.16 and 9.22, amongst others, to testify during the indicated period of the upcoming trial session, which is from 16 January 2006 to 10 February 2006. The Chamber is therefore satisfied that these witnesses are not required for criminal proceedings in Rwanda during that time and that the witnesses' presence at the Tribunal does not extend the period of their detention in Rwanda.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS the Registar, pursuant to Rule 90 *bis* of the Rules, to temporarily transfer Detained Witnesses known by the pseudonyms 7.3, 4.16 and 9.22 to the UNDF facility in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after the individual's testimony has ended.

REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registrar in the implementation of this Order.

DIRECTS the Registrar to cooperate with the authorities of the Governments Rwanda and Tanzania; Ensure proper conduct during transfer and during detention of the witness at the UNDF; Inform the Chamber of any changes in the conditions of detention determined by the Rwanda authorities and which may affect the length of stay in Arusha.

Arusha, 9 January 2006, done in English.

[Signed] : Dennis C. M. Byron

***

## *Decision on Time-limit to File a Response Rule 73 (E) of the Rules of Procedure and Evidence 17 January 2005 (ICTR-98-44-R73)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba – Severance of an accused, Separate amended indictments – Extension of time, Reply to Prosecution's Motion, Departing delay on the date on which Counsel received the Motion, Notification – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73 and 73 (E)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"), SITTING as Trial Chamber III composed of Judge Dennis C. M. Byron;

CONSIDERING Mathieu Ngirumpatse's Motion requesting extension of time to respond to Prosecution Motion to sever Rwamakuba and for leave to file separate amended indictments against Rwamakuba and against Karemera, Ngirumpatse and Nzirorera, or alternatively for leave to amend the indictment against Karemera, Ngirumpatse, Nzirorera and Rwamakuba ("Defence"), filed on 7 January 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

1. On 20 December 2004, the Prosecution filed a Motion entitled "Consolidated Motion to Sever Rwamakuba from the Joint Indictment and to Try Him Separately, For Leave to a Separate Amended Indictment against Rwamakuba, and For Leave to File a Separate Amended Indictment Against Karemera, Ngirumpatse and Nzirorera, or alternatively, Prosecutor's Motion for Leave to Amend the Indictment against Karemera, Ngirumpatse, Nzirorera and Rwamakuba" ("Prosecution Motion").
2. The Defence requests an extension of time of two judicial days from the receipt of the said Prosecution Motion to file its response. The Defence claims that Prosecution Motion has not been served upon it officially or unofficially. The Defence contends that it has knowledge of the said motion only from Joseph Nzirorera's Response to the Prosecution Motion filed on 4 January 2005.
3. The Chamber recalls that, pursuant to Rule 73 (E) of the Rules and in principle, a responding party has to file any reply within five days "from the date on which Counsel *received the motion*" (emphasis added).

## *Décision relative à la requête en prorogation du délai imparti pour déposer une réponse Article 73 (E) du Règlement de procédure et de preuve 17 janvier 2005 (ICTR-98-44-R73)*

(Original : Anglais)

Chambre de première instance III

Juge : Dennis C. Byron, Président de Chambre

*Edouard Karemera, Mathieu Ngriumpatse, Joseph Nzirorera et André Rwamakuba – Disjonction d'un accusé, Actes d'accusation amendés distincts – Prorogation du délai, Réponse à la requête du Procureur, Départ du délai à la réception de la requête par le conseil de la défence, Notification – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73 et 73 (E)*

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

SIÉGEANT en la Chambre de première instance III représentée par le juge Dennis M. Byron,

VU la requête en prorogation du délai imparti pour répondre à la requête déposée par le Procureur aux fins de faire disjoindre la cause de Rwamakuba de celle des coaccusés et d'obtenir l'autorisation de déposer un acte d'accusation modifié distinct contre Rwamakuba et un autre contre Karemera, Ngirurnpatse et Nzirorera ou, à défaut, d'obtenir l'autorisation de modifier l'acte d'accusation établi contre Karemera, Ngirumpatse, Nzirorera et Rwamakuba, déposée par Mathieu Ngirumpatse le 7 janvier 2005,

STATUE sur ladite requête en vertu de l'article 73 du *Règlement de procédure et de preuve* (le «Règlement»).

1. Le 20 décembre 2004, le Procureur a déposé des écritures intitulées *Requête actualisée du Procureur aux fins de faire disjoindre la cause de Rwamakuba de celles des autres coaccusés pour le juger séparément et d'obtenir l'autorisation de déposer un acte d'accusation modifié distinct contre lui et un autre contre Karemera, Ngirumpatse et Nzirorera ou* à *défaut, Requête du Procureur en modification de l'acte d'accusation établi contre Karemera, Ngirumpatse, Nzirorera et Rwamakuba* (la «requête du Procureur»).

2. La Défense demande à la Chambre de proroger de deux jours d'audience à compter de la date à laquelle elle aura reçu la requête du Procureur, le délai imparti pour déposer sa réponse. Elle fait valoir qu'elle n'a été notifiée ni officiellement, ni officieusement de la requête du Procureur, dont elle n'a eu connaissance qu'au moment où la réponse de Joseph Nzirorera à ladite requête a été déposée le 4 janvier 2005.

3. La Chambre rappelle qu'aux termes de l'article 73 (E) du Règlement et en principe, la partie défenderesse dépose sa réponse au plus tard cinq jours «après la date à laquelle *elle a reçu la requête*»(non souligné dans l'original).

4. The Chamber notes that, on 10 January 2005, the Prosecution Motion and Annexes thereto have been served to the Defence. The Chamber observes also that, within five days from the date on which the Counsel received the Prosecution Motion, on 14 January 2005, the Defence filed its response to the said Motion. Accordingly, the Chamber is of the view that no extension of time is required in the present case.

FOR THE ABOVE REASONS,

THE CHAMBER DISMISSES the motion.

Arusha, 17 January 2005, done in English.

[Signed] : Dennis C. M. Byron

***

4. La Chambre relève que la requête du Procureur et ses annexes ont été notifiées à la Défense le 10 janvier 2005 et que cinq jours après cette date, soit le 14 janvier 2005, la Défense a déposé sa réponse. Elle est donc d'avis qu'en l'occurrence, il n'est pas nécessaire de proroger le délai de réponse.

PAR CES MOTIFS, LE TRIBUNAL

REJETTE la requête de la Défense.

Arusha, le 17 janvier 2005.

[Signé] : Dennis C. Byron

***

## *Decision Granting Time-limit to File a Reply to Defence Responses Rule 73 of the Rules of Procedure and Evidence 25 January 2005 (ICTR-98-44-R73)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba – Time-limit to file a reply to defence responses, Technical problems, Interest of justice, Fair trial – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 73*

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

SITTING as Trial Chamber III composed of Judge Dennis C. M. Byron;

CONSIDERING the "Prosecutor's Request for Extension of Time to File a Reply to Nzirorera's Response to Motion of 17 December 2004 to Sever and for Leave to Amend" ("Prosecution Motion"), filed on 13 January 2005;

CONSIDERING that the Defence for Ngirumpatse, the Defence for Nzirorera and the Defence for Rwamakuba have not filed any response to the Prosecution Motion within the time-limit prescribed by the Rules;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

1. On 20 December 2004, the Prosecution filed a "Prosecutor's Consolidated Motion to Sever Rwamakuba from the Joint Indictment and to Try Him Separately, For Leave to File a Separate Amended Indictment against Rwamakuba, and For Leave to File a Separate Amended Indictment Against Karemera, Ngirumpatse and Nzirorera, or alternatively, Prosecutor's Motion for Leave to Amend the Indictment against Karemera, Ngirumpatse, Nzirorera and Rwamakuba". All Defence teams in the present case, except the Defence for Karemera, have filed their replies to the said Motion. By Decision of 7 December 2004, the Defence team is authorized, if they need the French version, to file their responses five days from the date of the service of the translation of the said Prosecution Motion and Annexes thereto.

2. In its Motion filed on 13 January 2005, the Prosecution requests an extension of time to reply to Nzirorera's Responses and that the Chamber refrains from deliberating on the Prosecution Motion of 20 December 2004 until at least 21 January 2005, or until such time as Ngirumpatse and Karemera have filed substantive responses to the said Prosecution Motion. The Prosecution alleges that the Ngirumpatse's Response addresses the Prosecution Motion for severance of Rwamakuba but not the Prosecution request for leave to file an amended indictment. The Prosecution argues that such

a consolidated submission would be in the benefit of the Chamber and the parties in the proceedings and would save time and resources of the Tribunal.

3. The Chamber observes that, due to technical problems, the Defence for Karemera received the Prosecution Motion only on 24 January 2005.

4. The Chamber notes that Rule 73 of the Rules does not anticipate the possibility for the requesting party to respond to the reply filed by a responding party to a motion.

5. However, the Chamber is of the view that the Prosecution Motion of 20 December 2004, requesting the severance of Rwamakuba from the joint Indictment of November 2001 and amendments of the said Indictment, raises major issues in the present case. The Chamber considers that granting a short-term time-limit to reply will not seriously affect the schedule of the Trial's commencement. The Chamber is therefore of the view that in the interest of justice and fair trial, the filing of a Prosecution Reply to the Defence Responses should be permitted.

FOR THE ABOVE REASONS,

THE CHAMBER

GRANTS the Motion,

AND AUTHORIZES the Prosecution to file its Consolidated Reply to all Defence Responses to the Prosecution Motion of 20 December 2004, no later than two (2) days from the filing of the Karemera's Response to the Prosecution Motion of 20 December 2004.

Arusha, 25 January 2005, done in English.

[Signed] : Dennis C. M. Byron

***

## *Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment Articles 6, 11, 12* quater*, 18 and 20 of the Statute; Rules 47, 50 and 82 (B) of the Rules of Procedure and Evidence 14 February 2005 (ICTR98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba – Severance of an accused, Accused at large, Conflict of interests, Interests of Justice, Amendement of the Indictment, Ameliorating effect of the changes on the clarity and precision of the case, Diligence of the Prosecution, Lateness in the opening of the Trial, Prejudice to the Defence, Unfair tactical advantage, Necessity of a modification of the Indictment, Distinct amended indictment – Stay of procedure, Translation, Communication of supporting materials – Joint Criminal enterprise, Responsability of the superior, Identification of the subordinates, Effective control – Right of the accused to be tried fairly and without undue delay, Right of each Accused to have adequate time to prepare his Defence, Right to be informed in detail of the nature and cause of the charges brought, Equality principle between the Accused – Discriminatory prosecution, Burden of the proof on the accused – Function of the Prosecutor, Redaction of the Indictment, Precision of the Indictment, Coherence of the Indictment – Further Initial Comparution – Good administration of justice, Fairness of the proceedings – Independance of the Judges, Ad litem Judges, Power of* ad litem *Judges, Power to Grant Leave to Amend an Indictment – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 47, 47 (E), 47 (F), 48, 50, 50 (A) (i), 50 (A) (ii), 50 (B), 66 (A) (i), 72, 72 (A), 73 and 82 (B); Statute, art. 4, 6, 6 (1), 11, 12* quater*, 15, 17 (1), 18, 20, 20 (4) (a) and 20 (4) (c)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli et al., *Confirmation et non-divulgation de l'acte d'accusation, 29 August 1998 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Alfred Musema*, Decision on the Prosecutor's Request, 6 May 1999 (ICTR-96-13); Trial Chamber,* The Prosecutor v. Augustin Bizimana et al., *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli, 6 July 2000 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Sylvain Nsabimana, Alphonse Nteziriyayo, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Joseph Kanyabashi and Elie Ndayambaje, *Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana, 8 September 2000 (ICTR-97-29A); Trial Chamber,* The Prosecutor v. Jean de

## *Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié Articles 6, 11, 12* quater*, 18 et 20 du Statut et Articles 47, 50 et 82 (B) du Règlement de procédure et de preuve 14 février 2005 (ICTR-98-44-PT)*

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngriumpatse, Joseph Nzirorera et André Rwamakuba – Disjonction d'un accusé, Accusés en fuite, Conflits d'intérêts, Intérêts de la justice, Modification de l'acte d'accusation, Effet positif sur la clarté et la précision de l'affaire en jugement, Diligence du Procureur, Retard pour l'ouverture du procès, Préjudice pour la Défense, Avantage tactique indu, Nécessité de modification de l'acte d'accusation, Acte d'accusation modifié distinct – Suspension de procédure, Traduction, Communication de pièces justificatives – Entreprise criminelle commune, Responsabilité du supérieur hiérarchique, Identification des subordonnés, Contrôle effectif – Droit de l'accusé d'être jugé équitablement et sans retard excessif, Droit de chaque accusé de disposer du temps nécessaire à la préparation de sa défense, Droit de l'accusé d'être informé de manière détaillée sur la nature et les motifs des accusations retenues contre lui, Principe d'égalité entre les accusés – Poursuite discriminatoire, Charge de la preuve sur l'accusé – Fonction du Procureur, Rédaction de l'acte d'accusation, Précision de l'acte d'accusation, Cohérence de l'acte d'accusation – Nouvelle comparution initiale – Bonne administration de la justice, Equité du procès – Indépendance des juges, Juges ad litem, Compétences des juges ad litem, Pouvoir d'autoriser la modification d'un acte d'accusation – Requête partiellement acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 47, 47 (E), 47 (F), 48, 50, 50 (A) (i), 50 (A) (ii), 50 (B), 66 (A) (i), 72, 72 (A), 73 et 82 (B); Statut, art. 4, 6, 6 (1), 11, 12* quater*, 15, 17 (1), 18, 20, 20 (4) (a) et 20 (4) (c)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Juvénal Kajelijeli et consorts, *Confirmation et non-divulgation de l'acte d'accusation, 29 août 1998 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Alfred Musema, *Décision sur la requête du Procureur en modification de l'acte d'accusation, 6 mai 1999 (ICTR-96-13); Chambre de première instance,* Le Procureur c. Augustin Bizimana et consorts, *Décision relative à la requête de la Défense en opposition à la jonction d'instances et à la requête en disjonction d'instances et aux fins d'un procès séparé déposées par l'accusé Juvénal Kajelijeli, 6 juillet 2000 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Sylvain Nsabimana, Alphonse Nteziriyayo, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Joseph Kanyabashi et Elie Ndayambaje, *Decision on the Defence Motion seeking a Sep-*

Dieu Kamuhanda, *Decision on Defence Motion for Severance and Separate Trials Filed by the Accused, 7 November 2000 (ICTR-99-54); Trial Chamber,* The Prosecutor v. André Rwamakuba, *Decision on André Rwamakuba's Motion for Severance, 12 December 2000 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Decision on Prosecutor's Motion to correct the Indictment dated 22 December 2000 and Motion for leave to file an Amended Indictment Warning to the Prosecutor's Counsels pursuant to Rule 46 (A), 25 January 2001 (ICTR-98-44A); Trial Chamber,* The Prosecutor v. Edouard Karemera, *Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to,* inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment, 25 April 2001 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, *Judgement and Sentence, 21 February 2003 (ICTR-96-10 and ICTR-96-17); Trial Chamber,* The Prosecutor v. Mikaeli Muhimana et al., *Decision on the Prosecutor's Motion for Leave to Sever an Indictment, 14 April 2003 (ICTR-95-1); Appeals Chamber,* The Prosecutor v. Georges Rutaganda*, Judgement, 26 May 2003 (ICTR-96-3); Trial Chamber,* The Prosecutor v. Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba, *Decision on the Prosecutor's Motion for severance of Félicien Kabuga's Trial and for Leave to the Accused's Indictment, 1st September 2003 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Augustin Bizimana et al., *Decision on the Prosecutor's Motion for Separate Trials and for Leave to File an Amended Indictment, 8 October 2003 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Protais Zigiranyirazo, *Decision on Prosecutor's Request for leave to amend the Indictment and on Defence urgent Motion for an Order to disclose supporting Material in Respect of the Prosecutor's Motion for leave to amend the Indictment, 15 October 2003 (ICTR-2001-73); Trial Chamber,* The Prosecutor v. Mikaeli Muhimana, *Decision on Motion to leave Indictment, 21 January 2004 (ICTR-95-1B); Trial Chamber,* The Prosecutor v. Aloys Simba, *Decision on Motion to Amend Indictment, 26 January 2004 (ICTR-2001-76); 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 an amended Indictment, 12 February 2004 (ICTR-99-50); Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision On The Prosecutor's Motion for leave to Amend the Indictment – Rule 50 of the Rules of Procedure and Evidence, 13 February 2004 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Augustin Ndindiliyimana, et al., *Decision on Prosecutor's Motion under Rule 50 for leave to amend the Indictment, 26 March 2004 (ICTR-2000-56); Appeals Chamber,* The Prosecutor v. Edouard Karemera and Joseph Nzirorera*, Decision on Interlocutory Appeals regarding Participation of* Ad Litem *Judges, 11 June 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 28 September 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Reasons for Decision on interlocutory Appeals regarding the continuation of Proceedings with a substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 October 2004 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Severance of André Rwamakuba and Amendments of the Indict-*

*arate Trial for the Accused Sylvain Nsabimana, 8 septembre 2000 (ICTR-97-29A); Chambre de première instance,* 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-99-54); Chambre de première instance,* Le Procureur c. André Rwamakuba, *Decision on André Rwamakuba's Motion for Severance, 12 décembre 2000 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Juvénal Kajelijeli, *Décision relative à la requête du Procureur en rectification de l'acte d'accusation daté du 22 décembre 2000 et à la requête en modification de l'acte d'accusation. Avertissement au Procureur par application de l'article 46 (A), 25 janvier 2001 (ICTR-98-44A); Chambre de première instance,* Le Procureur c. Édouard Karemera, *Décision intitulée, «Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to,* inter alia, *Lack of Jurisdiction and Defects in the Form of the Indictment», 25 avril 2001 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Elizaphan et Gérard Ntakirutimana, *Jugement, 21 février 2003 (ICTR-96-10 et 96-17); Chambre de première instance,* Le Procureur c. Muhimana et consorts, *Décision relative à la requête du Procureur en disjonction de l'acte d'accusation, 14 avril 2003 (ICTR-95-1B); Chambre d'appel,* Le Procureur c. Georges Anderson Rutaganda, *Arrêt, 26 mai 2003 (ICTR-96-3); Chambre de première instance,* Le Procureur c. Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Édouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera et André Rwamakuba, *Décision relative à la requête du Procureur aux fins de disjonction de l'instance contre Félicien Kabuga et de modification de l'acte d'accusation, 1er septembre 2003 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Augustin Bizimana et consorts, *Décision relative à la requête du Procureur en disjonction d'instance et en autorisation de modification de l'acte d'accusation, 8 octobre 2003 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Protais Zigiranyirazo, *Décision relative à la requête du Procureur en autorisation de modifier l'acte d'accusation et à la requête urgente de la Défense en communication des éléments justificatifs se rapportant à la modification demandée de l'acte d'accusation, 15 octobre 2003 (ICTR-2001-73); Chambre de première instance,* Le Procureur c. Mikaeli Muhimana, *Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation, 21 janvier 2004 (ICTR-95-1B); Chambre de première instance,* Le Procureur c. Aloys Simba, *Chambre de première instance, Décision relative à la requête en modification de l'acte d'accusation, 26 janvier 2004 (ICTR-2001-76); Chambre d'appel,* Le Procureur c. Casimir Bizimungu et consorts, *Décision intitulée «Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 october 2003 Denying leave to file an amended Indictment», 12 février 2004 (ICTR-99-50); Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts, *Décision relative à la requête du Procureur aux fins d'être autorisé a modifier l'acte d'accusation, article 50 du Règlement de procédure et de preuve, 13 février 2004 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Augustin Ndindiliyimana et consorts, *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); Chambre de première instance,* Le Procureur c. Édouard Karemera et Joseph Nzirorera, *Decision on Interlocutory Appeals regarding Participation of* Ad Litem *Judge, 11 juin 2004 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Decision on Interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 28 septembre 2004 (ICTR-98-44); Chambre d'appel,* Le Procureur c.

*ment, 7 December 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana, *Judgement, 13 December 2004 (ICTR-96-10 and 96-17)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Zejnil Delalić et al., *Judgment, 20 February 2001 (IT-96-21); Trial Chamber,* The Prosecutor v. Radoslav Brđanin and Momir Talić, *Decision On filing of Replies, 7 June 2001 (IT-99-36); Appeals Chamber,* The Prosecutor v. Zoran Kupreskić, *Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Milorad Krnojelac, *Judgment, 17 September 2003 (IT-97-25); Appeals Chamber,* The Prosecutor v. Tihomir Blaškić, *Judgement, 29 July 2004 (IT-95-14)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Short and Judge Gustave Kam ("Chamber");

CONSIDERING the "Prosecutor's Consolidated Motion to Sever Rwamakuba from the Joint Indictment and to try him separately, for leave to file a Separate Amended Indictment against Rwamakuba, and for leave to file a Separate Amended Indictment Against Karemera, Ngirumpatse and Nzirorera, or alternatively, Prosecutor's Motion for leave to amend the Indictment against Karemera, Ngirumpatse, Nzirorera and Rwamakuba", filed on 20 December 2004 ("Prosecution Motion");

CONSIDERING Joseph Nzirorera's Response and Additional Response thereto, respectively filed on 4 and 12 January 2005;

CONSIDERING the Decision granting extension of time to Defence for Rwamakuba to respond to the Prosecution Motion, filed on 6 January 2005;

CONSIDERING André Rwamakuba's Response to the Prosecution Motion, filed on 11 January 2005;

CONSIDERING Mathieu Ngirumpatse's Response to the Prosecution Motion, filed on 14 January 2005;

CONSIDERING the Decision of 7 December 2004 authorizing the Defence to file their response within five days from the service of the translation of the Prosecution Motion, when the French version was needed;

CONSIDERING Édouard Karemera's Response to the Prosecution Motion, filed on 8 February 2005;

CONSIDERING the Decision granting the Prosecution time to file a consolidated reply to all Defence responses, filed on 25 January 2005;

CONSIDERING the Prosecution Reply to the Defence Submissions, filed on 10 February 2005;

CONSIDERING Nzirorera's Application for Leave to File Sur-Reply Re Motion for Leave to Amend Indictment, filed on 11 February 2005;

Édouard Karemera et consorts, *Motifs de la décision de la Chambre d'appel intitulée Decision on Interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 octobre 2004 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts, *Décision relative à la disjonction de l'instance de Rwamakuba et à la modification de l'acte d'accusation (Chambre de première instance), 7 décembre 2004 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Gérard et Elizaphan Ntakirutimana, *Jugement, 13 décembre 2004 (ICTR-96-10 et 96-17)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Zejnil Delalić et consorts, *Arrêt, 20 février 2001 (IT-96-21); Chambre de première instance,* Le Procureur c. Radoslav Brđanin et Momir Talić, *Décision relative au dépôt des répliques, 7 juin 2001 (IT-99-36); Chambre d'appel,* Le Procureur c. Zoran Kupreskić, *Arrêt, 23 octobre 2001 (IT-95-16); Chambre d'appel,* Le Procureur c. Milorad Krnojelac, *Jugement, 17 septembre 2003 (IT-97-25); Chambre d'appel,* Le Procureur c. Tihomir Blaškić, *Jugement, 29 juillet 2004 (IT-95-14)*

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

SIÉGEANT en la Chambre de première instance III, composée des juges Demis C. M. Byron, Président de Chambre, Emile Short et Gustave Kam (la «Chambre»),

VU la *Requête actualisée du Procureur aux fins de faire disjoindre la cause de Rwamakuba de celles des autres coaccusés pour les juger séparément et aux fins d'obtenir l'autorisation de déposer un acte d'accusation modifié distinct contre lui et un autre contre Karemera, Ngirumpatse et Nzirorera ou* à *défaut Requête du Procureur en modification de l'acte d'accusation établi contre Karemera, Ngirumpatse, Nzirorera et Rwamakuba,* déposée le 20 décembre 2004 (la «Requête du Procureur»),

VU la réponse de Nzirorera et l'autre réponse relative à ladite requête, déposées les 4 et 12 janvier 2005,

VU la décision prorogeant le délai imparti à la Défense de Rwamakuba pour répondre à la requête du Procureur, rendue le 6 janvier 2005,

Vu la réponse d'André Rwamakuba à la requête du Procureur, déposée le 11 janvier 2005,

VU la réponse de Mathieu Ngirumpatse à la requête du Procureur, déposée le 14 janvier 2005,

VU la décision du 7 décembre 2004 autorisant les équipes de défense, si elles ont besoin de la version française de la requête du Procureur, à déposer leur réponse cinq jours après la date à laquelle la traduction leur a été communiquée,

VU la réponse d'Édouard Karemera à la requête du Procureur, déposée le 8 février 2005,

VU la décision accordant un délai supplémentaire au Procureur pour déposer une réplique globale aux réponses des accusés, rendue le 25 janvier 2005,

VU la réplique du Procureur aux arguments des équipes de défense, déposée le 10 février 2005,

VU la requête de Nzirorera en autorisation de déposer une duplique à la requête en modification de l'acte d'accusation, déposée le 11 février 2005,

HEREBY DECIDES the Motion pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

## INTRODUCTION

1. The Indictment against the Accused Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba was confirmed on 22 August 1998[1]. An amended version against the Accused Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba was filed on 21 November 2001, pursuant to the Trial Chamber II Decision of 25 April 2001[2]. On 1st September 2003, Félicien Kabuga, who is still at large, was severed from the Indictment at the Prosecution request[3]. On 8 October 2003, Augustin Bizimana and Callixte Nzabonimana, who are also still at large, were severed from the Indictment, at the Prosecution's request[4].

2. On 18 February 2004, the Prosecution filed a second amended version of the Indictment against the Accused Karemera, Ngirumpatse, Nzirorera and Rwamakuba, in conformity with the Chamber's Decision of 13 February 2004[5].

3. On 10 September 2004, the Prosecution filed a Motion for leave to amend the Indictment of 18 February 2004. Further, the Prosecution filed also a Motion to sever André Rwamakuba from the joint Indictment and to try him separately and a Motion for leave to file an amended separate Indictment against Karemera, Ngirumpatse and Nzirorera[6].

---

[1] *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44, Confirmation and Non-Disclosure of the Indictment (TC), 29 August 1998, Report 1998, p. 950.

[2] *Prosecutor v. Edouard Karemera*, Case N° ICTR-98-44, Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment (TC), 25 April 2001.

[3] *Prosecutor v. Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44 (*Augustin Bizimana et al.*), Decision on the Prosecutor's Motion for severance of Félicien Kabuga's Trial and for Leave to the Accused's Indictment (TC), 1st September 2003.

[4] *Augustin Bizimana et al.*, Decision on the Prosecutor's Motion for Separate Trials and for Leave to File an Amended Indictment (TC), 8 October 2003.

[5] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44 (*Karemera et al.*), Decision on the Prosecutor's Motion for Leave to Amend the Indictment (TC), 13 February 2004.

[6] Prosecutor's Motion to Sever André Rwamakuba from the Joint Indictment and to try him Separately and Prosecutor's Motion for leave to file and amended Separate Indictment against Karemera, Ngirumpatse and Nzirorera, respectively filed on 12 and 19 November 2004.

STATUE COMME SUIT sur la requête, conformément à l'article 73 du Règlement de procédure et de preuve (le «Règlement»).

## INTRODUCTION

1. L'acte d'accusation contre Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Édouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera et André Rwamakuba a été confirmé le 22 août 1998[1]. Une version modifiée en a été établie contre Augustin Bizimana, Félicien Kabuga, Édouard Karemera, Mathieu Nginunpatse, Callixte Nzabomimana, Joseph Nzirorera et André Rwamakuba, et déposée le 21 novembre 2001, en application de la décision rendue le 25 avril 2001[2] par la Chambre de première instance II. Le 1er septembre 2003, la cause de Félicien Kabuga, toujours en fuite, a été disjointe de l'acte d'accusation à la demande du procureur[3]. Le 8 octobre 2003, celles d'Augustin Bizimana et Callixte Nzabonimana, eux aussi en fuite, ont été disjointes de l'acte d'accusation à la demande du Procureur[4].

2. Le 18 février 2004, le Procureur a déposé une deuxième version modifiée de l'acte d'accusation établi contre les accusés Karemera, Ngirumpatse, Nzirorera et Rwamakuba, conformément à la décision rendue par la Chambre le 13 février 2004[5].

3. Le 10 septembre 2004, le Procureur a déposé une requête en autorisation de modifier l'acte d'accusation du 18 février 2004. Il a encore déposé une requête tendant à faire disjoindre l'instance de Rwamakuba de l'acte d'accusation et à le faire juger séparément ainsi qu'une requête en autorisation de déposer un acte d'accusation distinct contre Karemera, Ngirumpatse et Nzirorera[6].

---

[1] *Le Procureur c. Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Édouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44, «Confirmation et non divulgation de l'acte d'accusation», décision rendue par la Chambre de première instance le 29 août 1998, Rapport 1998, p. 950.

[2] *Le Procureur c. Édouard Karemera*, Affaire n° ICTR-98-44, décision intitulée, *«Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to, inter alia, Lack of Jurisdiction and Defects in the Form of the Indictment*», rendue par la Chambre de première instance le 25 avril 2001.

[3] *Le Procureur c. Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Édouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44, (Augustin Bizimana et consorts), décision relative à la requête du Procureur aux fins de disjonction de l'instance contre Félicien Kabuga et de modification de l'acte d'accusation, rendue par la Chambre de première instance le 1er septembre 2003.

[4] *Augustin Bizimana et consorts,* décision relative à la requête du Procureur en disjonction d'instance et en autorisation de modification de l'acte d'accusation, rendue par la Chambre de première instance le 8 octobre 2003.

[5] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba,* affaire n° ICTR-9844 *(Karemera et consorts),* décision relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation, rendue par la Chambre de première instance le 13 février 2004.

[6] Requête du Procureur en disjonction de l'instance d'André Rwamakuba pour permettre de juger celui-ci séparément et requête du Procureur demandant de pouvoir déposer un acte d'accusation distinct et modifié contre Karemera, Ngirumpatse et Nzirorera, déposées respectivement les 12 et 19 novembre 2004.

4. On 20 December 2004, the Prosecution filed the present Motion for leave to amend the Indictment of 21 November 2001, pursuant to the Chamber's Decision of 7 December 2004 denying the previous Prosecution Motions for leave to amend the Indictment of 18 February 2004[7].

## Arguments of the Parties

### PROSECUTION MOTION

5. The Prosecution seeks severance of Rwamakuba from the joint Indictment of 21 November 2001 ("current Indictment") and leave to amend that Indictment for the three Accused. Alternatively, if severance is not granted, the Prosecution moves for leave to amend the Indictment against the four Accused. Three Indictments are attached to the Prosecution Motion : one separate Amended Indictment for Rwamakuba and one Amended Indictment for Karemera, Ngirumpatse and Rwamakuba, if severance is granted; and one Amended Indictment for the four Accused if severance is not granted. The Prosecution indicates that, pursuant to Rule 50 of the Rules, it has provided all supporting materials for the proposed amendments of the three Indictments attached to its Motion.

6. The Prosecution indicates that it has re-evaluated its position on severance in view of the recent results of single-accused trials, which have been completed in a more timely and efficient manner.

7. The Prosecution argues that the requested severance is in the interests of justice, ensuring a fair trial without undue delay to the Accused. It considers that severance will shorten the trials for Rwamakuba and the three other Accused. It contends that no rule guarantees "joint defence" for Accused jointly indicted so that witnesses not called by the Prosecution in the separate trial could be called by the Accused during the presentation of their case.

8. The Prosecution alleges that the proposed Amended Indictment against Rwamakuba is narrower and more concise, as it is limited to his direct participation at two locations and reduces the number of counts from eleven to four[8]. It alleges that the severance would enable the Prosecution to restrict its case against the three other Accused to conspiracy and co-perpetration at the level of the MRND party, and their control of *Interahamwe*, rather than at the level of the government apparatus. The proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera, would

[7] See Prosecutor's Motion for leave to Amend the Indictment of 18 February 2004, filed on 10 September 2004; Prosecutor's Motion to Sever André Rwamakuba from the Joint Indictment and to Try Him Separately and Prosecutor's Motion for Leave to File and Amended Separate Indictment against Karemera, Ngirumpatse and Nzirorera, respectively filed on 12 and 19 November 2004.

[8] Genocide, or alternatively, complicity in genocide, murder as a crime against humanity and extermination as a crime against humanity.

4. Le 20 décembre 2004, le Procureur a déposé la présente requête en autorisation de modifier l'acte d'accusation du 21 novembre 2001, suite à la décision du 7 décembre rejetant ses requêtes antérieures tendant à obtenir l'autorisation de modifier l'acte d'accusation du 18 février 2004[7].

## Arguments des parties

### Requête du Procureur

5. Le Procureur souhaite disjoindre l'instance de Rwamakuba de l'acte d'accusation commun du 21 novembre 2001, l'«acte d'accusation actuel», et demande l»autorisation de modifier l'acte d'accusation concernant les trois autres accusés. A défaut, au cas où la disjonction ne serait pas autorisée, il demande l'autorisation de modifier l'acte d'accusation établi contre les quatre accusés. Il joint à sa requête trois actes d'accusation, à savoir : un acte d'accusation modifié distinct pour Rwamakuba et un acte d'accusation modifié pour Karemera, Ngirumpatse et Nzirorera, au cas où il serait fait droit à la disjonction; et un acte d'accusation modifié pour les quatre, au cas où la demande en disjonction est rejetée. Il dit avoir communiqué toutes les pièces justificatives concernant les projets de modification des trois actes d'accusation joints à sa requête, conformément à l'article 50 du Règlement.

6. Le Procureur souligne qu'il a revu sa position sur la disjonction d'instances à la suite des procès individuels tenus récemment, qui se sont déroulés plus rapidement et plus efficacement.

7. Le Procureur soutient que la disjonction sollicitée sert l'intérêt de la justice, puisqu'elle garantit à l'accusé un procès équitable et sans retard excessif. Il estime que la disjonction réduira la durée des procès de Rwamakuba et des trois autres accusés. Il affirme qu'aucune disposition du Règlement ne prévoit de «défense collective» pour des accusés qui font l'objet d'un acte d'accusation commun; les témoins qui n'ont pas été cités par le Procureur lors du procès séparé pourraient donc être cités par les accusés lors de la présentation de leurs moyens.

8. Selon le Procureur, le projet d'acte d'accusation modifié contre Rwamakuba est plus concis et plus circonscrit en ce qu'il ne vise que la participation directe de l'accusé à des crimes commis à deux endroits et ramène le nombre des chefs d'accusation de 11 à quatre[8]. La disjonction lui permettra de ne produire contre les trois autres accusés que les éléments de preuve tendant à établir leur entente et leur coactivité à l'échelon du MRND, ainsi que le contrôle qu'ils exerçaient sur les milices *Interahamwe* plutôt qu'au niveau de l'appareil de l'État. Le projet d'acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera ramènerait le nombre des chefs

[7] Voir requête du Procureur en modification de l'acte d'accusation du 18 février 2004, déposée le 10 septembre 2004; requête du Procureur en disjonction de l'instance d'André Rwamakuba pour permettre de juger celui-ci séparément et requête du Procureur demandant de pouvoir déposer un acte d'accusation distinct et modifié contre Karemera, Ngirumpatse et Nzirorera, déposées respectivement les 12 et 19 novembre 2004.

[8] Génocide ou subsidiairement, complicité dans le génocide, meurtres et extermination constitutifs de crimes contre l'humanité.

reduce the counts against them from eleven to seven[9] and would plead with greater precision the basis of their individual criminal responsibility, namely joint criminal enterprise as a form of commission under Article 6 (1) of the Statute of the Tribunal ("Statute"). The Prosecution alleges further that a separate trial for Rwamakuba will avoid superfluous cross-examinations of numerous witnesses. To support its Motion, the Prosecution refers to the *Kajelijeli* Decision of 6 July 2000 and the *Muhimana* Decision of 14 April 2003[10].

9. Linked to its request for severance, the Prosecution requests leave to amend the Indictment. The Prosecution contends that its request is justified because the factual allegations in the Amended Indictments are pleaded with greater specificity, providing greater notice to each Accused of the case against them, increasing the fairness of the trial and complying with the requirements set out in more recent jurisprudence of the International Criminal Tribunal for Rwanda ("ICTR") and International Criminal Tribunal for Former Yugoslavia ("ICTY"). In support of its request, the Prosecution relies upon the Appeals Chamber Decision of 19 December 2003 delivered in the present case[11].

10. The Prosecution claims that, in the context of the particular circumstances of the case, it has acted diligently and has made genuine efforts to notify the Defence of the allegations and charges the Accused will face at trial. It contends that the request for severance and leave to amend the Indictment is the result of long investigations and of the fact that it is only recently that Rwandan persons detained in Rwanda accepted to provide information about how they committed their crimes, allowing the Prosecution to build stronger cases against high level government and military figures. The Prosecution alleges that the proposed amendments do not prejudice the Accused unfairly and that the Accused were already informed of their content since August 2003. It recalls that it is only due to procedural reasons that it has to submit the amendments a second time and that the delay in commencing the trial is the result of the previous Defence motions challenging the composition of the bench in the present trial.

11. As an alternative, the Prosecution seeks leave to file an Amended Indictment for the four Accused, if severance is not granted. With respect to Karemera, Ngirumpatse and Nzirorera, the amendments would be identical to those proposed for the separate Indictment against these three Accused. The only difference is that this Indictment includes Rwamakuba in a joint criminal enterprise with the other three Accused.

---

[9] Conspiracy to commit genocide, direct and public incitement to genocide, genocide, or alternatively, complicity in genocide, rape as crime against humanity, extermination as a crime against humanity, killing and violence to health and mental well-being as serious violation of Article 3 common to the Geneva Conventions and Additional Protocol II.

[10] *Augustin Bizimana et al.*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli (TC), 6 July 2000; *Prosecutor v. Muhimana et al.*, Case n° ICTR-95-1-I, Decision on the Prosecutor's Motion for Leave to Sever an Indictment (TC), 14 April 2003.

[11] *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 (AC), 19 December 2003.

retenus contre eux de 11 à sept[9] et préciserait davantage les fondements de leur responsabilité pénale individuelle, notamment en ce qui concerne l'entreprise criminelle commune en tant que forme de commission au sens de l'article 6 (1) du Statut du Tribunal (le «Statut»). Le Procureur fait valoir en outre que le fait de juger Rwamakuba séparément permettra de faire l'économie de bon nombre de contre-interrogatoires superflus. A l'appui de son affirmation, il cite la décision rendue le 6 juillet 2000 dans l'affaire *Kajelijeli* et la décision *Muhimana* du 14 avril 2004[10].

9. En rapport avec sa demande en disjonction d'instance, le Procureur demande l'autorisation de modifier l'acte d'accusation. Il affirme que sa demande se justifie en raison du fait que les actes d'accusation modifiés énoncent les allégations factuelles de manière plus détaillée, informant mieux les accusés des faits qui leur sont reprochés, renforçant l'équité du procès et se conformant aux règles énoncées dans la jurisprudence récente du Tribunal pénal international pour le Rwanda (TPIR) et du Tribunal pénal international pour l'ex-Yougoslavie (TPIY). À l'appui de sa demande, le Procureur évoque la décision rendue le 19 décembre 2003 par la Chambre d'appel en la présente affaire[11].

10. Le Procureur affirme qu'au regard des circonstances particulières de l'espèce, il a agi avec diligence et s'est employé à informer la Défense de toutes les allégations et accusations dont l'accusé aurait à répondre au cours du procès. Il affirme que la demande en disjonction d'instances et en autorisation de modification de l'acte d'accusation intervient après de longues enquêtes et se justifie du fait que ce n'est que tout récemment, que certains rwandais détenus au Rwanda ont accepté de fournir des renseignements sur la manière dont ils ont perpétré leurs crimes, lui permettant ainsi d'étoffer ses accusations à l'encontre de hauts responsables gouvernementaux et de militaires de haut rang. Il affirme encore que les modifications proposées ne sont pas injustement préjudiciables aux accusés et que ceux-ci en connaissaient la teneur depuis août 2003. Il rappelle que s'il est contraint de présenter les modifications une seconde fois, c'est uniquement pour des raisons d'ordre procédural et que le retard dans l'ouverture du procès est imputable aux requêtes de la Défense contestant la composition de la Chambre devant connaître de la présente affaire.

11. Subsidiairement, le Procureur demande l'autorisation de modifier l'acte d'accusation des quatre accusés s'il n'est pas fait droit à la disjonction d'instances.

---

[9] Entente en vue de commettre le génocide, incitation directe et publique à commettre le génocide, génocide, ou à titre subsidiaire, complicité dans le génocide, viol constitutif de crime contre l'humanité, extermination constitutive de crime contre l'humanité, meurtre et atteintes portées à la santé et au bien-être mental constitutifs de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II.

[10] *Augustin Bizimana et consorts,* décision relative à la requête de la Défense en opposition à la jonction d'instances et à la requête en disjonction d'instances et aux fins d'un procès séparé déposées par l'accusé Juvénal Kajelijeli, rendue par la Chambre de première instance le 6 juillet 2000 et *Le Procureur c. Muhimana et consorts,* affaire n° ICTR-95-14, Décision relative à la requête du Procureur en disjonction de l'acte d'accusation rendue par la Chambre de première instance le 14 avril 2003.

[11] *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 rendue le 19 décembre 2003 par la Chambre d'appel.

*Defence Replies*

*Defence for Karemera*

12. The Defence for Karemera opposes the severance of Rwamakuba. It alleges that such a severance constitutes a breach of the equality principle between the Accused and is contrary to the interests of justice, as guaranteed by Rule 82 of the Rules. It claims that it is not permissible for the Prosecution to reduce the charges against one of the Accused, whereas the other Accused are jointly indicted on the basis of a joint criminal enterprise theory. It contends that it cannot understand how the reduced length of the proposed Amended Indictment may add particulars and details to the current Indictment. To support the joinder of the Accused, the Defence for Karemera relies upon ICTY decisions[12]. Concerning the request for leave to amend the Indictment, the Defence for Karemera claims that Annex F to the Prosecution Motion has not been fully translated into French and that the witness statements supporting the new charges against Karemera are only in English. Accordingly, it requests that the Chamber stays the proceedings until it is in a position to respond to the said Motion.

*Defence for Ngirumpatse*

13. The Defence for Ngirumpatse does not oppose the severance of Rwamakuba provided that such severance does not unduly delay the trial against Ngirumpatse. The Defence for Ngirumpatse draws to the attention of the Chamber different factors which in its view could cause delays in the trial of the Accused. It requests the Chamber to take into consideration those factors in adjudicating on the Prosecution Motion. With respect to the proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera, the Defence for Ngirumpatse has no objection but reserves its rights to challenge that indictment as to form and content following confirmation.

*Defence for Nzirorera*

14. As a preliminary matter, the Defence for Nzirorera requests that the Chamber does not rule on the Prosecution Motion until the issues raised by a Motion which he had filed before the President are resolved. The Defence for Nzirorera indicates that, in light of the response filed on 11 January 2005 by the Accused Rwamakuba, it no longer persists in its opposition to severance. The Defence for Nzirorera has no objection in principle to the Prosecution being granted leave to file an Amended Indictment. Nevertheless, it contends that Rule 50 (A) of the Rules, as amended in 2004, requires review and confirmation of Amended Indictments. It claims that, according to Article 12 *quater* of the Statute, *ad litem* Judges are prohibited from participating in the review of an Amended Indictment. The Defence requests therefore that, if leave to amend the Indictment is granted, the review and confirmation should be done by permanent Judges. Finally, the Defence contends that there are allegations

[12] *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case n° IT-99-36-AR72.2, Decision on Request to Appeal (AC), 16 May 2000; *Prosecutor v. Kordic and Cerkez* (citation not provided).

*Réponses des équipes de défense*

*Défense de Karemera*

12. La Défense de Karemera s'oppose à la disjonction de l'instance de Rwamakuba. Elle affirme qu'une telle disjonction porte atteinte au principe d'égalité entre les accusés et est contraire à l'intérêt de la justice, lesquels sont consacrés à l'article 82 du Règlement. Elle affirme que le Procureur n'a pas le droit de réduire le nombre des chefs retenus contre un des accusés, alors que les autres coaccusés sont poursuivis sur la base de la théorie d'entreprise criminelle commune. Elle ne comprend pas comment le Procureur peut prétendre qu'il apporte des précisions et des détails à l'acte d'accusation actuel alors que le projet d'acte d'accusation modifié est beaucoup plus court. Pour soutenir la jonction d'instances, elle se fonde sur des décisions rendues par le TPIY[12]. S'agissant de la demande d'autorisation aux fins de modifier l'acte d'accusation, elle fait observer que l'annexe F de la requête du Procureur n'a pas été entièrement traduite en français et que les déclarations de témoin qui fondent les nouvelles accusations portées contre Karemera sont exclusivement en anglais. Elle demande par conséquent à la Chambre de surseoir à l'examen de la requête du Procureur jusqu'à ce qu'elle soit en mesure d'y répondre.

*Défense de Ngirumpatse*

13. La Défense de Ngirumpatse ne s'oppose pas à ce que Rwamakuba soit jugé séparément, pourvu que la disjonction ne retarde pas indûment le procès de son client. Elle attire l'attention de la Chambre sur divers facteurs qui, selon elle, pourrait retarder le procès des accusés, et lui demande d'en tenir compte au moment de statuer sur la requête du Procureur. S'agissant du projet d'acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera, elle ne soulève aucune objection, mais se réserve le droit de l'attaquer tant dans sa forme que dans sa teneur une fois qu'il aura été confirmé.

*Défense de Nzirorera*

14. A titre préliminaire, la Défense de Nzirorera demande à la Chambre de ne pas se prononcer sur la requête du Procureur tant que les questions qu'elle a soulevées dans sa requête au Président du Tribunal n'auront pas été résolues. Suite à la réponse déposée le 11 janvier 2005 par Rwamakuba, elle ne persiste pas dans son opposition à la disjonction. Elle ne s'oppose donc pas, en principe, à ce qu'il soit fait droit à la requête du Procureur tendant à déposer un acte d'accusation modifié. Cependant, elle fait observer que l'article 50 (A) du Règlement, tel que modifié en 2004, exige que les actes d'accusation modifiés soient examinés et confirmés. Elle soutient qu'aux termes de l'article 12 *quater* du Statut, les juges *ad litem* ne sont pas habilités à participer à l'examen d'un acte d'accusation modifié. Elle demande donc que des juges permanents procèdent à l'examen et à la confirmation de l'acte d'accusation modifié

[12] *Le Procureur c. Radoslav Brdjanin et Momir Talic,* affaire n° IT-99-36-AR72.2, décision relative à la demande d'interjeter appel, rendue par la Chambre d'appel le 16 mai 2000 ; *Le Procureur c. Kordic et Cerkez* (référence non indiquée).

in the proposed Amended Indictment against the Accused which are not supported by any supporting material. It requests the opportunity to file a brief listing these allegations to assist the Trial Chamber in its review and confirmation function.

*Defence for Rwamakuba*

15. The Defence no longer opposes the severance. It changed its position in the light of the Prosecution's declared intention to base its case only on specific acts allegedly committed by Rwamakuba in Gikomero and Butare. In the Defence's view, the fact that, in the case against Rwamakuba, the Prosecution does not intend to rely on the doctrine of joint criminal enterprise is a decisive element in its decision not to oppose the requested severance. The Defence agreement to severance is predicated on the assumption that the Prosecution's list of witnesses is final and that no expert witnesses will be called by the Prosecution or that, if there are such expert witnesses, their testimony will not widen the facts in issue in the case. Pursuant to Article 20 (2) of the Statute, Rules 82 (B) and 54 of the Rules, the Defence for Rwamakuba requests the Chamber to make directions necessary to ensure that no prejudice is suffered by the Accused due to severance. The Defence requests the Chamber to address the timing of the commencement of the severed trial and, if possible, set a trial date not earlier than April 2005. The Defence also requests the Chamber to grant the motion for severance in the light of the Prosecution assurances, as stated above. Finally, the Defence claims that the proposed Amended Indictment for Rwamakuba still includes command responsibility. The Defence contends that that reference is unnecessary for the purpose of a case based on direct participation in specific locations and is contrary to the Prosecution's declared position. Accordingly, the Defence requests the Chamber to remove the reference to command responsibility from the proposed separate indictment.

PROSECUTION REPLY

16. With respect to Rwamakuba's Response, the Prosecution confirms its intention to establish the individual criminal responsibility of the Accused for commission of crimes in Gikomero and Butare, and not to rely on the joint criminal enterprise doctrine. It specifies however that the question of what evidence it may adduce to establish the responsibility of the Accused is a different issue and will not necessarily be limited to events in those two locations that concern Rwamakuba. The Prosecution reiterates its commitment to call no more than twenty witnesses against Rwamakuba, including one expert witness. It alleges that references to command responsibility in the proposed separate Indictment are appropriate since it intends to argue that Rwamakuba's capacity to order or instigate killings was enhanced by his status as a member of the interim government. The Prosecution opposes Karemera's objection to severance, arguing that the reduction of the charges against one Accused, and not the others, does not violate the Accused's right to equality.

s'il est fait droit à la demande du Procureur. Enfin, elle affirme que le projet d'acte d'accusation renferme des allégations qui ne sont étayés par aucune pièce justificative. Elle demande à déposer un mémoire énumérant ces allégations, pour aider la Chambre à procéder à l'examen et à la confirmation de l'acte d'accusation.

*Défense de Rwamakuba*

15. La Défense ne s'oppose plus à la disjonction d'instances. Elle a changé d'avis en raison de l'intention déclarée du Procureur de se fonder uniquement sur les actes précis qu'aurait commis Rwamakuba à Gikomero et à Butare. Le fait que le Procureur n'envisage pas d'utiliser la doctrine de l'entreprise criminelle commune contre Rwamakuba est un élément déterminant de sa décision de ne plus s'opposer à la disjonction d'instances. Son accord se fonde sur la prémisse que la liste des témoins à charge est définitive et que le Procureur ne fera pas appel à des témoins experts ou que, si tel était le cas, leur déposition n'élargira pas le champ des questions litigieuses de la cause. S'appuyant sur l'article 20 (2) du Statut et sur les articles 82 (B) et 54 du Règlement, la Défense de Rwamakuba demande à la Chambre de donner les directives nécessaires pour que les accusés ne subissent aucun préjudice suite à la disjonction d'instances. Elle lui demande aussi de prévoir une date pour l'ouverture du procès séparé, en veillant, dans la mesure du possible, à ce que celui-ci ne commence pas avant avril 2005. En outre, elle lui demande de faire droit à la requête en disjonction d'instances, compte tenu, comme elle l'a indiqué plus haut, des assurances données par le Procureur. Enfin, elle signale que le projet d'acte d'accusation modifié de Rwamakuba inclut encore des éléments relatifs à la responsabilité du supérieur hiérarchique. Or, une telle mention n'est pas nécessaire dans le cadre d'une affaire fondée sur la participation directe de l'accusé à des crimes perpétrés à des endroits précis et est contraire à la position déclarée du Procureur. La Défense de Rwamakuba demande donc à la Chambre de supprimer la référence à la responsabilité du supérieur hiérarchique qui figure dans le projet d'acte d'accusation séparé.

RÉPLIQUE DU PROCUREUR

16. S'agissant de la réponse de Rwamakuba, le Procureur confirme son intention d'établir la responsabilité pénale de celui-ci eu égard aux crimes commis à Gikomero et à Butare et de ne pas s'appuyer sur la doctrine d'entreprise criminelle commune. Il précise cependant que la question de savoir quels éléments de preuve il pourrait produire pour établir la responsabilité de l'accusé est toute autre et que l'administration de la preuve ne se limitera pas nécessairement aux événements survenus dans ces deux localités qui concernent Rwamakuba. Il réitère son engagement à ne pas citer plus de 20 témoins à charge contre Rwamakuba, dont un témoin expert. Il affirme que les références à la responsabilité du supérieur hiérarchique dans le projet d'acte d'accusation séparé sont opportunes étant donné qu'il entend faire valoir que la capacité de Rwamakuba d'ordonner des massacres et d'inciter à en commettre était renforcée par son statut de membre du gouvernement intérimaire. Quant à l'objection de Karemera à la disjonction, le Procureur s'y oppose car le fait de réduire le nombre des accusations portées contre un accusé, et pas contre ses coaccusés, ne porte pas atteinte à leur droit à l'égalité.

17. Concerning the request for leave to amend the Indictment, the Prosecution reiterates its acknowledgement that the proposed amendments would amount to new charges necessitating a further initial appearance and allowing further preliminary motions. It contends that Rule 50 of the Rules does not give the right to the Accused to make submissions on whether a *prima facie* case exists. It opposes therefore Karemera's request to stay the proceedings and Nzirorera's request to file a brief commenting on the supporting material. Finally, with respect to the power of *ad litem* Judges to adjudicate on the current Motion, the Prosecution contends that it is not a matter properly placed before the Chamber.

NZIRORERA'S REPLY TO PROSECUTION REPLY

18. The Defence for Nzirorera contends that there is no reason to prohibit the filing of a brief listing the lack of supporting material as regards four allegations in the proposed Amended Indictments. It relies upon a Separate Opinion of Judge Dolenc delivered on 8 October 1999[13]. It alleges that, contrary to the Prosecution allegation, the appropriate time to file such a brief would be after the filing of a final Amended Indictment, pursuant to the Chamber's authorization. In addition, the Defence claims that it has not been permitted to travel to Arusha to consult with his client on the proposed Amended Indictment and the supporting material. Accordingly, it requests to be heard before any decision on confirmation of the Amended Indictment is given.

## Deliberations

*On the Nzirorera's Application to stay Adjudication*

19. There is no provision in the Statute or in the Rules which prescribes that a pending motion before another Chamber or the President results in a staying of the proceedings. In addition, the Chamber does not consider that the Defence for Nzirorera has shown any good reason to justify a staying of the proceedings in the present situation. It is appropriate to recall that, pursuant to Article 11 of the Statute, the Chamber is independent and its decisions are not subject to the supervision of any authority. The application falls to be rejected.

[13] *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Case n° ICTR-97-34-I and ICTR-97-30-I, Separate and Concurring Opinion of Judge Dolenc on the Decision on the Prosecutor's Motion to Amend the Indictment (TC), 8 October 1999, *Report 1999*, pp. 556 and seq (*Gratien Kabiligi and Aloys Ntabakuze* Separate Opinion of Judge Dolenc*)*.

17. En ce qui concerne la demande d'autorisation aux fins de modifier l'acte d'accusation, le Procureur reconnaît de nouveau que les projets d'acte d'accusation modifié constitueraient de nouvelles accusations nécessitant une nouvelle comparution initiale des accusés, qui seraient amenés à soulever de nouvelles exceptions préjudicielles. Il soutient que l'article 50 du Règlement n'autorise pas la Défense à faire valoir qu'au vu des présomptions, il y a lieu ou non de poursuivre. Il s'oppose par conséquent à la demande de Karemera tendant à ce que la chambre sursoie à l'examen de sa requête ainsi qu'à la demande de Nzirorera aux fins de déposer un mémoire pour faire des observations sur les pièces justificatives. Enfin, s'agissant du pouvoir des juges *ad litem* de se prononcer sur la requête actuelle, il affirme que c'est à tort que la Chambre a été dûment saisie d'une telle question.

DUPLIQUE DE NZIRORERA À LA RÉPLIQUE DU PROCUREUR

18. La Défense de Nzirorera affirme qu'il n'y a pas de raison d'interdire que soit déposé un mémoire sur le défaut de pièces justificatives s'agissant de quatre allégations contenues dans les projets d'acte d'accusation modifié. Elle s'appuie sur une Opinion individuelle du juge Dolenc rendue le 8 octobre 1999[13] Elle estime que, contrairement aux allégations du Procureur, le moment indiqué pour déposer un tel mémoire serait après le dépôt de l'acte d'accusation définitif, sur autorisation de la Chambre. De plus, n'ayant pas été autorisée à se rendre à Arusha pour rencontrer son client au sujet du projet d'acte d'accusation modifié et des pièces justificatives, elle demande à être entendue avant que toute décision soit rendue sur la confirmation de l'acte d'accusation modifié.

## Deliberations

*Sur la requête de Nzirorera en arrêt de procédures*

19. Aucune disposition du Statut ou du Règlement ne prévoit qu'une requête pendante devant une Chambre ou devant le Président entraîne une suspension de procédure. Par ailleurs, la Chambre n'est pas convaincue que la Défense de Nzirorera ait montré qu'une telle suspension se justifierait en l'espèce. Il convient de rappeler qu'aux termes de l'article 11 du Statut, les juges sont indépendants et leurs décisions ne sont soumises à aucune autorité de tutelle. La requête doit par conséquent être rejetée.

[13] *Le Procureur c. Gratien Kabiligi et Aloys Ntabakuze,* affaires n° ICTR-97-34-I et ICTR-30-I, Opinion individuelle et concordante du juge Dolenc à l'occasion de la décision sur la requête du Procureur en modification de l'acte d'accusation, rendue par la Chambre de première instance le 8 octobre 1999 Rapport 1999, p. 556 et suivantes (Gratien Kabiligi et Aloys Ntabakuze, Opinion individuelle du juge Dolenc).

*On the Karemera's Application to stay Adjudication*

20. On 26 January 2005, the French version of the Prosecution Motion was sent to the parties. While the provisional translation of Annexes A, B, C and E thereto[14] were also disclosed to the parties a few days later, the revised and final French version of the said Annexes were forwarded to the parties on 31 January 2005. The parties received the Annex D French version[15] on 7 February 2005. The translation of Annex F, presenting an analysis grid of the proposed Amended Indictment for the four Accused, was delivered just after the filing of Karemera's Response. This grid only provides references to the paragraphs of the current Indictment and to witness statements on the basis of which the Prosecution pleads new charges. Contrary to Karemera's contention, it is only designed to assist the Defence and the Chamber in the analysis of the said Indictment and it does not contain further factual allegations or charges against the Accused than those alleged in the proposed Amended Indictment of which the French version was made available since 31 January 2005.

21. It is true that the five statements specifically involving the Accused Karemera, provided in the supporting material, were only disclosed in English[16]. It appears however that Witnesses AMN's and AMO's statements have been previously disclosed to the Defence, on 6 August 2004 and 25 November 2004 respectively[17] and that Witness QBG's statement contained in the supporting material and related to Karemera was disclosed in French. The Chamber notes in addition that while the Prosecution may provide the Chamber supporting material to its request to amend an Indictment[18], Rule 66 (A)(i) of the Rules prescribes that the said supporting material must only be disclosed to the parties within thirty days of the initial appearance of the Accused. Although disclosure of the supporting material in both languages would have been more appropriate in the interest of good administration of justice, the Prosecution's obligation to disclose the French version of the witness statements becomes operative after the filing of the Motion and depends on whether the Chamber grants leave to file an Amended Indictment containing new charges supported by the said witness statements. The Chamber considers that the Accused is not prejudiced by the fact that two witness statements supporting the charges against him were disclosed only in English since it will have the opportunity to file preliminary motions, pursuant to Rules 50 (B) and 72 of the Rules, challenging the form of the Indictment. The Defence request is accordingly rejected.

[14] The "Amended Indictment for Rwamakuba"; the "analysis grid for Amended Indictment for Rwamakuba"; the "Amended Indictment for Karemera, Ngirumpatse and Nzirorera"; and the "Amended Indictment for the four Accused", if severance is not granted.

[15] "Analysis grid for Amended Indictment for Karemera, Ngirumpatse and Nzirorera".

[16] See Witnesses AMM, AMN, AMO and GGX.

[17] See Prosecution Interoffice Memorandum, filed on 6 August 2004, including disclosure of Witness AMN's statement of 12 November 2003 in French (number K0828-6360-K028-6365); and Prosecution Interoffice Memorandum, filed on 25 November 2004, including disclosure of Witness AMO's statement of 11 November 2003 in French (number K028-6355-6359).

[18] See Rules 50 (A) (i), 47 (E) and 47 (F) of the Rules.

*Sur la requête de Karemera en arrêt de procédures*

20. Les parties ont reçu la version française de la requête du Procureur le 26 janvier 2005, la traduction non révisée des annexes A, B, C et E de ladite requête[14], quelques jours plus tard et leur traduction révisée et certifiée, le 31 janvier 2005. La traduction française[15] de l'annexe D leur a été communiquée le 7 février 2005 et celle de l'annexe F, comportant un tableau analytique de l'acte d'accusation modifié dressé contre les quatre accusés, peu après le dépôt de la réponse de Karemera. Le tableau renvoie uniquement aux paragraphes de l'acte d'accusation en vigueur et aux déclarations de témoins que le Procureur présente à l'appui des nouvelles charges. Contrairement aux prétentions de Karemera, le tableau a seulement pour objet d'aider la Défense et la Chambre dans leur analyse de l'acte d'accusation. Il ne reprend que les allégations factuelles et les charges retenues contre l'accusé dans l'acte d'accusation modifié, dont la version française avait été communiquée aux parties le 31 janvier 2005.

21. Certes, les cinq déclarations portant sur des actes précis reprochés à l'accusé Karemera, et qui ont été fournies comme pièces justificatives, n'ont été communiquées qu'en anglais[16], mais les déclarations des témoins AMN et AMO avaient déjà été communiquées à la Défense, le 6 août et le 25 novembre 2004 respectivement[17] et, celle du témoin QBG, fournie comme pièce justificative et portant sur les actes reprochés à Karemera, avait été transmise en version française. De plus, la Chambre relève que le Procureur peut certes fournir des éléments à l'appui de sa demande de modification de l'acte d'accusation[18], mais qu'aux termes de l'article 66 (A)(i) du Règlement, ces éléments doivent être communiqués aux parties dans les 30 jours qui suivent la comparution initiale de l'accusé. S'il est vrai qu'il aurait été plus approprié, pour une bonne administration de la justice, que les pièces justificatives fussent communiquées dans les deux langues, l'obligation faite au Procureur de communiquer la version française des déclarations des témoins ne prend effet qu'après le dépôt de la requête et une fois que la Chambre a accepté l'acte d'accusation modifié contenant les nouvelles charges à l'appui desquelles ces déclarations ont été présentées. La Chambre estime que l'accusé ne subit aucun préjudice du fait que deux déclarations de témoins concernant les charges retenues contre lui ont été communiquées uniquement en anglais, puisqu'il aura la possibilité de soulever des exceptions en vertu des articles 50 (B) et 72 du Règlement pour contester la forme de l'acte d'accusation. La requête de la Défense est par conséquent rejetée.

---

[14] « Acte d'accusation modifié établi contre Rwamakuba »; « Projet d'acte d'accusation modifié disjoint concernant Rwamakuba : tableau analytique »; « Acte d'accusation modifié établi contre Karemera, Ngirumpatse et Nzirorera » et « Acte d'accusation modifié établi contre les quatre accusés », au cas où la disjonction serait refusée.

[15] « Tableau analytique de l'acte d'accusation modifié établi contre Karemera, Ngirumpatse et Nzirorera ».

[16] Voir les déclarations des témoins AMM, AMN, AMO et GGX.

[17] Voir le Mémorandum intérieur du Bureau du Procureur déposé le 6 août 2004, notamment la communication de la déclaration du témoin AMN du 12 novembre 2003 en français, (no K0828-6360-K028-6365); et le Mémorandum intérieur du Bureau du Procureur déposé le 25 novembre 2004, notamment la communication de la déclaration du témoin AM0 du 11 novembre 2003 en français (n° K028-6355-6359).

[18] Articles 50 (A) (i), 47 (E) et (F) du Règlement.

*On the Power of* ad litem *Judges to grant Leave to amend an Indictment*

22. The Defence for Nzirorera challenges the right of *ad litem* Judges to adjudicate on the Prosecution Motion on the same grounds already canvassed and rejected by the Appeals Chamber.

23. Article 12 *quater* of the Statute prescribes that *ad litem* Judges enjoy the same powers as the permanent Judges of the International Tribunal, with the exception of the right to adopt Rules of Procedure and Evidence, the right to review an Indictment pursuant to Article 18 of the Statute and the right to consult with the President in relation to the assignment of Judges or in relation to a pardon or commutation of sentence. Rule 50 (A) (i) of the Rules provides that at or after the initial appearance, an amendment of an Indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73 of the Rules, and that in deciding whether to grant leave, it shall follow the procedures and standards set out in Rules 47 (E) and (F) of the Rules. Rule 47 regulates the exercise of the power of review of an Indictment submitted by the Prosecution for confirmation before the arrest of a suspect as mandated by Article 18 of the Statute. Rules 47 (E) and (F) require the reviewing Judge to examine the counts in the Indictment, and any supporting materials the Prosecution may provide, and confer power to request the Prosecution to present additional material in support of any or all of the counts.

24. When adjudicating on a Motion seeking leave to file an Amended Indictment after the initial appearance, the Trial Chamber does not act as a confirming Judge under Article 18 of the Statute because it applies the procedure and standards set out in Rule 47 (E) and (F). As the Appeals Chamber has already stated

> "*ad litem* Judges, sitting as members of a Trial Chamber, are […] empowered to participate in the consideration and decision of a motion for leave to amend an indictment pursuant to Rule 50 of the Rules and, that it is independent of the question whether, in deciding to grant leave to amend an indictment, the Trial Chamber shall apply the standards set out in Sub-Rules 47 (E) and (F) of the Rules"[19].

Accordingly, the Chamber rejects the Defence objection.

*On the Severance of Rwamakuba*

25. Pursuant to Rule 82 (B) of the Rules,

> "The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice".

[19] *Prosecutor v. Edouard Karemera and Joseph Nzirorera*, Case n° ICTR-98-44-AR73.4, Decision on Interlocutory Appeals Regarding Participation of *Ad Litem* Judges (AC), 11 June 2004, p. 4.

*Sur le pouvoir des juges* ad litem *d'autoriser la modification d'un acte d'accusation*

22. La Défense de Nzirorera conteste le pouvoir des juges *ad litem* à statuer sur la requête du Procureur en se fondant sur des motifs que la Chambre d'appel avait déjà examinés et rejetés.

23. Selon l'article 12 *quater* du Statut, les juges *ad litem* jouissent des mêmes pouvoirs que les juges permanents du Tribunal pénal international pour le Rwanda, mais ne sont pas habilités à participer à l'adoption du Règlement de procédure et de preuve, ni à l'examen d'un acte d'accusation conformément à l'article 18 du Statut, ni aux consultations tenues par le Président au sujet de la nomination de juges ou de l'octroi d'une grâce ou d'une commutation de peine. L'article 50 (A) (i) du Règlement prévoit que, lors de la 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, et que, pour décider s'il est opportun d'autoriser la modification de l'acte d'accusation, la Chambre devrait suivre les normes et procédures énoncées aux paragraphes (E) et (F) de l'article 47 du Règlement. Cet article régit en effet l'exercice du pouvoir d'autoriser la modification d'un acte d'accusation présenté par le Procureur pour confirmation avant l'arrestation d'un suspect conformément à l'article 18 du Statut. Selon les paragraphes (E) et (F) de l'article 47, le juge désigné examine les chefs d'accusation et tout élément de preuve que le Procureur présenterait à l'appui, et peut demander à ce dernier de présenter des éléments supplémentaires à l'appui de l'un ou de la totalité des chefs d'accusation.

24. En statuant sur une requête en modification de l'acte d'accusation après la comparution initiale de l'accusé, la Chambre de première instance n'agit pas comme un juge le ferait en vertu de l'article 18 du Statut, mais applique les normes et procédures énoncées aux paragraphes (E) et (F) de l'article 47 du Règlement. Comme la Chambre d'appel l'a déjà déclaré :

> «Les juges *ad litem* siégeant dans une Chambre de première instance sont [...] habilités à statuer et à se prononcer sur les requêtes en modification de l'acte d'accusation conformément à l'article 50 du Règlement, et ce, indépendamment de la question de savoir si, pour décider d'autoriser ou non la modification, la Chambre de première instance doit appliquer les normes énoncées aux paragraphes (E) et (F) de l'article 47 du Règlement»[19] (Traduction).

La Chambre rejette par conséquent l'objection de la Défense.

*Sur la disjonction de l'instance de Rwamakuba*

25. L'article 82 (B) du Règlement est ainsi libellé :

> «La Chambre de première instance peut ordonner un procès séparé pour des accusés dont les instances avaient été jointes en application de l'article 48, pour éviter tout conflit d'intérêts de nature à causer un préjudice grave à un accusé, ou pour sauvegarder l'intérêt de la justice».

[19] *Le Procureur c. Édouard Karemera et Joseph Nzirorera*, affaire n° ICTR-98-44-AR73.4, Chambre de première instance, *Decision on interlocutory Appeals regarding Participation of* Ad Litem *Judge*, 11 juin 2004, p. 4.

26. In the appreciation of the interests of justice, the right to be tried fairly and without undue delay, as guaranteed by Article 20 of the Statute, must be taken into account[20].

27. On 12 December 2000, Trial Chamber II denied a Defence Motion seeking severance of the Accused Rwamakuba[21]. At that time, the Prosecution opposed the severance on the ground that a separate trial was not necessary to protect the interests of justice. The Chamber observes that the circumstances have changed. Presently, the Prosecution contends that it is in the interests of justice for the severance to be granted. The Accused Rwamakuba submits that the request for severance as presented by the Prosecution is in the interests of justice and supports the severance in principle. The Accused Ngirumpatse and Nzirorera do not object to the severance. The Defence for Karemera, however, opposes the severance alleging that it breaches the equality of the Accused and is contrary to the interests of justice.

28. Pursuant to Article 15 of the Statute, the Prosecutor is "responsible for the investigation and prosecution of persons responsible" for crimes within the jurisdiction of the Tribunal and acts independently. He "assess[es] the information received or obtained", "decide[s] whether there is sufficient basis to proceed" and, upon the determination of a *prima facie* case, prepares "an Indictment containing a concise statement of the facts and the crimes with which the Accused is charged under the Statute"[22]. The prosecutorial functions under the Statute are presumed to be exercised regularly[23]. According to the standard articulated by the ICTY Appeals Chamber in *Delalic*, where selective prosecution is alleged, the requesting party must establish (i) an unlawful or improper (including discriminatory) motive for the prosecution against the Accused and (ii) that other similarly situated persons were not prosecuted[24]. In the present case, the Accused Karemera has not shown that the Prosecution's decision to prosecute him was based on impermissible motives. In addition, the fact that Rwamakuba will be indicted only on the basis of his direct participation in criminal acts, instead of joint criminal enterprise, is not contrary to the equality of Accused, since they will not be in a similar situation. The case against Rwamakuba

[20] *Augustin Bizimana et al.*, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trials Filed by the Accused Juvénal Kajelijeli (TC), 6 July 2000, para. 30; *Prosecutor v. Sylvain Nsabimana, Alphonse Nteziriyayo, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Joseph Kanyabashi and Elie Ndayambaje*, Case n° ICTR-97-29A-T, Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana (TC), 8 September 2000, para. 34; *Prosecutor v. Jean de Dieu Kamuhanda*, Case n° ICTR-99-54-T, Decision on Defence Motion for Severance and Separate Trials Filed by the Accused (TC), 7 November 2000, para. 4; *Muhimana et al*., Decision on the Prosecutor's Motion for Leave to Sever an Indictment (TC), 14 April 2003.

[21] *Prosecutor v. André Rwamakuba*, Case n° ICTR-98-44-T, Decision on André Rwamakuba's Motion for Severance (TC), 12 December 2000.

[22] Art. 17 (1) and 17 (4) of the Statute.

[23] *Prosecutor v. Delalic et al*., Judgment (AC), 20 February 2001, para. 611 (*Delalic* Appeals Judgement)

[24] *Delalic* Appeals Judgement; see also *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Judgment (TC), 21 February 2003, para. 871; *Prosecutor v. Augustin Ndindiliyimana*, Decision on Urgent Oral Motion for a Stay of the Indictment, or In the Alternative a Reference to the Security Council (TC), 26 March 2004, paras. 25-26.

26. Pour déterminer où se trouve l'intérêt de la justice, la Chambre doit tenir compte du droit de l'accusé d'être jugé équitablement et sans retard excessif, qui est consacré à l'article 20 du Statut[20].

27. Le 12 décembre 2000, la Chambre de première instance II avait rejeté une requête de la Défense en disjonction de l'instance de Rwamakuba[21]. A l'époque, le Procureur s'opposait à la requête parce qu'il estimait qu'un procès séparé n'était pas nécessaire pour sauvegarder l'intérêt de la justice. La Chambre relève que les circonstances ont changé et que le Procureur soutient désormais le contraire. L'accusé Rwamakuba fait valoir que la disjonction d'instances sollicitée par le Procureur sert l'intérêt de la justice et qu'il la soutient dans le principe. Les accusés Ngirimpatse et Nzirorera ne s'opposent pas à la demande du Procureur. La Défense de Karemera, par contre, s'oppose à la disjonction d'instances, qu'elle prétend contraire au principe d'égalité entre les accusés et à l'intérêt de la justice.

28. Selon l'article 15 du Statut, le Procureur est «responsable de l'instruction des dossiers et de l'exercice de la poursuite contre les personnes présumées responsables» des crimes qui relèvent de la compétence du Tribunal, et il agit en toute indépendance. Il «évalue les renseignements reçus ou obtenus et décide s'il y a lieu de poursuivre», et «[s]'il décide qu'au vu des présomptions, il y a lieu d'engager des poursuites, [il] établit un acte d'accusation dans lequel il expose succinctement les faits et le crime ou les crimes qui sont reprochés à l'accusé en vertu du Statut»[22]. La présomption est que le Procureur exerce comme il convient les fonctions que lui assigne le Statut[23] en matière de poursuites. Selon le critère énoncé par la Chambre d'appel du TPIY dans l'arrêt *Delalic,* si l'accusé estime qu'il fait l'objet de poursuites sélectives de la part du Procureur, il lui appartient de démontrer i) que les poursuites se fondent sur un motif illégal ou illégitime (notamment discriminatoire) et ii) que d'autres personnes placées dans une situation similaire n'ont pas été poursuivies[24]. En l'espèce, l'accusé Karemera n'a pas prouvé que la décision du Procureur de le pour-

[20] *Le Procureur c. Augustin Bizimana et consort,* affaire n° ICTR-98-44-T, Chambre de première instance, Décision relative à la requête de la Défense en opposition à la jonction d'instances et à la requête en disjonction d'instances et aux fins d'un procès séparé déposées par l'accusé Juvénal Kajelijeli, 6 juillet 2000, para. 30; *Le Procureur c. Sylvain Nsabimana, Alphonse Nteziriyayo, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Joseph Kanyabashi et Elie Ndayambaje,* affaire n° ICTR-97-29A-T, Chambre de première instance, *Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana,* 8 septembre 2000, para. 34; *Le Procureur c. Jean de Dieu Kamuhanda,* affaire n° ICTR-99-54-T, Chambre de première instance, Décision sur la requête de la Défense en disjonction d'instances et aux fins de procès séparé, 7 novembre 2000, para. 4; *Le Procureur c. Muhimana et consorts,* affaire n° ICTR-95-1B-1, Chambre de première instance, Décision relative à la requête du Procureur en disjonction de l'acte d'accusation, 14 avril 2003.

[21] *Le Procureur c. André Rwamakuba*, affaire n° ICTR-98-44-T, Chambre de première instance, *Decision on André Rwamakuba's Motion for Severance*, 12 décembre 2000.

[22] Art. 17 (1) et 4 du Statut.

[23] *Le Procureur c. Delalic et consorts*, arrêt du 20 février 2001, para. 611 (arrêt *Delalic*).

[24] Arrêt *Delalic*; voir également Le Procureur c. Elizaphan et Gérard Ntakirutimana, Jugement du 21 février 2003, para. 871; *Le Procureur c. Augustin Ndindiliyirnana*, affaire n° ICTR-2000-56-1, Chambre de première instance, Décision relative d 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, paras. 25 et 26.

will be completely different from the one to be met by the other three Accused, if severance is granted.

29. The proposed Amended Indictment against Rwamakuba incorporates only allegations that are unique and relevant to him. The charge of joint criminal enterprise, which formed the basis of the joinder and was one of the reasons why the Prosecution previously opposed the severance, has been removed. The Prosecution has indicated that the severance of Rwamakuba has allowed it to narrow the allegations of joint criminal enterprise from the large level of the government apparatus to the level of the MRND party, and to focus primarily on the control of *Interahamwe* militias.

30. The jurisprudence quoted by the Defence for Karemera does not support its Motion. On the contrary, it shows that where the Accused persons are not prosecuted on the basis of the same factual allegations, there is no reason to maintain a joinder.

31. Considering the interests of justice in the present case, the right of each Accused to be tried fairly will not be prejudiced by the severance, and it is clear that their right to be tried without undue delay will be enhanced. The proposed Amended Indictments narrow the case against each Accused and simplify their Defence. The Prosecution has submitted a witness list which indicates that about 20 witnesses will be called to testify against Rwamakuba and has also indicated its intention to reduce the evidence to be adduced at trial against the three other Accused.

32. Concerning the right of each Accused to have adequate time to prepare his Defence, it appears that most of the Prosecution witness statements have been previously disclosed to the Defence, and even for some of them in un-redacted form. The Defence for each Accused has indicated that it would be ready for trial by the month of April. The Chamber is satisfied that each Accused will have sufficient time to prepare their defence.

33. The Chamber is of the view that the requested severance is in the interests of justice, as required by Rule 82 (B) of the Rules.

*On the Leave to amend the Indictment of 21 November 2001*

34. Pursuant to Rule 50 of the Rules, after the initial appearance of the Accused, an amendment of an Indictment may only be made by leave granted by that Trial Chamber pursuant to a motion filed. In deciding whether to grant leave to amend the indictment, the Chamber applies the standards set out in Rules 47 (E) and (F) in addition to considering any other relevant factors[25]. These Sub-Rules require examination of each count of the proposed Amended Indictment and any supporting material provided by the Prosecution. If necessary, the Prosecution may be requested to present additional material in support of its request.

[25] Rule 50 (A) (ii) of the Rules.

suivre était inspirée par des motifs inadmissibles. De plus, Rwamakuba ne sera poursuivi que sur la base de sa participation directe à la commission de crimes et non sur celle de l'entreprise criminelle commune, ce qui n'est pas contraire au principe de l'égalité des accusés devant la loi dans la mesure où les procès des accusés ne seront plus les mêmes. En cas de disjonction, l'instance de Rwamakuba sera totalement différente de celles des trois autres accusés.

29. Le projet d'acte d'accusation modifié dressé contre Rwamakuba ne retient que les allégations pertinentes portées contre lui seul, le Procureur ayant abandonné la charge d'entreprise criminelle commune qui avait justifié la jonction d'instances et qui était un des arguments sur lesquels il s'était fondé pour s'opposer à la disjonction. Le Procureur a indiqué que la disjonction de la cause de Rwamakuba lui avait permis de restreindre le champ de l'entreprise criminelle commune en le ramenant du niveau gouvernemental à celui du parti MRND, et de se concentrer essentiellement sur le contrôle exercé par l'accusé sur les milices *Interahamwe.*

30. La jurisprudence invoquée par la Défense de Karemera n'étaie pas sa requête; elle montre au contraire que la jonction d'instances n'est pas justifiée lorsque les accusés ne sont pas poursuivis pour les mêmes faits.

31. S'agissant de l'intérêt de la justice en l'espèce, la disjonction d'instances ne viendra pas compromettre le droit des accusés d'être jugés équitablement et favorisera, de toute évidence, leur droit d'être jugés sans retard excessif. Le projet d'acte d'accusation modifié réduit le champ de chaque procès et simplifie la stratégie de défense de chaque accusé. Le Procureur a présenté une liste de 20 témoins qui déposeront contre Rwamakuba et annoncé son intention de réduire le nombre d'éléments de preuve qu'il entend présenter au procès contre les trois autres accusés.

32. En ce qui concerne le droit de chaque accusé de disposer du temps nécessaire à la préparation de sa défense, il apparaît que la plupart des déclarations de témoins à charge, dont certaines non caviardées, ont déjà été communiquées à la Défense. Toutes les équipes de défense ont déclaré qu'elles seraient prêtes pour le procès au mois d'avril. La Chambre est convaincue que chaque accusé disposera du temps nécessaire à la préparation de sa défense.

33. La Chambre est d'avis que la disjonction d'instances sollicitée sert l'intérêt de la justice, comme le requiert l'article 82 (B) du Règlement.

*Sur l'autorisation de modifier l'acte d'accusation du 21 novembre 2001*

34. Selon l'article 50 du Règlement, l'acte d'accusation ne peut être modifié après la comparution initiale que sur autorisation de la Chambre de première instance, à la suite d'une requête déposée à cette fin. Pour décider s'il est opportun d'autoriser la modification de l'acte d'accusation, la Chambre applique les normes fixées aux paragraphes (E) et (F) de l'article 47 et tient compte de tout autre élément d'appréciation pertinent[25]. Ces dispositions exigent l'examen de chacun des chefs de l'acte d'accusation modifié proposé et de tout élément que le Procureur présenterait à leur appui. Lorsqu'elle le juge nécessaire, la Chambre peut demander à ce dernier de présenter les éléments nécessaires à l'appui de sa requête.

[25] Article 50 (A) (ii) du Règlement.

35. Rule 50 of the Rules does not explicitly prescribe a time-limit within which the Prosecution may file a request to amend the Indictment, leaving open consideration of the motion in light of the circumstances of each individual case[26]. Following the jurisprudence of both *ad hoc* Tribunals, the fundamental issue in relation to granting leave to amend an Indictment is whether the amendment will unfairly prejudice the Accused[27]. In deciding whether to grant leave to amend an Indictment, the Chamber must consider the right to be tried without undue delay, guaranteed by Article 20 (4) (c) of the Statute, in conjunction with other rights of the Accused, including the right to be informed in detail of the nature and cause of the charges brought[28]. The factors to be weighed in determining whether to grant leave to amend an Indictment may consist of the ameliorating effect of the changes on the clarity and precision of the case to be met; the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and the likely delay or other possible prejudice to the Defence, if any, caused by the amendment[29]

36. It is noted that the Accused Ngirumpatse, Nzirorera and Rwamakuba have indicated that they do not oppose, in principle, the request to file an Amended Indictment and reserve their right to challenge its form if and when leave is granted. The Chamber is of the view that, at the present stage, there is no need to grant Nzirorera's requests to be heard or to file a brief listing the allegations against him where there would be no supporting material. As Judge Dolenc noted in his Separate Opinion and contrary to Nzirorera's contention, it is up to the Chamber to decide if an *inter partes* hearing is needed, bearing in mind the right of the Accused

[26] See *Prosecutor v. Alfred Musema,* Case n° ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment (TC), 6 May 1999, *Recueil 1999*, p. 1256, para. 17; *Prosecutor v. Juvénal Kajelijeli*, Case n° ICTR-98-44A-T (*Kajelijeli*), Decision on Prosecutor's Motion to Correct the Indictment dated 22 December 2000 and Motion for Leave to File an Amended Indictment Warning to the Prosecutor's Counsels Pursuant to Rule 46 (A) (TC), 25 January 2001, para. 35.

[27] *Prosecutor v. Protais Zigiranyirazo,* Case n° ICTR-2001-73-I, Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment (TC), 15 October 2003, para. 19; *Prosecutor v. Aloys Simba*, Case, n° ICTR-2001-76-I, Decision on Motion to Amend Indictment (TC), 26 January 2004, para. 7 (*Simba* Decision); *Prosecutor v. Brdanin and Talic*, Case n° IT-99-36, Decision on Filing Replies (TC), 7 June 2001, para. 3.

[28] See *Prosecutor v. Muhimana*, Case ICTR-1995-1B-I (*Muhimana*), Decision on Motion to Leave Indictment (TC), 21 January 2004, para. 10; *Simba* Decision, para. 8.

[29] See *Kajelijeli*, Decision on Prosecutor's Motion to Correct the Indictment dated 22 December 2000 and Motion for leave to file an Amended Indictment warning to the Prosecutor's Counsels Pursuant to Rule 46 (A) (TC), 25 January 2001, para. 36-37; *Muhimana*, Decision on Motion to Leave Indictment (TC), 21 January 2004, para. 10; *Simba,* Decision, para. 9; *Prosecutor v. Casimir Bizimungu*, Case 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 (AC), 12 February 2004, para. 16 (*Bizimungu* Decision).

35. L'article 50 du Règlement n'impartit pas expressément au Procureur un délai pour le dépôt d'une requête en modification de l'acte d'accusation, laissant à la Chambre toute latitude examiner une telle requête en fonction des circonstances de l'espèce[26]. Selon la jurisprudence développée par les deux Tribunaux *ad hoc*, il est fondamental, avant d'autoriser une modification de l'acte d'accusation, de se demander si la modification serait injustement préjudiciable à l'accusé[27]. Pour décider s'il est opportun d'autoriser une modification de l'acte d'accusation, la Chambre doit tenir compte du droit d'être jugé sans retard excessif énoncé à l'article 20 (4) (c) du Statut et des autres droits reconnus à l'accusé, notamment celui d'être informé de manière détaillée sur la nature et les motifs des accusations retenues contre lui[28]. Les éléments que la Chambre doit peser aux fins de déterminer s'il convient d'autoriser ou non la modification d'un acte d'accusation sont les suivants : l'effet positif que les modifications peuvent avoir sur la clarté et la précision de l'affaire en jugement, la diligence dont doit faire preuve le Procureur en procédant sans retard à ses modifications, diligence dont le défaut serait de nature à lui procurer un avantage indu, et le retard qui risque d'en résulter pour l'ouverture du procès ou tout autre préjudice éventuel que subirait la Défense du fait de cette modification[29].

36. La Chambre note que les accusés Ngirumpatse, Nzirorera et Rwamakuba ont indiqué qu'ils ne s'opposaient pas, en principe, à la requête en modification de l'acte d'accusation et qu'ils se réservaient le droit d'en contester la forme lorsque la Chambre aurait donné son autorisation. La Chambre estime qu'il n'est pas nécessaire d'autoriser, à ce stade de la procédure et en l'absence de toute pièce justificative, l'audition de Nzirorera ou le dépôt d'un mémoire énumérant les allégations portées contre lui. Comme le juge Dolenc l'a relevé dans son Opinion individuelle et concor-

[26] *Le Procureur c. Alfred Musema*, affaire n° ICTR-96-13-T, Chambre de première instance, Décision sur la requête du Procureur en modification de l'acte d'accusation, 6 mai 1999, Recueil 1999, p. 1256, para. 17; *Le Procureur c Juvénal Kajelijeli*, affaire n° ICTR-98-44A-T (*Kajelijeli*), Chambre de première instance, Décision relative à la requête du Procureur en rectification de l'acte d'accusation daté du 22 décembre 2000 et à la requête en modification de l'acte d'accusation. Avertissement au Procureur par application de l'article 46 (A), 25 janvier 2001, para. 35.

[27] *Le Procureur c. Protais Zigiranyirazo*, affaire n° ICTR-2001-73-I, Chambre de première instance, Décision relative à la requête du Procureur en autorisation de modifier l'acte d'accusation et à la requête urgente de la Défense en communication des éléments justificatifs se rapportant à la modification demandée de l'acte d'accusation, 15 octobre 2003, para. 19; *Le Procureur c. Aloys Simba*, affaire n° ICTR-2001-76-I, Chambre de première instance, Décision relative à la requête en modification de l'acte d'accusation, 26 janvier 2004, para. 7 (Décision Simba); *Le Procureur c. Brdanin et Talic*, affaire n° IT-99-36, Chambre de première instance, Décision relative au dépôt de répliques, 7 juin 2001, para. 3.

[28] *Le Procureur c. Muhimana*, affaire n° ICTR-1995-1B-I (Muhimana), Chambre de première instance, Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation, 21 janvier 2004, para. 10; décision *Simba*, para. 8.

[29] Voir *Kajelijeli*, Décision relative à la requête du Procureur en rectification de l'acte d'accusation daté du 22 décembre 2000 et à la requête en modification de l'acte d'accusation. Avertissement au Procureur par application de l'article 46 (A), 25 janvier 2001, paras. 36 et 37; *Muhimana*, Chambre de première instance, Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation, para. 10; Décision *Simba*, para. 9; *Le Procureur c. Casimir Bizimungu*, affaire n° ICTR-99-50- AR 50, Chambre d'appel, *Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, 12 février 2004, para. 16 (décision Bizimungu).

to a fair trial[30]. If the Chamber grants the Prosecution leave to file the proposed Amended Indictment, the Accused would have ample opportunity to challenge the form of the said Indictment by filing preliminary motions, pursuant to Rule 72 (A) of the Rules, if it includes new charges. This Rule guarantees full protection of his right to a fair trial.

37. Both the proposed Amended Indictments substantially modify the current Indictment. The amendments fall into two categories. The first category consists of deletion of introductive paragraphs, including pages on the "Historical Context" and "The Power Structure", which do not specifically relate to any charge against the Accused. Only four counts remain against Rwamakuba and the proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera drops four of the eleven counts of the current Indictment. In both proposed Amended Indictments, the count of complicity of genocide is pleaded as an alternative to the count of genocide. The Chamber is of the view that this first category of amendments will not cause prejudice to the Accused or have any major impact on the overall fairness of the proceedings. On the contrary, the removal of charges and general allegations that the Prosecution does not intend to prove at trial may simplify the Defence preparation.

38. The second category of amendments involves addition of particulars on the facts alleged and the Prosecution theory on commission of crimes. With respect to this second category, the Chamber addresses separately the two proposed Indictments in the light of the above-mentioned criteria and the supporting material provided by the Prosecution.

*Proposed Amended Indictment against Rwamakuba*

39. The amendments to the separate Indictment against Rwamakuba substantially modify the case against the Accused in conformity with the severance requested based on the direct participation of the Accused in crimes in specific locations. The criteria to be taken in consideration in granting leave to amend an Indictment include ascertaining whether the Prosecution has acted with diligence in securing the evidence and has requested the amendments in a timely manner[31]. They also include considering whether the Accused had prior notice of the Prosecution'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[32].

[30] *Gratien Kabiligi and Aloys Ntabakuze* Separate Opinion of Judge Dolenc, *Report 1999*, p. 578, para. 55.

[31] *Muhimana*, Decision on Motion to leave Indictment (TC), 21 January 2004, para. 6; *Simba* Decision, para. 8.

[32] *Muhimana*, Decision on Motion to Leave Indictment (TC), 21 January 2004, para. 6; Simba Decision, para. 8; *Bizimungu* Decision, para. 16; *Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu*, Case No. ICTR-2000-56-I, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January (TC), 26 March 2004, paras. 41-42 *(Ndindiliyimana* Decision).

dante, et contrairement aux prétentions de Nzirorera, c'est à la Chambre qu'il revient de décider de la tenue d'une audience contradictoire, en gardant à l'esprit le droit de l'accusé à un procès équitable[30]. Si la Chambre autorisait le Procureur à modifier l'acte d'accusation, et que celui-ci y incorporait de nouvelles charges, l'accusé aurait toute latitude pour contester la forme dudit acte d'accusation, en soulevant des exceptions en vertu de l'article 72 (A) du Règlement, qui concerne son droit à un procès équitable.

37. Les deux projets d'acte d'accusation modifié changent radicalement la nature de l'acte d'accusation en vigueur et comportent deux types de modifications. Le premier concerne la suppression des paragraphes introductifs, notamment les paragraphes relatifs au «contexte historique» et à la «structure du pouvoir», qui ne se rapportent à aucune des charges retenues contre les accusés. Seules quatre allégations faites contre Rwamakuba ont été retenues. Quatre des 11 chefs retenus contre Karemera, Ngirumpatse et Nzirorera dans l'acte d'accusation en vigueur ne figurent plus dans le projet d'acte d'accusation modifié dressé contre ces accusés. Dans les deux projets, le chef de complicité dans le génocide est présenté comme subsidiaire à celui de génocide. La Chambre estime que ce premier type de modification ne cause pas de préjudice aux accusés et sera sans grand effet sur l'équité du procès en général. Elle estime qu'au contraire, la suppression des charges et des allégations générales que le Procureur n'entend pas prouver au procès simplifie la tâche de la Défense.

38. Le second type de modifications est la présentation d'éléments supplémentaires à l'appui des faits allégués et à la thèse du Procureur sur la commission des crimes. A cet égard, la Chambre examinera chaque projet d'acte d'accusation modifié à la lumière des critères définis plus haut et des pièces justificatives présentées par le Procureur.

*Projet d'acte d'accusation modifié contre Rwamakuba*

39. Les modifications apportées à l'acte d'accusation distinct établi contre Rwamakuba modifient radicalement la nature des accusations portées contre l'accusé du fait que la demande de disjonction est fondée sur sa participation directe à la perpétration de crimes dans des lieux précis. Pour que soit accordée l'autorisation de modifier un acte d'accusation, certaines conditions doivent être remplies : Il faut se demander si le Procureur a agi avec diligence dans l'obtention des éléments de preuve, s'il a demandé les modifications à temps[31], si les accusés ont été avisés au préalable de l'intention du Procureur de demander l'autorisation de modifier l'acte d'accusation, et comment ils l'ont fait et enfin s'il ne cherche pas à en tirer un avantage tactique indu[32].

---

[30] *Le Procureur c. Gratien Kabiligi et Aloys Ntabakuze*, Opinion individuelle et concordante du Juge Dolenc. Rapport 1999, p. 578, para. 55.

[31] *Muhimana,* décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation (Chambre de première instance), 21 janvier 2004, para. 6; Décision *Simba,* para. 8.

[32] *Muhimana,* Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation (Chambre de première instance), 21 janvier 2004, para. 6; Décision *Simba,* para. 8; Décision *Bizimungu,* para. 16; *Le Procureur c. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu,* affaire n° ICTR-2000-56-1, *Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January* (Chambre de première instance), 26 mars 2004, paras. 41 et 42 (la décision *Ndindiliyimana*).

40. The Defence has not denied and the Chamber accepts that the Prosecution experienced difficulty in the investigatory process pointed out in its Motion to explain the filing of such an Amended Indictment only recently. Most of the statements on which the proposed amendments are based were taken in 2003, two of them were taken in 2004, and all were quickly disclosed to the Defence. The particular circumstances of the case, related to its rehearing[33], have also to be taken into consideration. Since 12 November 2004, the Prosecution has notified the Defence and the Chamber of its intention to sever the Accused and to file a separate Amended Indictment[34]. The Chamber notes that following its Decision of 7 December 2004[35], the Prosecution acted promptly by filing a new Motion seeking the severance of Rwamakuba and leave to file a separate Amended Indictment.

41. The substantial modification to the current Indictment is closely related to the severance of the Accused. As far as the proposed separate Indictment reflects the requested severance and considering the particular circumstances of the case, the Chamber is satisfied that the Prosecution acted diligently, and that there is no improper tactical advantage to be gained by the Prosecution as a result of the proposed amendments. On the contrary, they narrow and simplify the case to be met by the Defence.

42. The changes have an ameliorating effect on the clarity and precision of the case to be met by the Accused. The proposed Amended Indictment has been reduced from seventy to seven pages of factual allegations, while providing a detailed and comprehensive account of the criminal acts alleged and the Prosecution theory of the Accused's criminal liability. The factual allegations describe, in many cases, the place and date of events, the presence of other persons and, in one case, the names of the victims.

43. The Chamber observes that the proposed Amended Indictment contains expanded factual allegations that do in fact amount to new charges. In its Motion, the Prosecution recognizes explicitly the existence of new charges, particularly as regards the delivery of weapons to Kayanga *secteur* in early April and participation in attacks against the Kayanga Health Center in early-mid April 1994. These are based on allegations in witness statements reproduced in the supporting material. The vast majority of those allegations are to be found in statements previously disclosed to the Defence between 2001 and 2004. The un-redacted version of these statements has been disclosed to the Defence at the latest in November 2004. The new alleged facts provide more precise particulars as to the location of the criminal acts. Rather than changing

[33] A rehearing of the proceedings has been decided pursuant to Appeals Chamber Decisions. See *Karemera et al.*, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.*, Reasons for Decision on interlocutory appeals regarding the Continuation of Proceedings with a substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[34] See Prosecutor's Motion to Sever André Rwamakuba from the Joint Indictment and to try him separately, filed on 12 November 2004.

[35] *Karemera et al*., Decision on Severance of André Rwamakuba and Amendments of the Indictment (TC), 7 December 2004.

40. La Défense ne nie pas et la Chambre accepte que le Procureur a rencontré des dificultés au cours de ses enquêtes. Il les a d'ailleurs exposées dans sa requête pour expliquer pourquoi il n'a déposé l'acte d'accusation modifié que tout récemment. La plupart des déclarations sur lesquelles sont fondées les modifications proposées ont été recueillies en 2003, deux d'entre elles ont été recueillies en 2004 et toutes ont été communiquées à la Défense. Les circonstances particulières qui sont à l'origine de la reprise du procès[33], ont aussi été prises en considération. Le Procureur a avisé la Défense et la Chambre de son intention de disjoindre la cause de l'accusé et de déposer un acte d'accusation distinct[34]. La Chambre relève qu'après sa décision du 7 décembre 2004[35] le Procureur a rapidement déposé une nouvelle requête sollicitant la disjonction de la cause de Rwamakuba et l'autorisation de déposer un acte d'accusation modifié distinct.

41. La modification substantielle de l'acte d'accusation actuel est la conséquence directe de la disjonction d'instances. Dans la mesure où le projet d'acte d'accusation modifié reflète la disjonction demandée et compte tenu des circonstances particulières de l'espèce, la Chambre est convaincue que le Procureur a agi avec diligence et qu'il ne retirera aucun avantage tactique indu des modifications proposées. Au contraire, celles-ci ont pour effet de réduire et de simplifier les accusations que la Défense aura à réfuter.

42. Les modifications améliorent la clarté et la précision des accusations que l'accusé aura à réfuter. Des 70 pages d'allégations factuelles que compte l'acte d'accusation actuel, le projet d'acte d'accusation modifié n'en retient que sept, bien que les actes criminels reprochés à l'accusé et la thèse que le Procureur défend pour établir la responsabilité pénale y soient exposés de manière plus détaillée et plus exhaustive. Dans bien des cas, les allégations factuelles contiennent une description de l'endroit où se sont produits les faits, précisent la date à laquelle ils se sont produits, indiquent si d'autres personnes étaient présentes et, dans un cas, fournissent les noms des victimes.

43. La Chambre fait observer que l'acte d'accusation modifié contient des allégations factuelles plus étoffées qui, en réalité, constituent de nouvelles charges. Dans sa requête, le Procureur reconnaît explicitement l'existence de nouvelles charges, surtout en ce qui concerne la livraison d'armes dans le secteur de Kayanga au début du mois d'avril et la participation aux attaques contre le centre de santé de Kayanga dans la première moitié du mois d'avril 1994. Ces charges trouvent leur fondement dans les déclarations de témoins qui sont reproduites dans les pièces justificatives. La grande majorité de ces allégations se trouvent dans les déclarations qui ont déjà été communiquées à la Défense entre 2001 et 2004. Les versions non caviardées de ces

[33] La reprise du procès a été décidée conformément aux décisions de la Chambre d'appel. Voir Karemera et consorts, *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material* (Chambre d'appel ), 28 septembre 2004; Karemera et consorts, Motifs de la décision de la Chambre d'appel intitulée *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material* (Chambre d'appel ), 22 octobre 2004.

[34] Voir la requête intitulée *Prosecutor's Motion to Sever André Rwamakuba from the Joint Indictment and to try him separately*, déposée le 12 novembre 2004.

[35] *Karemera et consorts,* Décision relative à la disjonction de l'instance de Rwamakuba et à la modification de l'acte d'accusation (Chambre de première instance), 7 décembre 2004.

or extending geographical scope, the effect of the proposed Amended Indictment is to focus on specific locations within the broad area defined in the current Indictment or its supporting material. Likewise, the proposed Amended Indictment considerably narrows the charges against the Accused, giving specific details of general allegations contained in the current Indictment. The Accused is not prejudiced by the introduction of those new charges. There has been no rebuttal to the position of the Prosecution that it has provided the Accused with notice of the information on which the Amended Indictment has been prepared. The Chamber notes that the Defence indicated that it would be ready to start the trial from April 2005. It is clear that the duration of the trial would be significantly reduced due to the filing of a more narrow and specific Indictment against the Accused.

44. The Chamber is therefore of the view that the proposed Amended Indictment is required for the separate trial against the Accused and would enhance the fairness of the trial. However, it considers that the degree of specificity required to adequately inform the Accused of the charges against him should be improved in certain respects.

45. The jurisprudence of the two *ad hoc* Tribunals shows that the degree of specificity of an Indictment depends on the Prosecution case[36]. In the *Ntakuritimana* Judgement, the Appeals Chamber recently recalled that

> "the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual"[37].

When alleging that the Accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision"[38]. If the Prosecution is in a position to name the victims and locations of the alleged crimes, the Indictment should indicate those particulars. It is not acceptable for the Prosecution to omit material aspects of its main allegations in the Indictment with the aim of moulding its case in the course of the trial depending on how the evidence unfolds[39]. With respect to the nature of the responsibility incurred, the Chamber recalls that since Article 6 (1) of the Statute allows for several forms of direct criminal responsibility, a failure to specify in the Indictment which form(s) of participation the Prosecution intends to plead gives rise to ambiguity that should be avoided[40].

---

[36] See *Prosecutor v. Georges Anderson Rutaganda,* Case n° ICTR-96-3-A, Judgement (AC), 26 May 2003, paras. 301-303 (*Rutaganda* Appeals Judgment); *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Case n° ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, paras. 24 et seq. *(Ntakirutimana* Appeals Judgment); *Prosecutor v. Kupreskic*, IT-95-16-A, Judgment (AC), 23 October 2001, para. 89; *Prosecutor v. Krnojelac*, Case n° IT-97-25-A, Judgement (AC), 17 September 2003, para. 131 (*Krnojelac* Appeals Judgment).

[37] *Ntakirutimana* Appeals Judgment, para. 74.

[38] *Prosecutor v. Blaskic*, Case n° IT-95-14-A, Judgment (AC), 29 July 2004, para. 213 (*Blaskic* Appeals Judgment).

[39] *Rutaganda* Appeals Judgment, para. 301-303; *Ntakirutimana* Appeals Judgment, 13 Dec. 2004, paras. 24-125, 469 and 470.

[40] See *Krnojelac* Appeals Judgment, para. 138.

déclarations lui ont été communiquées au plus tard en novembre 2004. Les nouvelles allégations contiennent des détails plus précis sur l'endroit où ont été commis les actes criminels. Au lieu de changer ou d'étendre leur champ géographique, le projet d'acte d'accusation modifié tend a circonscrire les lieux pertinents dans la vaste région visée dans l'acte d'accusation actuel ou dans les pièces justificatives. En outre, il réduit considérablement les charges retenues contre l'accusé tout en fournissant plus de détails sur les allégations générales de l'acte d'accusation actuel. L'introduction des nouvelles charges ne porte pas préjudice à l'accusé. La Défense n'a soulevé aucune objection lorsque le Procureur a informé l'accusé des éléments sur la base desquels l'acte d'accusation modifié a été préparé. La Chambre relève que la Défense a indiqué qu'elle serait prête pour le procès à partir d'avril 2005. Il est clair que le dépôt d'un acte d'accusation plus circonscrit et plus précis aura pour effet de réduire considérablement la durée du procès de l'accusé.

44. En conséquence, la Chambre estime que le projet d'acte d'accusation modifié est nécessaire pour le procès séparé de l'accusé, qu'il rendra plus équitable. Elle considère toutefois qu'à certains égards, la précision des charges retenues contre l'accusé pourrait encore être améliorée.

45. Il ressort de la jurisprudence des deux tribunaux spéciaux que le degré de précision d'un acte d'accusation dépend de la nature des accusations portées par le Procureur[36]. Dans l'arrêt *Ntakuritimana*, la Chambre d'appel a récemment rappelé que

> «l'obligation de précision à laquelle le Procureur est tenu est plus stricte lorsqu'il cherche à démontrer que l'accusé a tué ou blessé une personne en particulier» [traduction][37].

S'il impute à l'accusé les actes constitutifs du crime en question, le Procureur doit indiquer «avec la plus grande précision», l'identité de la victime, le lieu où ont été commis les actes allégués, la date approximative de leur commission et les moyens utilisés à cet effet [traduction][38]. Si le Procureur connaît le nom des victimes et les lieux où les crimes auraient été commis, il doit les indiquer dans l'acte d'accusation. Il n'est pas acceptable que le Procureur omette de préciser des aspects importants de ses principales allégations afin de pouvoir modifier sa thèse à mesure que d'autres éléments de preuve deviennent disponibles[39]. S'agissant de la nature de la responsabilité encourue, la Chambre d'appel rappelle que dans la mesure où le paragraphe 6 (1) du Statut envisage plusieurs formes de responsabilité pénale directe, l'imprécision de l'acte d'accusation quant à la forme ou aux formes de responsabilité alléguée par le Procureur entraîne une ambiguïté à éviter[40].

---

[36] Voir *Le Procureur c. Georges Anderson Rutaganda*, affaire n° ICTR-96-3-A, arrêt, 26 mai 2003, para. 301 à 303 (arrêt *Rutaganda*); *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaire n° ICTR-96-10-A et ICTR-96-17-A, arrêt, 13 décembre 2004, paras. 24 et suivants (arrêt *Ntakirutimana*); *Le Procureur c. Kupreskic*, IT-95-16-A, arrêt, 23 octobre 2001, para. 89; *Le Procureur c. Krnojelac*, affaire n° IT-97-25-A, Arrêt, 17 septembre 2003, para. 131 (arrêt *Krnojelac*).

[37] Arrêt *Ntakirutimana*, para. 74

[38] *Le Procureur c. Blaskic*, affaire n° IT-95-14-A, Arrêt, 29 juillet 2004, para. 213 (arrêt *Blaskic*)

[39] Arrêt *Rutaganda*, paras. 301 à 303; Arrêt *Ntakirutimana*, 13 décembre 2004, para. 24 à 125 ainsi que 469 et 470.

[40] Voir arrêt *Krnojelac*, para. 138

46. Paragraphs 15 and 16 of the proposed Amended Indictment seem similar to Paragraphs 23 and 26, while containing differences that may lead to ambiguity. In particular, Paragraph 16 refers to the death of two persons at Butare University Hospital, while Paragraph 26 quotes the name of two persons (Rukaru and Mutabazi) killed upon the premises of the Butare Hospital, in similar circumstances. As regards the allegations of killings or crimes[41], the Prosecution must provide more details, if they are in its possession, as to the identity of the victims, or at least other identifying information, and the means by which those acts were committed. The Prosecution should also provide additional details, where they are in its possession, on the various public meetings and gatherings in Gikomero *Commune*.

47. The proposed Amended Indictment pleads the forms of participation alleged for each count on the basis of Article 6 (1) of the Statute. It presents without ambiguity the case against the Accused as based on his direct participation in criminal acts in specific locations. The Chamber considers however that the phrase "command responsibility" of the Accused, at paragraph 2 of the proposed Amended Indictment, could raise ambiguity on the form of the responsibility the Prosecution intends to plead. The Chamber is of the view that the said paragraph of the proposed Amended Indictment should be reformulated without use of the phrase "command responsibility" since the Indictment pleads only the individual criminal responsibility of the Accused pursuant to Article 6 (1).

48. Considering the evidence presented by the Prosecution in support of its Motion, the Chamber finds that a *prima facie* case has been established with respect to the counts contained in the proposed Amended Indictment against Rwamakuba and grants leave to file it subject to further amendments detailed in the order.

*Proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera*

49. With respect to the diligence of the Prosecution in seeking leave to amend the Indictment, the Defence has not denied, and the Chamber accepts, that some witnesses were more willing to provide detailed information on the Accused after their guilty pleas and convictions in 2002 and 2003 providing additional details, previously unknown to the Prosecution. Most of these statements were taken in 2003[42] and, three of them, in 2004[43] and they were quickly disclosed to the Defence. Since August 2003, the Prosecution has been seeking leave to file an Amended Indictment[44]. The Prosecution acted with dispatch when filing this motion pursuant to the Decision of

[41] See paras. 12, 13, 15, 16 and 26.

[42] See the statements of Witnesses ALC, AMB, AMM, AMN, AMO, ANP, GAV, GBC, GBU, GDC, GFA, GFF, GGX, GOB and XBM.

[43] See the statements of Witnesses AWB, BM and CB.

[44] See Prosecutor's consolidated Motion (i) for separate Trials pursuant to Rules 72 and 82; and (ii) for leave to file an amended Indictment pursuant to Rules 73 and 50, filed on 29 August 2003; Prosecutor's *Observations Supplémentaires* concerning the Motion to File an Amended Indictment of 29 August 2003, The Appeals Decision of 19 December 2003 and Prosecutor's Request for leave to include additional factual Allegations in the amended Indictment filed pursuant to Trial Chamber III Order of 19 January 2004, filed on 23 January 2004.

46. Les paragraphes 15 et 16 du projet d'acte d''accusation modifié semblent presque identiques aux paragraphes 23 et 26, avec toutefois des différences qui peuvent être source d'ambiguïté. Le paragraphe 16 en particulier fait état de la mort de deux personnes au centre hospitalier universitaire de Butare, tandis qu'au paragraphe 26 sont cités les noms de deux personnes (Rukaru et Mutabazi) tuées à l'Hôpital de Butare dans des circonstances analogues. Lorsqu'il s'agit d'allégations de meurtre ou de crime[41], le Procureur doit fournir plus de détails, s'il les connaît, sur l'identité des victimes ou, du moins, des informations permettant de les identifier ainsi que les moyens utilisés pour commettre les infractions alléguées. Le Procureur devrait aussi fournir plus de détails, s'il en a sur les réunions publiques et rassemblements tenus dans la commune de Gikomero.

47. Le projet d'acte d'accusation expose les formes de participation alléguées pour chaque chef retenu en vertu du paragraphe 6 (1) du Statut. Il présente sans ambiguïté les accusations portées contre l'accusé du fait de sa participation directe à des actes criminels dans des lieux bien précis. Toutefois, la Chambre considère que l'expression «responsabilité du supérieur hiérarchique» au paragraphe 2 du projet d'acte d'accusation pourrait être source d'ambiguïté quant à la forme de responsabilité que le Procureur entend plaider. Elle estime que ce paragraphe devrait être reformulé et l'expression «responsabilité du supérieur hiérarchique» supprimé puisque seule la responsabilité pénale individuelle de l'accusé au sens du paragraphe 6 (1) du Statut est alléguée dans le projet d'acte d'accusation.

48. Au regard des éléments présentés par le Procureur à l'appui de sa requête, la Chambre conclut qu'il existe des présomptions suffisantes pour engager des poursuites au titre des chefs retenus dans le projet d'acte d'accusation contre Rwamakuba et autorise le Procureur à le déposer, sous réserve des autres modifications prescrites dans l'ordonnance.

*Projet d'acte d'accusation contre Karemera, Ngirumpatse et Nzirorera*

49. S'agissant de la diligence avec laquelle le Procureur a demandé l'autorisation de modifier l'acte d'accusation, la Défense n'a pas nié et la Chambre accepte que certains témoins ont été plus enclins à donner des informations plus détaillées sur les accusés après que ceux-ci eurent reconnu leur culpabilité et eurent été condamnés en 2002 et 2003 et qu'ils ont ainsi fourni des précisions supplémentaires que le Procureur ignorait. La plupart des déclarations ont été recueillies en 2003[42], trois l'ont été en 2004[43] et elles ont été rapidement communiquées à la Défense. Le Procureur demande l'autorisation de déposer un acte d'accusation modifié depuis août 2003[44]. Il a déposé

[41] Voir les paras. 12, 13, 15, 16 et 26.

[42] Voir les déclarations des témoins ALC, AMB, AMM, AMN, AMO, ANP, GAV, GBC, GBU, GDC, *GFA, GFF,* GGX, GOB et XBM

[43] Voir les déclarations des témoins AWB, BM et CB.

[44] Voir la Requête binaire du Procureur en (i) disjonction d'instance en vertu des articles 72 et 82; et (ii) modification de l'acte d'accusation en vertu des articles 73 et 50, déposée le 29 août 2003; les observations du Procureur intitulées *Prosecutor's* Observations Supplémentaires *concerning the Motion to File an Amended Indictment of 29 August 2003, The Appeals Decision of 19 December 2003 and Prosecutor's Request For Leave to lnclude Additional Factual Allegations in the Amended Indictment Filed Pursuant to Trial Chamber III Order of 19 January 2004,* déposées le 23 janvier 2004

7 December 2004[45]. Considering the particular circumstances of the case, the Chamber is satisfied on the issue of diligence.

50. The changes have an ameliorating effect on the clarity and precision of the case to be met. The length of the proposed Amended Indictment is considerably reduced, while the added particulars in the proposed Amended Indictment more accurately reflect the evidence that the Prosecution seeks to present at trial and provide further notice to the Accused of the nature of the charges against them. Likewise, the specific allegation of a joint criminal enterprise and its form give the Accused notice of the theory that the Prosecution intends to argue at trial. The additional particulars and the removal of charges and general allegations not intended to be proved at trial may facilitate the Defence preparation. This should substantially enhance the fairness of the trial.

51. The Prosecution explicitly recognizes, and the Chamber notes, that the proposed Amended Indictment includes an additional legal theory of responsibility and expanded factual allegations that amount to new charges. Joint criminal enterprise is pleaded in conformity with the recent jurisprudence of both *ad hoc* Tribunals and does not prejudice the Accused. The new facts are based on allegations in witness statements mostly recorded in 2003 and 2004 and already disclosed to the Defence, among which the un-redacted versions were disclosed at the latest in November 2004. The Chamber observes that, with respect to new charges involving specifically Karemera, two witness statements were only disclosed in English, while the Accused and his Counsel speak and understand French[46]. The Chamber considers, however, that the three other witness statements related to specific allegations against Karemera and previously disclosed in French give sufficient notice to the Accused of the new charges that the Prosecution intends to plead[47]. In addition, it is noted that the Defence for Karemera also includes a bilingual legal assistant that may assist the Accused, until the service of the official translation in French, and may provide sufficient information on the content of the said witness statements. The extensive prior disclosure by the Prosecution gave sufficient notice to the Accused of the new pleadings. The proposed amendments considerably narrow the case against the Accused by providing more details as regards the date, locations and criminal acts or omissions of the general allegations contained in the current Indictment. The Accused are not prejudiced by the introduction of the new charges; on the contrary, they may simplify the Defence preparation. The Chamber also notes that the parties have already notified that they will be ready to start the trial by April 2005[48].

52. In the light of the previous quoted case-law, the Chamber considers that additional details should be provided. The Chamber is also of the view that in a case

[45] *Karemera et al*., Decision on Severance of André Rwamakuba and Amendments of the Indictment (TC), 7 December 2004.

[46] Witness AMM's and GGX's statements.

[47] See Witness AMN's, AMO's and QBG's statements.

[48] See Status Conference held on 26 November 2004.

promptement la présente requête comme le lui enjoignait la Chambre dans la décision du 7 décembre 2004[45]. Étant donné les circonstances particulières de l'espèce, la Chambre est convaincue qu'il s'est montré diligent.

50. Les modifications améliorent la clarté et la précision des accusations portées. Le projet d'acte d'accusation est beaucoup moins long, alors même que les précisions supplémentaires qu'il contient explicitent encore mieux la thèse que le Procureur cherchera à défendre au procès tout en éclairant davantage les accusés sur la nature des charges retenues contre eux. De même, l'allégation précise de l'entreprise criminelle commune et de sa forme indique aux accusés que c'est la thèse que le Procureur a l'intention de défendre au procès. Les précisions supplémentaires et le retrait de charges et d'allégations à caractère général que le Procureur n'a pas l'intention de prouver au procès sont de nature à faciliter la préparation de la défense, rendant ainsi le procès plus équitable.

51. Le Procureur reconnaît explicitement et la Chambre constate que le projet d'acte d'accusation modifié énonce une thèse additionnelle sur la responsabilité et qu'il renferme des allégations factuelles plus étoffées, qui constituent de nouvelles charges. L'entreprise criminelle commune est alléguée conformément à la jurisprudence récente des deux tribunaux spéciaux et ne porte pas préjudice à l'accusé. Les nouveaux faits s'appuient sur des allégations faites par des témoins dans leurs déclarations, dont la plupart ont été recueillies en 2003 et 2004, ont déjà été communiquées à la Défense et dont les versions non caviardées ont été communiquées au plus tard en novembre 2004. La Chambre fait observer qu'en ce qui concerne les nouvelles charges retenues plus précisément contre Karemera, deux déclarations de témoin ont été communiquées en anglais seulement, alors que l'accusé et son conseil ne parlent et ne comprennent que le français[46]. La Chambre estime toutefois que les trois autres déclarations de témoin faisant état d'allégations précises contre Karemera ont déjà été communiquées à l'accusé en français et l'informent suffisamment des nouveaux faits qui lui sont reprochés[47]. Il faut noter en outre que l'équipe de la défense de Karemera compte un assistant juridique bilingue, qui est en mesure d'informer l'accusé du contenu desdites déclarations en attendant que lui soit communiquée la traduction française officielle. Les accusés ont été informés suffisamment à l'avance des nouvelles charges grâce aux éléments de preuve à charge communiqués par le Procureur. Les modifications proposées réduisent considérablement le nombre de charges retenues contre les accusés en fournissant plus de détails sur les allégations à caractère général exposées dans l'acte d'accusation actuel ainsi que sur les dates, les lieux, la commission des actes ou omissions correspondants aux accusations. Les accusés ne subiront aucun préjudice du fait de l'introduction des nouvelles charges; au contraire, il est possible que celles-ci facilitent la préparation de la défense. La Chambre relève aussi que les parties ont déjà indiqué qu'elles étaient prêtes à commencer le procès en avril 2005[48].

52. À la lumière de la jurisprudence citée plus haut, la Chambre estime que des détails supplémentaires doivent être fournis. Elle est aussi d'avis que, dans la mesure

[45] *Karemera et consorts,* Décision relative à la disjonction de l'instance d'André Rwarnakuba et à la modification de l'acte d'accusation (Chambre de première instance), 7 décembre 2004

[46] Déclarations des témoins AMM et GGX.

[47] Voir les déclarations des témoins AMN, AM0 et QBG.

[48] Voir Conference de mise en état tenue le 26 novembre 2004.

where superior criminal responsibility pursuant to Article 6 (3) of the Statute is alleged, the material facts in the Indictment must sufficiently identify the subordinates over whom the Accused had effective control and for whose acts he is alleged to be responsible[49].

53. At paragraphs 25.3, 31, 32.3, 62.2 and 62.7, the proposed Amended Indictment must provide more particulars on the locations and/or the dates of the alleged events, where they are in the Prosecution's possession. Likewise, paragraph 32.1 of the proposed Amended Indictment should specify if the child has been killed and, if so, the identity of the perpetrators and the means used. With respect to the allegations of killings as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II, the Prosecution must provide more particulars at least as regards some of the victims, if this information is in its possession[50]. The Chamber notes a lack of concordance between paragraphs 24 and 32.2 of the Indictment and the related supporting material (the statement of Witnesses ALC and ANP respectively). The Prosecution should accordingly remedy this lack of concordance either by deleting the said paragraphs or by including appropriate amendments. The Chamber is not satisfied that a *prima facie* case has been established as regards paragraphs 32.4 and 49 of the proposed Amended Indictment. The Prosecution should therefore either provide further supporting material or remove the said paragraphs. With respect to the Accused's superior responsibility under Article 6 (3) of the Statute, although the proposed Amended Indictment generally states elements of the said responsibility, paragraph 33.3 does not sufficiently identify the subordinates over whom the Accused had effective control and for whose acts they are alleged to be responsible[51]. The Prosecution must accordingly provide additional particulars.

54. Considering the evidence presented by the Prosecution in support of its Motion, the Chamber finds that a *prima facie* case has been established with respect to the counts contained in proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera and grants leave to file it subject to further amendments detailed in the order.

*Further Initial Appearance of the Accused*

55. Considering that the introduction of the new charges substantially modifies the current Indictment as regards both Rwamakuba and Karemera, Ngirumpatse and Nzirorera, the Chamber considers that a further initial appearance must be held to enable the Accused to enter a plea on their respective proposed Amended Indictment, pursuant to Rule 50 (B) of the Rules. The Chamber recalls the Prosecution's obligation to disclose the supporting material to its Motion within thirty days of the initial appearance of the Accused, both in English and French to allow the Defence preparation, pursuant to Rule 66 (A) (i) of the Rules and Article 20 (4) (a) of the Statute.

[49] See *Blaskic* Appeals Judgment, para. 218.
[50] See para. 76.
[51] See, in particular, paragraph 33.3.

où la responsabilité du supérieur hiérarchique prévue au paragraphe 6 (3) du Statut est alléguée, les faits essentiels mentionnés dans l'acte d'accusation doivent suffisamment établir l'identité des subordonnés sur lesquels les accusés exerçait un contrôle effectif et dont les actes relevaient de leur responsabilité[49].

53. Aux paragraphes 25.3, 31, 32.3, 62.2 et 62.7 du projet d'acte d'accusation modifié, le Procureur doit fournir, s'il en a en sa possession, plus de détails sur les lieux où se sont produits les faits allégués et sur la date à laquelle ils se sont produits. Dans le même ordre d'idées, le paragraphe 32.1 du projet d'acte d'accusation devrait préciser si l'enfant a été tué et, si tel est le cas, indiquer l'identité de l'auteur du crime et les moyens qu'il a utilisés pour le commettre. S'agissant des allégations de meurtres constitutifs de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, le Procureur doit, s'il est en mesure de le faire, fournir plus de détails, du moins en ce qui concerne certaines victimes[50]. La Chambre constate un manque de concordance entre les paragraphes 24 et 32.2 de l'acte d'accusation et les pièces justificatives s'y rapportant (les déclarations des témoins ALC et ANP respectivement). Le Procureur devrait donc y remédier, soit en supprimant ces paragraphes, soit en y apportant les modifications nécessaires. La Chambre n'est pas convaincue qu'au vu des présomptions, il y ait lieu d'engager des poursuites au titre des paragraphes 32.4 et 49 du projet d'acte d'accusation. Le Procureur devrait donc, soit fournir des pièces justificatives supplémentaires, soit supprimer lesdits paragraphes. S'agissant de la responsabilité du supérieur hiérarchique prévue au paragraphe 6.3 du Statut, bien que le projet d'acte d'accusation expose de façon générale les éléments de cette responsabilité, le paragraphe 33.3 ne contient pas suffisamment de précisions sur l'identité des subordonnés sur lesquels l'accusé exerçait un contrôle effectif et dont les actes étaient censés relever de sa responsabilité[51]. Le Procureur doit donc fournir des détails supplémentaires.

54. Étant donné les éléments de preuve présentés par le Procureur à l'appui de sa requête, la Chambre conclut qu'au vu des présomptions, il y a lieu d'engager des poursuites sur la base des chefs retenus dans le projet d'acte d'accusation établi contre Karemera, Ngirumpatse et Nzirorera et autorise le Procureur à le déposer, sous réserve des autres modifications précisées dans l'ordonnance.

*Nouvelle comparution initiale des accusés*

55. Étant donné que l'introduction des nouvelles charges modifie radicalement l'acte d'accusation actuel, en ce qui concerne tant Rwamakuba que Karemera, Ngirumpatse et Nzirorera, la Chambre estime qu'une une nouvelle comparution initiale des accusés doit avoir lieu pour qu'ils puissent déclarer s'ils plaident ou non coupable des chefs qui leur sont imputés dans leurs projets d'actes d'accusation respectifs, conformément au paragraphe 50 (B) du Règlement. La Chambre rappelle l'obligation faite au Procureur aux articles 66 (A) (i) du Règlement et 20 (4) (a) du Statut de communiquer, en français et en anglais, les pièces justificatives jointes à l'acte d'accusation dans les 30 jours de la comparution initiale de l'accusé afin que la Défense puisse se préparer.

[49] Voir arrêt *Blaskic,* para. 218.
[50] Voir para. 76.
[51] Voir en particulier le paragraphe 33.3.

FOR THE ABOVE REASONS, THE CHAMBER

1. DENIES Karemera's preliminary request;
2. DENIES Nzirorera's requests;
3. GRANTS the Prosecution leave to sever André Rwamakuba from the Indictment of 21 November 2001;
4. DIRECTS the Registry to designate a new number for the separate Indictment against André Rwamakuba;
5. GRANTS the Prosecution leave to file the Amended Indictment against Rwamakuba under the conditions set out below.
6. ORDERS the Prosecution with respect to the Indictment against Rwamakuba :

   I. At paragraphs 12, 13, 15, 16 and 26, to add, where they are in the Prosecution's possession, details as to the identity of the victims, or at least other identifying information, and the means by which those acts were committed.

   II. To provide additional details, where they are in the Prosecution's possession, on the various public meetings and gatherings in Gikomero *Commune*;

   III. To clarify the factual allegations contained in paragraphs 15, 16, 23 and 26, and specify, if possible, the links between the said paragraphs;

   IV. To reformulate paragraph 2 of the Indictment without use of the phrase "command responsibility".
7. GRANTS the Prosecution leave to file the Amended Indictment against Karemera, Ngirumpatse and Nzirorera under the conditions set out below.
8. ORDERS the Prosecution with respect to the Indictment against Karemera, Ngirumpatse and Nzirorera :
   I. At paragraphs 25.3, 31, 32.3, 62.2 and 62.7, and where they are in the Prosecution's possession, to provide more particulars on the locations and/or the dates of the alleged events;
   II. At paragraph 32.1, to specify, where the information is in the Prosecution's possession, if the child has been killed and, if so, the identity of the perpetrators and the means used;
   III. With respect to count 7, to add more particulars on the alleged events at least as regards some of the victims, if the information is in the Prosecution's possession;
   IV. Either to remove paragraphs 24 and 32.2 or to amend the said paragraphs;
   V. To provide further additional supporting material as regards paragraphs 32.4 and 49 no later than two (2) days from the filing of the present decision or otherwise remove the said paragraphs;
   VI. At paragraph 33.3, to provide additional information on the subordinates over whom the Accused had effective control and for whose acts they are alleged to be responsible.

PAR CES MOTIFS, LE TRIBUNAL

1. REJETTE la demande préliminaire de Karemera;
2. REJETTE les demandes de Nzirorera;
3. AUTORISE le Procureur à disjoindre la cause d'André Rwamakuba de l'acte d'accusation du 21 novembre 2001;
4. INVITE le Greffier à assigner un nouveau numéro à l'acte d'accusation distinct établi contre André Rwamakuba;
5. AUTORISE le Procureur à déposer un acte d'accusation modifié contre Rwamakuba, sous réserve des conditions énoncées ci-après;
6. ENJOINT au Procureur, s'agissant de l'acte d'accusation établi contre Rwamakuba :
   I. D'ajouter dans les paragraphes 12, 13, 15, 16 et 26, s'il en a en sa possession, des détails sur l'identité des victimes ou, du moins, des informations de nature à établir leur identité et sur les moyens utilisés pour commettre les actes incriminés.
   II. De fournir des détails supplémentaires, s'il en a en sa possession, sur les réunions publiques et les rassemblements organisés dans la commune de Gikomero;
   III. De clarifier les allégations factuelles exposées dans les paragraphes 15, 16, 23 et 26 et de préciser, si possible, les rapports qui existent entre lesdits paragraphes;
   IV. De reformuler le paragraphe 2 de l'acte d'accusation sans utiliser l'expression «responsabilité du supérieur hiérarchique».
7. AUTORISE le Procureur à déposer un acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera, sous réserve des modifications énoncées ci-après;
8. ENJOINT au Procureur, s'agissant de l'acte d'accusation établi contre Karemera, Nginunpatse et Nzirorera :
   I. D'insérer dans les paragraphes 25.3, 31, 32.3, 62.2 et 62.7, s'il en a en sa possession, plus de détails sur les lieux où les faits allégués se sont produits et les dates auxquelles ils se sont produits;
   II. De préciser au paragraphe 32.1, s'il possède l'information, si l'enfant a été tué et, si tel est le cas, l'identité de l'auteur et les moyens utilisés;
   III. S'agissant du chef 7, d'ajouter plus de précisions au sujet des faits allégués, du moins en ce qui concerne certaines victimes, s'il est en mesure de le faire;
   IV. Soit de supprimer les paragraphes 24 et 32.2, soit de les modifier;
   V. Soit de fournir des pièces justificatives supplémentaires en ce qui concerne les paragraphes 32.4 et 49 au plus tard dans les deux jours qui suivent le dépôt de la présente décision, soit de supprimer les paragraphes en question;
   VI. De fournir au paragraphe 33.3, fournir des informations supplémentaires au sujet des subordonnés sur lesquels les accusés exerçaient un contrôle effectif et dont les actes auraient relevé de leur responsabilité.

9. INSTRUCTS the Prosecution to file the said Indictment against Rwamakuba and the said Indictment against Karemera, Ngirumpatse and Nzirorera, as amended pursuant the current order, no later than 23 February 2005.

Arusha, 14 February 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Corrigendum to Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment 15 February 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba – Typographical error*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Short and Judge Gustave Kam ("Chamber");

NOTING paragraph 53 of the Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment ("Decision") which states that

> "the Chamber notes a lack of concordance between paragraphs 24 and 32.2 of the Indictment and the related supporting material (the statement of Witnesses ALC and ANP respectively)";

NOTING paragraph 8.IV of the order of the Decision which

> "orders the Prosecution with respect to the Indictment against Karemera, Ngirumpatse and Nzirorera : IV. Either to remove paragraphs 24 and 32.2 or to amend the said paragraphs";

CONSIDERING that the mention of paragraph 24 was a typographical error;

HEREBY ORDERS that, in paragraph 53 of the Decision and paragraph 8.IV of the order of the Decision, the words "paragraph 24" be replaced with the words "paragraph 24.8";

AND that the Decision reads as follows :

9. ORDONNE au Procureur de déposer l'acte d'accusation contre Rwamakuba et celui contre Karemera, Ngirumpatse et Nzirorera, modifié conformément à la présente ordonnance, au plus tard le 23 février 2005.

Arusha, le 14 février 2005.

[Signé] : Dennis C. M. Byron; Emile Short; G. Gustave Kam

***

## *Rectificatif à la décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié 15 février 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba – Erreur typographique*

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

SIÉGEANT en la Chambre de première instance III, composée des juges Demis C. M. Byron, Président de Chambre, Emile Short et Gustave Kam (la «Chambre»),

VU le paragraphe 53 de la décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié (la «décision»), dans lequel il est indiqué que

> «La Chambre constate un manque de concordance entre les paragraphes 24 et 32.2 de l'acte d'accusation et les pièces justificatives s'y rapportant (les déclarations des témoins ALC et ANP respectivement)»,

VU le paragraphe 8.IV du dispositif de la décision qui

> «enjoint au Procureur, s'agissant de l'acte d'accusation établi contre Karemera, Ngirumpatse et Nzirorera : IV de supprimer les paragraphes 24 et 32.2 soit de les modifier»,

ATTENDU que la mention du paragraphe 24 résultait d'une erreur typographique,

ORDONNE PAR LE PRÉSENT RECTIFICATIF, que les mots «paragraphes 24» figurant au paragraphe 53 de la décision et au paragraphe 8.IV de son dispositif soient remplacés par les mots «paragraphe 24.8»,

ET que la décision se lise comme suit :

"53. [...] The Chamber notes a lack of concordance between paragraphs 24.8 and 32.2 of the Indictment and the related supporting material (the statement of Witnesses ALC and ANP respectively) [.. .]".

"8. ORDERS the Prosecution with respect to the Indictment against Karemera, Ngirumpatse and Nzirorera : [.. .]

IV. Either to remove paragraphs 24.8 and 32.2 or to amend the said paragraphs; […]".

Arusha, 15 February 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

«53. La Chambre constate un manque de concordance entre les paragraphes 24.8 et 32.2 de l'acte d'accusation et les pièces justificatives s'y rapportant (les déclarations des témoins ALC et ANP respectivement) […]»

«8. ENJOINT au Procureur, s'agissant de l'acte d'accusation établi contre Karemera, Ngirumpatse et Nzirorera : [.. .]

IV. Soit de supprimer les paragraphes 24.8 et 32.2 soit de les modifier [.. .]».

Fait à Arusha, le 15 février 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Oral decision on stay of proceedings 16 February 2005 (ICTR-98-44-T)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam (absent)

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Stay of proceedings, Disclosure of Rwandan documents, Order for production of documents by the government of Rwanda, Time limits for filing expert witness reports – Impact of partial or late disclosure of material cross-examination of witnesses, Recalling of the witnesses – Lack of diligence of the Prosecutor, Positive and continuous obligation of the Prosecutor to disclosure, Unity of the Office of the Prosecutor, Proper administration of international criminal justice, Due administration of justice, Interests of justice, Interests of a fair trial; Good faith, Sanctions against counsel when having improper conduct – Assessment of exculpatory material, Credibility of Witnesses, Cross-examination of the witness – Right of all the Accused to a fair trial, Right to cross-examine a witness, Right to have adequate time and facilities to prepare their defence, Right to be tried without undue delay, Right to be provided with the indictment, the supporting material and all evidentiary material which will be used in the adjudicative process in a language he understands – Translation, Bilingual Defence team*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 3, 66, 66 (A) (2), 66 (C) and 68; Statute, art. 20*

Decision : In a motion filed on the 6th of February 2006, Nzirorera moves for a stay of proceedings until 60 days after all the material identified in his motion is disclosed. Nzirorera claims that the Prosecution's failure to disclose is depriving him of a fair trial.

Ngirumpatse joined Nzirorera's motion on 9th February 2006, and further requests his provisional release during the stay of proceedings.

The Chamber ordered oral arguments to take place on Monday, 13th of February 2006, on the issues at stake. During the arguments, Karemera also supported some of the submissions made by his co-defendants. At the oral hearing, further information was provided by the parties, which assisted the Court in ruling on these matters.

The Chamber is of the view that the following disclosure issues raised by the Defence in the motion for stay of proceedings are now resolved : One, the disclosure of Rwandan documents has been decided in the decision on motions for the order for production of documents by the government of Rwanda and for consequential orders dated 13th February 2006.

Two, time limits for filing expert witness reports have been decided in several prior decisions.

Three, the impact of partial or late disclosure of material regarding Witness G and Mbonyunkiza on their cross-examination has also been previously addressed by the Chamber. We had ruled that the witnesses could be re-called at a later stage, if necessary.

And, four, the partial disclosure of documents concerning Witness T has also been already decided by the Chamber.

There is no need for the Chamber to repeat the content of these decisions. It must be emphasised, however, that in each case the Chamber expressly took into consideration the rights of all the Accused to a fair trial, including the right to cross-examine a witness, the right to have adequate time and facilities to prepare their defence, and the right to be tried without undue delay.

Accordingly, the issues that remain for the Chamber to resolve with respect to the present motion are, firstly, alleged violations of Rule 66 (A) (2); secondly, alleged violations of Rule 68, disclosure; and, thirdly, issues of unavailable translations.

Now, firstly, Rule 66 (A) (2), disclosure. The Defence for Nzirorera requests a stay of proceedings until the Prosecution has complied with its obligations pursuant to Rule 66 (A) (2), which requires it to disclose the statements of all the witnesses it plans to call at trial no later than 60 days prior to the commencement of trial. In particular, it requests disclosure of Witness AWB's prior statement from the *Bagilishema* trial six years ago and of Witness GFA's testimony in the Ndindiliyimana case from the week of 30th January 2006.

The Defence for Nzirorera also claims that the Prosecution failed several times to disclose witness statements in its possession within the 60 days prior to the commencement of the trial.

The Prosecution responds by disclosing AWB's requested statement and argues that, although the disclosure might have been late, this does not justify a stay because information is already in the hands of the Defence. It concedes that it has not yet disclosed Witness GFA's testimony in the Ndindiliyimana case but contends that its failure is due to the delay in posting the transcripts on the TRIM database.

In the present case, the Chamber notes that the Prosecution recognises that it did not act with the required diligence when disclosing Witness AWB's statement. Additionally, although the transcript of Witness GFA may not be posted in the TRIM database, the Tribunal's standard procedure is for the parties to be served with the transcripts by the registry five days after the testimony is heard. The Prosecutor should be able to comply with its obligations in respect of this witness, and we order the immediate disclosure of the requested transcripts.

Although the Prosecution cannot disclose what it does not have in its possession, it is expected to make the disclosure at the earliest opportunity. As a result, the Chamber expresses its disapproval of the conduct of the Prosecution. The Prosecution trial team is expected to perform its disclosure duties in accordance with the rules and the due administration of justice.

However, the lack of diligence on the part of the Prosecution does not substantially handicap the preparations of the Defence because they already have access to the

statements regarding – relating to AWB and will get GFA's transcripts in time to avoid the kind of prejudice that would require a stay of proceedings.

Now, secondly, the Rule 68 disclosure. The Defence also claims that the Prosecution has not complied with its obligations under Rule 68 of the rules. From the oral arguments submitted by the parties in Court, it appears that they have a conflicting interpretation of that rule. The Prosecution has a positive and continuous obligation under Rule 68 of the rules to disclose, as soon as practicable, to the – to the Defence any material which, in its actual knowledge, may suggest the innocence, or mitigate the guilt, of the Accused or affect the credibility of the Prosecution's evidence.

It is an important part of the machinery to provide a fair trial to the Accused. That initial assessment of such exculpatory material must be done by the Prosecution in good faith, and it must assist in the proper administration of international criminal justice by providing the Accused with any information which may assist him to impeach the credibility of the Prosecution's witnesses.

If the Accused wishes to show that the Prosecution is in breach of these obligations, it must identify specifically the materials sought, present a *prima facie* showing of its probable exculpatory nature, and prove the Prosecutor's custody or control of the materials requested. Breach of the Prosecution's obligations do not always create prejudice to the Accused, partly in cases where, as the appeals Chamber stated in the *Niyitegeka* case, the existence of the relevant exculpatory evidence is known and accessible to the Defence.

When the disclosure of material which could assist the Accused to impeach the testimony of a Prosecution witness is made so late that it has an impact on the fairness of the trial, different lines of remedies have been utilised by Trial Chambers. The evidence could be excluded, the trial or the testimony could be postponed, the cross-examination of the witness could be deferred, or the witness could be re-called. In addition to these remedies, sanctions can be imposed against counsel when there is conduct which willfully interferes with the administration of justice, obstructs the proceedings, or is contrary to the interests of justice.

The Chamber notes three different circumstances concerning the Prosecution's compliance with Rule 68 in this case : One, the Prosecution claims that it does not have the requested information; two, the Prosecution agrees that it has some of the information sought but claims that it is not Rule 68 material; or, three, the Prosecution had the material and has or is making late disclosure.

One, where the Prosecution does not have the requested information. The onus of showing that the Prosecution has custody or control of information requested is on the Accused. In relation to material – to certain material alleged to affect the credibility of Witnesses Mbonyunkiza, UB, GFA, and GBU, Prosecution counsel declared that, to his knowledge, the Prosecution did not take or have – or, have statements, as asserted by Nzirorera.

The Defence was not in a position to provide evidence to rebut the Prosecution's representations but invited the Chamber to draw inferences from the circumstances that the Prosecution had made admissions of custody of a number of statements only after the Defence had been able to establish that the Prosecution, in fact, had the documents. He also suggested that the Prosecution had indicated that there were deficiencies in the certain mechanisms available so that the denials of possession were not reliable and the Chamber should weigh the likelihood of enquiries having been

made from the surrounding circumstances, such as the testimony referring to the witnesses and the likelihood of consequent investigations in search of supporting and corroborating evidence.

In view of remarks made by the Prosecution counsel, it seems necessary to emphasise that the Prosecutor's obligations under Rule 68 are not dependent on the knowledge of any individual person in the Office of the Prosecutor. As the Apeals Chamber in the Bagosora case stated, "The Prosecution teams are all representatives in the same Office of the Prosecutor".

It should also be emphasised that the existence of an – of an electronic database created by the Office of the Prosecutor for storage and retrieval of documents, which allows the Defence to do its own searches for exculpatory material, does not relieve the Prosecution from its positive obligation to disclose all Rule 68 material in the possession of the Prosecution.

Nonetheless, the Chamber is unable to draw the inferences for which counsel for Nzirorera contended. There are too many other conclusions that could be drawn from the circumstances on which we relied, and the Chamber finds that the application fails in relation to those statements where no evidence has been adduced to rebut the – the denials by the Prosecution that any statements had been taken. It would be meaningless to make an order for disclosure of material which may not exist.

These include 14 out of 16 witnesses alleged to affect the credibility of Witness Mbonyunkiza; four out of six witnesses relevant to Witness UB; and five out of seven witnesses relevant to Witnesses GFA and GBU.

For purposes of witness protection, particulars will be provided in the order which will be read in closed session.

The Chamber considers it necessary to point out that the administration of justice depends on the integrity of the Prosecution to the extent that, if it is subsequently established that the declarations made in this session were inaccurate, the Chamber will revisit the issue to consider whether there has been misconduct on behalf of the Prosecution.

Secondly, where the Prosecution has the requested information but has determined that Rule 68 is inapplicable, the Prosecution has admitted having possession of material the Defence has categorized as exculpatory but indicated that it had assessed that it was not exculpatory. Among the material requested are statements from a German priest at Saint André, a survivor at Saint André, and the statement of Joseph Munyaneza, which have been shown to probably contradict the impending testimony of Witness UB. These documents bear a Prosecution K-number, and their content has been adequately described.

Having considered the descriptions provided by the Defence, the Chamber finds that a prima facie case of the exculpatory nature has been shown and orders their disclosure.

Also among the materials requested, the Prosecution has admitted to having statements for two of the seven witnesses listed by Nzirorera as allegedly contradicting the impending testimony of Witness UB. The Defence provided no specific information as to the probable exculpatory material in the statement and, as so, no order can be made for disclosure.

The Prosecution denied that the credibility of Witness AWB could be impeached by a document showing that he was not one of the persons assigned to the roadblock he claims to have supervised and by statements of other witnesses at the same roadblock who never saw Ngirumpatse, contrary to what Witness AWB has claimed.

There is evidence that the document has been already disclosed and is in the exhibit bundle. No order is required.

MR. PRESIDENT : *(Continuing)*

The Chamber finds that the statements of the persons at the alleged roadblocks, whose statements refer to the same time window as Witness AWB's intending testimony, may affect the credibility of the witness and should be disclosed.

The Prosecution conceded possession of statements from two persons concerning the potential testimony of Witness GFA and GBU, but denied that the information in those statements falls within the ambit of Rule 68, despite indicating that the statement of the first person had been previously disclosable under Rule 66 because he used to be on the Prosecution's witness list. The Prosecution persisted in refusing to disclose. The Defence had no information about the probable content of the other statement, and were unable to refute the Prosecution's assessment that there was nothing of an exculpatory nature in that material.

The Chamber orders the disclosure of the statement of the first person on the list, but rules that the Accused has not crossed the threshold of a prima facie showing of a probable exculpatory content in the statement of the second person, and makes no order for the disclosure pursuant to Rule 68.

Finally, the Prosecution also claimed possession of statements of three individuals which are alleged to contradict the testimony of Witness Mbonyunkiza. For one of these individuals, the Chamber has already decided the statement – the status of his statement in the decision on Rule 66 (C) material delivered on 15 February 2006, another individual the Prosecution claimed that the statement did not constitute exculpatory material. The Defence provided no information as to the probable exculpatory material in the statement, and so no order can be made for disclosure.

Finally, the Chamber notes that the Prosecution undertook to disclose the unredacted witness statement of the third individual who is a protected witness.

Now, thirdly, the way the Prosecution has disclosed the requested material : The Prosecution admitted in open court to finding the statement of the Catholic priest which could affect the credibility of Witness UB, and has disclosed it to the Defence, who already had the requested information. The Prosecution also indicated that it found the three requested statements regarding Witness ALG's alleged involvement in an attack at the CELA institute and killings at the St. Paul pastoral centre, and the Prosecution undertook to disclose them as well.

As a result of the Prosecution's denial in open court and at the consequent direction of the Chamber, the Defence for Nzirorera provided the Prosecution K-numbers of the statements which he alleges affect the credibility of Witness HH. In response to this additional filing, the Prosecution admitted possession and agreed to disclose the requested material, while claiming that the information contained in those statements should already have been known to the Defence through other disclosures.

In its filing after the hearing, the Prosecution admitted possession of, and offered to disclose, eight statements from six out of fifteen witnesses listed by Nzirorera in

relation to the material which could affect the credibility of Omar Serushago. The Prosecution asserts that all the information resulting from finding these statements is already known to the Defence through Mr. Serushago's own testimony in many cases, which goes beyond his indictment and plea agreement with the Office of the Prosecutor.

Disposition : As a result of the information provided, the Chamber finds that the Prosecution failed to comply with its obligation pursuant to Rule 68 of the rules.

The Chamber now determines whether the Accused suffered any prejudice, and if so, which remedy will be the most appropriate. The Chamber is mindful of the imperative of ensuring that the Defence has adequate time and facilities to prepare its case. In this case, the indictment against the Accused was confirmed on 22nd August 1998. They made the initial appearance on 7th April 1999, and their trial originally commenced on 27th November 2003. This is a hearing de novo which commenced on 19th September 2005. Consequently, the Defence has had substantial disclosures relating to all of the witnesses scheduled for this trial session. The Defence already had knowledge, or was even in possession of much of the material which the Prosecutor ought to have disclosed, and that circumstance diminishes or removes the prejudice to the presentation of their case.

The Defence contends that the lateness of this disclosure makes it unfair to proceed with the trial. The Chamber is, however, satisfied that the material which they have demanded and is now being disclosed, albeit in breach of the Prosecutor's obligations, will not hamper the effective cross-examination of these witnesses or the management of the Defence case. In the event future problems arise, the Chamber will make any necessary orders on a case-by-case basis.

The Chamber does not consider that the interests of justice require any postponement of the proceedings, and in particular, the Chamber is satisfied that the testimony of UB can commence forthwith.

The Chamber is very concerned about some of the explanations given by counsel for the Prosecution in open court. Difficulties faced by the Prosecution in searching the database or other deficiencies in research are not satisfactory explanations. The Chamber strongly recommends that the Prosecution improve its management of disclosure in its case. Lack of diligence or other default may require the Chamber to consider whether this is conduct which willingly interferes with the administration of justice, obstructs the proceedings or is otherwise contrary to the interests of justice.

The Chamber would like to add that it expects the parties to cooperate on such disclosure issues for the remainder of this trial, as Rule 68 is a continual obligation, and that it should not have to intervene unless a true issue of law arises.

Now, thirdly, translation issues : Now, finally, to support its motion for a stay of proceedings, the Defence for Nzirorera claims that some documents disclosed to the Defence concerning Witness HH, UB and ALG are only available either in Kinyarwanda or in French. In particular, the Defence contends that it cannot cross-examine Witness UB if not provided with the translation of the Rwandan judgement of the witness recently disclosed to the Defence. Relying on the Karera case, the Defence requests the postponement of Witness UB's testimony. The Prosecution submits that some missing translations are not a ground for declaring the trial unfair.

According to Article 20 of the Statute of the Tribunal, Rule 3 of the Rules, and established jurisprudence, the Accused is entitled to be provided with the indictment,

the supporting material, and all evidentiary material which will be used in the adjudicative process, in a language he understands. For all of the documents, unless it is deemed to contravene the interests of a fair trial, it has been held sufficient for the Defence teams to be bilingual, to be able to communicate those issues to the Accused, and to facilitate an efficient trial.

In the instant case, the Accused speaks and understands Kinyarwanda and French. The Accused, therefore, has a full knowledge of the content of the documents. Further, the Defence team is bilingual. The Chamber has no doubt that the Defence team can work with its resources and will be duly able to deal with the documents, even if not yet available in English.

In addition, different practical steps were adopted by the Chamber to provide the translation of the documents requested as soon as possible, particularly the translation of the relevant portions of Witness UB's Rwandan judgement, as determined in an agreement between the parties, was provided orally before today's hearing.

The Chamber is, therefore, of the view that a stay of proceedings is not warranted. In addition, there is no reason at this stage to postpone the testimony of Witness UB. The witness can start his direct and cross-examinations.

This was the situation in Karera, where the Chamber did not postpone the proceedings, as Nzirorera asserts, but simply allowed the witness to be recalled for further examination, if required, by virtue of new information of an exculpatory nature from the Rwandan judgement.

Now, the order disposing of this – well, I suppose I can read the first part of the order in open chambers – in open session.

Now, for those reasons, the Chamber denies the Defence motion for a stay of proceedings, and consequently denies Ngirumpatse's request for provisional release.

The orders regarding disclosure will be read shortly, in closed session. But before going to closed session, we have to address another application for a stay of proceedings filed by Nzirorera after an inadvertent disclosure by the registrar.

The final issue that the Chamber must decide at this time is the other outstanding motion by Nzirorera filed on 30th January 2006, which was precipitated by the disclosure of a document filed ex parte to the Prosecution. Here, Nzirorera requests a stay of proceedings until the circumstances of this serious violation of trust is disclosed and remedied.

After this motion was filed, the Chamber made an order, requesting the registrar for a submission to explain the circumstances surrounding the disclosure. The registrar made his submission on 6th February 2005, wherein he explained to the Chamber the human error that was involved when the document was filed in the TRIM database. The registrar made further representations about how he plans to avoid these problems in the future.

Nzirorera responded to the registrar's submission on 8th February 2006 and acknowledged the error as inadvertent and made suggestions to the Chamber to remedy the situation by ordering the Prosecution to destroy and delete any copies it might have of the *ex parte* annex and ordering the Prosecution to refrain from communication with Defence witness NZ, or his legal representative, without first making a request to counsel for Nzirorera, who will then undertake to facilitate the interview, if agreed to, by NZ and/or his legal representative.

The Prosecution has no objection, in principle, to destroying the documents containing the confidential information, but claims that, in the first instance, the document should not have been filed ex parte and therefore shouldn't be disclosed to the Prosecution. Further, it strongly objects to the second proposal made by Nzirorera restricting any contact with the witness.

As a result of the registry's submission, the Chamber finds that the matter concerning the inadvertent disclosure of the confidential annex is now resolved.

The Chamber will deal with the *ex parte* nature of the confidential annex and the remedies sought by the Defence when it decides the merits of the Defence motion regarding Defence Witness NZ1. The Chamber is of the view that, in the meantime, the Prosecution should delete any electronic copy and destroy any paper copies of the document and refrain from contacting Witness NZ1 or his legal representative.

For these reasons, the Chamber denies Nzirorera's motion for a stay of proceedings, grants the Defence request that the *ex parte* annex be destroyed and deleted from any Prosecution file, and orders the Prosecution to refrain from contacting Witness DNZ1, or his legal representative, until the Chamber has decided the merits of the motion.

[Signed] : Unspecified

***

## *Decision on Prosecution Motion for Leave to File Amended Indictment and Filing of Further Supporting Material Rules 47 (E), 47 (F) and 50 (A) of the Rules of Procedure and Evidence 18 February 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera– Amended Indictment, Prima facie case – Lack of diligence of the Prosecution – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 47 (E), 47 (F), 50 (A) and 50 (A) (ii)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment, 14 February 2005 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Short and Judge Gustave Kam ("Chamber");

CONSIDERING the "Prosecutor's Consolidated Motion to Sever Rwamakuba from the Joint Indictment and to Try Him Separately, For Leave to File a Separate Amended Indictment against Rwamakuba, and For Leave to File a Separate Amended Indictment Against Karemera, Ngirumpatse and Nzirorera, or alternatively, Prosecutor's Motion for Leave to Amend the Indictment against Karemera, Ngirumpatse, Nzirorera and Rwamakuba", filed on 20 December 2004 ("Prosecution Motion");

CONSIDERING that, on 14 February 2005, the Chamber ordered the Prosecution to provide further additional supporting material as regards paragraphs 32.4 and 49 of the proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera ("proposed Amended Indictment"), no later than two days from the filing of the said Decision, or otherwise remove the said paragraphs[1];

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment (TC), 14 February 2005.

## *Décision relative à la Requête du Procureur tendant à obtenir l'autorisation de déposer un acte d'accusation modifié et des pièces justificatives supplémentaires Articles 47 (E), 47 F) et 50 (A) du Règlement de procédure et de preuve 18 février 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Acte d'accusation modifié, Présomptions sérieuses – Manque de diligence du Procureur – Requête acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 47 (E), 47 (F), 50 (A) et 50 (A) (ii)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba, *Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005 (ICTR-98-44)*

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

SIÉGEANT en la Chambre de première instance III, composée des juges Dennis C. M. Byron, Président de Chambre, Emile Short et Gustave Kam (la «Chambre»),

VU la *Requête actualisée du Procureur aux fins de faire disjoindre la cause de Rwamakuba de celles des autres coaccusés pour les juger séparément et aux fins d'obtenir l'autorisation de déposer un acte d'accusation modifié distinct contre lui et un autre contre Karemera, Ngirumpatse et Nzirorera ou* à *défaut Requête du Procureur en modification de l'acte d'accusation établi contre Karemera, Ngirumpatse, Nzirorera et Rwamakuba,* déposée le 20 décembre 2004 (la «Requête du Procureur»),

ATTENDU que le 14 février 2005 la Chambre a ordonné au Procureur de fournir des pièces justificatives supplémentaires en ce qui concerne les paragraphes 32.4 et 49 du projet d'acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera (projet d'acte d'accusation modifié), au plus tard dans un délai de deux jours courant à partir du dépôt de ladite décision ou, à défaut, de supprimer lesdits paragraphes[1],

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-PT, Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié (Chambre de première instance), 14 février 2005.

CONSIDERING, pursuant to Rules 50 (A) (ii) of the Rules, the further supporting material filed by the Prosecution on 16 February 2005 and its suggestion to amend paragraph 32.4 of the proposed Amended Indictment, as follows :

> On or about 6 May 1994 Joseph NZIRORERA participated in a large pacification meeting with high level government officials, including Prime Minister Jean KAMBANDA, in Ruhengeri *préfecture*. By that time massive killings of Tutsi civilians in Ruhengeri had already substantially eliminated the Tutsi population in the region. Joseph NZIRORERA'S public association and endorsement of Interim Government ministers and policies were intended to, and had the consequence of, inciting further attacks upon the Tutsi.

1. The Chamber is satisfied that a *prima facie* case has been established with respect to paragraph 32.4, as amended by the Prosecution on 16 February 2005.

2. The Chamber is also satisfied that a *prima facie* case has been made as regards the first and third sentences of paragraph 49 except for the allegation that Justin Mugenzi was "representing the Interim Government" or was acting on "on behalf of the Interim Government". The Prosecution should therefore remove the said phrases, but may indicate that Justin Mugenzi was a Minister of the Interim Government.

3. For the second sentence of paragraph 49, the Prosecution relies on a witness statement taken in May 1998 and not disclosed to the Defence up to now. Under the circumstances of the present case, such lack of diligence shall not permit the introduction of this new allegation in the Indictment. Furthermore, the Prosecution is not going to rely on that unique allegation for its case. Removing it from the Indictment will not prejudice the prosecution case.

FOR THE ABOVE REASONS, THE CHAMBER

1. GRANTS leave to maintain paragraphs 32.4 in the proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera, as follows :

   > On or about 6 May 1994 Joseph NZIRORERA participated in a large pacification meeting with high level government officials, including Prime Minister Jean KAMBANDA, in Ruhengeri *préfecture*. By that time massive killings of Tutsi civilians in Ruhengeri had already substantially eliminated the Tutsi population in the region. Joseph NZIRORERA'S public association and endorsement of Interim Government ministers and policies were intended to, and had the consequence of, inciting further attacks upon the Tutsi.

2. GRANTS leave to maintain paragraphs 49 in the proposed Amended Indictment against Karemera, Ngirumpatse and Nzirorera under the condition set out above in paragraphs 2 and 3.
3. INSTRUCTS the Prosecution to file the said Indictment, as amended according to the Decision of 14 February 2005 and the current order, no later than 23 February 2005.

Arusha, 18 February 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

VU, en application de l'article 50 (A)(ii) du *Règlement de procédure et de preuve,* les pièces justificatives supplémentaires déposées le 16 février 2005 par le Procureur et sa proposition de modifier le paragraphe 32.4 du projet d'acte d'accusation modifié comme suit :

> Le 6 mai 1994 ou vers cette date, Joseph NZIRORERA a participé à une grande réunion de pacification avec des personnalités gouvernementales de haut rang, notamment avec le Premier Ministre Jean Kambanda, dans la préfecture de Ruhengeri. A ce moment-là, les tueries massives de civils tutsis perpétrées dans la préfecture de Ruhengeri avaient déjà éliminé une partie importante de la population tutsie de la région. Le fait pour Joseph Nzirorera de s'associer et de donner son appui publiquement aux ministres et aux politiques du Gouvernement intérimaire avait pour but et a eu pour conséquence de susciter d'autres attaques contre les Tutsis

1. La Chambre est convaincue qu'il existe des éléments de preuve au soutien des portées au paragraphe 32.4, ainsi qu'il a été modifié par le Procureur le 16 février 2005.

2. La Chambre est également convaincue qu'il existe des présomptions sérieuses au soutien de la première et de la troisième phrase du paragraphe 49 sauf en ce qui concerne l'allégation selon laquelle «Justin Mugenzi, [.. .] représentait le Gouvernement intérimaire» ou agissait «au nom du Gouvernement intérimaire». Le Procureur devra en conséquence supprimer ces membres de phrase, mais peut indiquer que Justin Mugenzi était ministre du Gouvernement intérimaire.

3. S'agissant de la deuxième phrase du paragraphe 49, le Procureur se fonde sur une déclaration de témoin recueillie en mai 1998, qui à ce jour n'a pas été communiquée à la Défense. Dans les circonstances de l'espèce, un tel défaut de diligence n'autorise pas à porter cette nouvelle allégation dans l'acte d'accusation. En outre, le Procureur ne s'appuiera pas sur cette allégation très spécifique lors de la présentation de ses moyens. Le fait de la supprimer ne nuira donc pas à la thèse de l'accusation.

PAR CES MOTIFS,

1. AUTORISE le Procureur à maintenir le paragraphe 32.4 dans le projet d'acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera comme suit :

> Le 6 mai 1994 ou vers cette date, Joseph Nzirorera a participé à une grande réunion de pacification avec des personnalités gouvernementales de haut rang, notamment avec le Premier Ministre Jean Kambanda, dans la préfecture de Ruhengeri. À ce moment-là, les tueries massives de civils tutsis perpétrées dans la préfecture de Ruhengeri avaient déjà éliminé une partie importante de la population tutsie de la région. Le fait pour Joseph Nzirorera de s'associer et de donner son appui publiquement aux ministres et aux politiques du Gouvernement intérimaire avait pour but et a eu pour conséquence de susciter d'autres attaques contre les Tutsis.

2. AUTORISE le Procureur à maintenir le paragraphe 49 du projet d'acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera ainsi qu'il est indiqué aux paragraphes 2 et 3 plus haut.

3. INVITE le Procureur à déposer ledit acte d'acusation, modifié conformément à la décision rendue le 14 février 2005 et à la présente, au plus tard le 23 février 2005.

Fait à Arusha, le 18 février 2005 en langue anglaise.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Amended Indictment*
## *23 February 2005 (ICTR-98-44-T)*

(Original : English)

The Prosecutor of the International Criminal Tribunal for Rwanda ("The Prosecutor"), pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute of the Tribunal"), charges :

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Pursuant to Article 2 of the Statute of the Tribunal, with :

– Conspiracy To Commit Genocide;
– Direct and Public Incitement To Genocide;

and

– Genocide, or Alternatively;
– Complicity In Genocide;

Pursuant to Article 3 of the Statute of the Tribunal, with :

– Rape, and
– Extermination, as Crimes Against Humanity

Pursuant to Article 4 of the Statute of the Tribunal, with :

– Killing and Causing Violence to Health and Physical or Mental Well-Being as Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.

### The Accused

#### I. PARTICULARS OF THE ACCUSED

1. Édouard Karemera, alias Rukusanya, was born in Mwendo commune, Kibuye *préfecture*, in 1951. Édouard Karemera was trained as a lawyer and was Minister of the Interior in the Interim Govemment of 8 April 1994, taking the oath of office on 25 May 1994 and continuing in that capacity until the Interim Government fled from Rwanda in July 1994. During 1994 Édouard Karemera was also First Vice-President of the MRND political party and a member of the party's Steering Committee, serving in that capacity since July 1993.

2. Mathieu Ngirumpatse was born in 1939 in Tare *commune*, Kigali-rural *préfecture*, Rwanda. Mathieu Ngirumpatse was trained as a lawyer and during 1994 was President of the MRND political party and a member of the party's Steering Committee, serving in that capacity since July 1993. Mathieu Ngirumpatse previously served as Minister

## *Acte d'accusation modifié 23 février 2005 (ICTR-98-44-T)*

(Original : Anglais)

Le Procureur du Tribunal pénal international pour le Rwanda (le «Procureur»), en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut du Tribunal»), accuse :

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

en application de l'article 2 du Statut du Tribunal, des crimes suivants :
– Entente en vue de commettre le génocide;
– Incitation directe et publique à commettre le génocide;
et
– Génocide, ou subsidiairement;
– Complicité dans le génocide;
en application de l'article 3 du Statut du Tribunal, des crimes suivants :
– Viol et
– Extermination constitutifs de Crimes contre l'Humanité
en application de l'article 4 du Statut du Tribunal, des crimes suivants :
– Meurtre et atteintes portées à la santé et au bien-être physique ou mental de personnes *constitutifs de* Violations graves de l'article 3 commun aux conventions de Genève et du Protocole Additionnel II.

### Les accusés

#### I. RENSEIGNEMENTS CONCERNANT LES ACCUSÉS

1. Édouard Karemera, alias Rukusanya, est né en 1951 au Rwanda dans la commune de Mwendo (préfecture de Kibuye). Juriste de formation, il était Ministre de l'intérieur dans le Gouvernement intérimaire du 8 avril 1994. Ayant prêté serment le 25 mai 1994, il a exercé cette fonction jusqu'à ce que le Gouvernement intérimaire s'enfuie du Rwanda en juillet 1994. En 1994, il était également Premier Vice-président du MRND et membre du Comité directeur de ce parti politique, postes qu'il occupait depuis juillet 1993.

2. Mathieu Ngirumpatseest né en 1939 au Rwanda dans la commune de Tare (préfecture de Kigali-rural). Juriste de formation, il était en 1994 Président du MRND et membre de son Comité directeur, postes qu'il occupait depuis juillet 1993. Il avait été Ministre de la justice dans le premier Gouvernement rwandais «pluripartite» du

of Justice in Rwanda's first "multi-party" government of 31 December 1991, and was also Secretary-General of the MRND from May 1992 through July 1993 and a member of its Steering Committee. Previously he was also Ambassador to Germany and Ethiopia, Director General for Foreign Affairs in the President's office and general manager of SONARWA, an insurance Company.

3. Joseph Nzirorera was born in 1950 in Mukingo *commune*, Ruhengeri *préfecture*, Rwanda. During 1994 Joseph Nzirorera was National-Secretary of the MRND political party and a member of its Steering Committee, serving in that capacity since July 1993. Joseph Nzirorera was also a member of the *Chambre des Députés* in the *Assemblée Nationale*, representing the MRND and Ruhengeri *préfecture* in that capacity, and served as *President of the Assemblée Nationale* in the Interim Government of 8 April 1994. Previously Joseph Nzirorera was Minister of Public Works in the MRND government of 15 January 1989 and was Minister of Industry, Mines and Artisanry in the MRND governments formed on 9 July 1990 and on 4 February 1991. Joseph Nzirorera was a member of the MRND Steering Committee throughout the period 1992 – 1994 and even prior to 1991.

**Individual criminal responsibility**

4. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera are individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute of the Tribunal and described in this indictment, which they planned, instigated, ordered, committed, or in whose planning, preparation, or execution they otherwise aided and abetted. Committing in this indictment also refers to participation in a joint criminal enterprise as a Co-perpetrator.

5. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera participated in a joint criminal enterprise as set out in paragraphs 9 to 14. The purpose of this joint criminal enterprise was the destruction of the Tutsi population in Rwanda through the commission of crimes in violation of Articles 2, 3, and 4 of the Statute of the Tribunal.

6. This joint criminal enterprise came into existence before January 1994 and continued until at least July 1994. Participants in this joint criminal enterprise included Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera and the following individuals :

– military authorities, including Augustin Bizimana, Minister of Defense; Col. Théoneste Bagosora, *Directeur de cabinet* in the Ministry of Defense; Lt. Col. Anatole Nsengiyumva, *commandant de place* in Gisenyi; Col. Tharcisse Renzaho, *préfet* of Kigali-ville; Augustin Bizimungu, Amy Chief of Staff, and Augustin Ndindiliyimana, Chief of Staff of the *Gendarmerie*, among others;

– political authorities at the national and regional level, particularly those individuals participating in the Interim Government of 8 April 1994, including Theodore Sindikubwabo, Interim President; Callixte Nzabonimana, Minister of Youth and Sports; Pauline Nyiramasuhuko, Minister of Family and Gender; Eliézer Niyitegeka, Minister of Information; Justin Mugenzi, Minister of Commerce; Casimir Bizimungu, Minister of Health; and Jerôme-Clément Bicamumpaka, Minister of Foreign Affairs, among others; and regional officials such as Clément Kayishema, *préfet* of

31 décembre 1991. De mai 1992 à juillet 1993, il avait été Secrétaire général du MRND et membre de son Comité directeur. Il avait également été Ambassadeur du Rwanda en Allemagne et en Éthiopie, Directeur général chargé des affaires étrangères à la Présidence et Directeur général de la SONARWA, compagnie d'assurance.

3. Joseph Nzirorera est né en 1950 au Rwanda dans la commune de Mukingo (préfecture de Ruhengeri). En 1994, il était Secrétaire national du MRND et membre de son Comité directeur, postes qu'il occupait depuis juillet 1993. Il était également député à l'Assemblée nationale, où il représentait le MRND et la préfecture de Ruhengeri, et Président de l'Assemblée nationale sous le Gouvernement intérimaire du 8 avril 1994. Il avait été Ministre des travaux publics dans le Gouvernement MRND du 15 janvier 1989 et Ministre de l'industrie, des mines et de l'artisanat dans les gouvernements formés par le MRND le 9 juillet 1990 et le 4 février 1991. De 1992 à 1994, et même avant 1991, il était membre du Comité directeur du MRND.

## II. Responsabilité pénale individuelle

4. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera sont, à titre individuel, pénalement responsables des crimes visés aux articles 2, 3 et 4 du Statut du Tribunal et articulés dans le présent acte d'accusation qu'ils ont planifiés, incité à commettre, ordonnés, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter. Dans le présent acte d'accusation, le terme «commission» désigne aussi la participation à une entreprise criminelle commune en qualité de coauteur.

5. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont participé à une entreprise criminelle commune de la manière décrite aux paragraphes 9 à 14. Cette entreprise criminelle commune était destinée à détruire la population tutsie du Rwanda par la perpétration de crimes en violation des articles 2, 3 et 4 du Statut du Tribunal.

6. Mise sur pied avant janvier 1994, l'entreprise criminelle commune en question a duré jusqu'en juillet 1994 au moins. Parmi les parties à l'entreprise figuraient Édouard Karemera, Mathieu Ngirumpatseet Joseph Nzirorera, ainsi que les personnes suivantes :

– Des autorités militaires, dont Augustin Bizimana, Ministre de la défense, le colonel Théoneste Bagosora, Directeur de Cabinet au Ministère de la défense, le lieutenant-colonel Anatole Nsengiyumva, commandant de place à Gisenyi, le colonel Tharcisse Renzaho, préfet de Kigali-ville, Augustin Bizimungu, chef d'état-major de l'armée, et Augustin Ndindiliyimana, chef d'état-major de la gendarmerie, pour ne citer que celles-là;
– Des autorités politiques nationales et régionales, en particulier les membres du Gouvernement intérimaire du 8 avril 1994, dont Théodore Sindikubwabo, Président par intérim, Callixte Nzabonimana, Ministre de la jeunesse et des sports, Pauline Nyiramasuhuko, Ministre de la famille et de la promotion féminine, Éliézer Niyitegeka, Ministre de l'information, Justin Mugenzi, Ministre du commerce, Casimir Bizimungu, Ministre de la santé, et Jerôme-Clément Bicamumpaka, Ministre des affaires étrangères, pour ne citer que ceux-là, et des responsables régionaux tels que Clément Kayishela, préfet de Kibuye, Sylvain Nsabimana, préfet de Butare, Juvénal

Kibuye; Sylvain Nsabimana, *préfet* of Butare; Juvenal Kajelijeli, *bourgmestre* of Mukingo; and Laurent Semanza, *bourgmestre* of Bicumbi, among others;

– influential businessmen and political party leaders affiliated with "Hutu Power" including Jean Bosco Barayagwiza, a leader of the CDR political party; Ferdinand Nahimana, an academic; Félicien Kabuga, a businessman; Obed Ruzindana, a businessman, among many unnamed others; and

– leaders of the *Interahamwe* and *Impuzamupagambi* political party "youth wing" rnilitias and the "civil defense" program including, though not lirnited to, Robert KAJUGA, national president of the *MRND-Interahamwe;* Georges RUTAGANDA, first vice-president of the *MRND-Interahamwe;* Bernard MANIRAGABA, an *Interahamwe* leader in Kigali; Yusuf MUNYAKAZI, an *Interahamwe* leader in Cyangugu; Col. Aloys SIMBA, leader of the "civil defense" in Gikongoro; Col. Alphonse NTEZIRYAYO, *préfet* and leader of the "civil defense" in Butare; Col. RWAGAFILITIA, leader of the "civil defense" in Kibungo; Bernard MUNYAGISHARI, President of the *Interahamwe* in Gisenyi; and Omar SERUSHAGO, an *Interahamwe* leader in Gisenyi; among others.

7. The crimes enumerated in Counts 2, 3, 4, 6, and 7 of this indictment were within the object of the joint criminal enterprise. The crimes enumerated in Counts 3, 4, and 5 were the natural and foreseeable consequences of the execution of the object of the joint criminal enterprise and the accused were aware that such crimes were the possible outcome of the execution of the joint criminal enterprise.

8. In order for the joint criminal enterprise to succeed in its objective, Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera worked in concert with or through several individuals in the joint criminal enterprise. Each participant or Co-perpetrator within the joint criminal enterprise played his own role or roles that significantly contributed to the overall objective of the enterprise. The roles of the participants or CO-perpetrators include, but are not limited to, the following :

9. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera constituted the national executive leadership of the *MRND* political party and, along with Second Vice-President Ferdinand Kabagema, comprised its Steering Committee. In their respective capacities as President, National-Secretary, and First and Second Vice-Presidents they participated in the MRND Political Bureau [made up of the Steering Committee and the MRND Chairman at the prefectural level] and the MRND Central Committee [made up of the Steering Committee and five members from every préfecture].

10. On the basis of their executive, leadership positions in the MRND, Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera exercised authority over government officials in the territorial administration that were also MRND party members. Governmental authority, as mediated by the territorial administration, either complemented or was subordinate to structures of authority in the MRND in those *préfectures* or *communes* controlled by the MRND.

11. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera exercised effective control over the *Interahamwe*, the youth wing of the MRND political party, through structures of authority in the MRND party at the level of the *préfecture*. As President of the MRND, Mathieu Ngirumpatse exercised the ultimate authority over the MRND and the *Interahamwe*.

Kajelijeli, bourgmestre de Mukingo, et Laurent Semanza, bourgmestre de Bicumbi, pour ne citer que ceux-là;

– Des commerçants influents et des dirigeants de partis politiques appartenant au mouvement «Hutu Power», notamment Jean Bosco Barayagwiza, un des dirigeants de la CDR, Ferdinand Nahimana, universitaire, Félicien Kabuga, commerçant, Obed Ruzindana, commerçant, ainsi que de nombreuses autres personnes dont les noms n'ont pas été indiqués;

– Les dirigeants des milices *Interahamwe* et *Impuzamugambi* - «organisations des jeunes» de partis politiques - et les responsables du programme de «défense civile», dont Robert KAJUGA, Président national du MRND-*Interahamwe*, Georges Rutaganda, Premier Vice-président du MRND-*Interahamwe*, Bernard MANIRAGABA, un des chefs des *Interahamwe* de Kigali, Yusuf Munyakazi, un des chefs des *Interahamwe* de la préfecture de Cyangugu, le colonel Aloys SIMBA, responsable de la «défense civile» dans la préfecture de Gikongoro, le colonel Alphonse NTEZIRYAYO, préfet et responsable de la «défense civile» de Butare, le colonel RWAGAFILITIA, responsable de la «défense civile» dans la préfecture de Kibungo, Bernard MUNYAGISHARI, Président des *Interahamwe* de la préfecture de Gisenyi, et Omar SERUSHAGO, un des chefs des *Interahamwe* de la préfecture de Gisenyi, pour ne citer que ceux-là.

7. Les crimes énumérés aux chefs 2, 3, 4, 6 et 7 du présent acte d'accusation entraient dans l'objet de l'entreprise criminelle commune. Les crimes énumérés aux chefs 3, 4 et 5 étaient les conséquences naturelles et prévisibles de la réalisation de l'objet de l'entreprise criminelle commune et les accusés savaient que l'exécution de l'entreprise pourrait déboucher sur ces crimes.

8. Pour mener à bien l'entreprise criminelle commune, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont agi de concert avec plusieurs personnes ou par leur intermédiaire. Chacune des parties à l'entreprise ou chacun de ses coauteurs a joué un ou plusieurs rôles propres qui ont contribué sensiblement à la réalisation de l'objectif général. Ces rôles consistent, entre autres, dans les actes suivants :

9. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera formaient la direction nationale du MRND et constituaient avec Ferdinand Kabagema, deuxième Vice-président, le Comité directeur du parti. En leurs qualités respectives de Président, de Secrétaire national et de Premier et Deuxième Vice- Présidents, ils faisaient partie du Bureau politique du MRND [composé du Comité directeur et des présidents du MRND à l'échelon préfectoral] et de son Comité central [composé du Comité directeur et de cinq membres désignés dans chaque préfecture].

10. En raison de leur qualité de dirigeants du MRND, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera avaient autorité sur les fonctionnaires de l'Administration territoriale qui étaient également membres du MRND. Dans les préfectures ou communes dirigées par le MRND, l'autorité de l'État, exercée par l'intermédiaire de l'Administration territoriale, constituait le complément du pouvoir acquis dans la structure hiérarchique du MRND ou lui était subordonnée.

11. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera exerçaient un contrôle effectif sur les *Interahamwe* - organisation des jeunes du MRND - par le truchement de la structure hiérarchique du MRND à l'échelon préfectoral. En sa qualité de Président du MRND, Mathieu Ngirumpatse avait autorité en dernier ressort sur le MRND et les *Interahamwe*.

12. Édouard Karemera was Minister of the Interior in the Interim Government during the period after 25 May 1994. In that capacity he exercised de jure and de facto authority and effective control over the regional territorial administration of *préfets*, *sous-préfets*, and *bourgmestres* throughout Rwanda. Furthermore, as Minister of Interior Édouard Karemera (i) was responsible for appointments of *préfets* and *bourgmestres* nationwide; and (ii) received regular reports from *préfets* and *bourgmestres* on security in their respective administrative constituencies.

13. Collectively, the national leadership in the MRND political party, particularly its Steering Committee, and the Ministry of the Interior and the Ministry of Defense, both of which were controlled by the MRND political party, initiated and exercised authority over the "civil defense program". Particularly after 6 April 1994 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera exercised effective control over the network of national and regional leaders in the "civil defense program" and the *Interaharnwe* militias.

14. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera, acting alone and in concert with other members of the joint criminal enterprise, participated in the joint criminal enterprise in the following ways : they created, founded, and organized the *Interahamwe*; recruited members for the *Interahamwe*; provided weapons, military training and indoctrination to the *Interahamwe*; purchased and distributed weapons to armed militias, particularly to the *Interahamwe*; organized and participated in rallies and public meetings that promoted the ideology of "Hutu Power"; made public statements and engaged in public displays that supported anti-Tutsi ideology; legitimized the Interim Government at international *fora* and manipulated press reports of the genocide; led propaganda efforts to accelerate the genocide; publicly characterized the Tutsi as "accomplices of the enemy" or publicly acquiesced to such characterizations; organized and participated in meetings of the MRND for such purposes; incited, encouraged or abetted killings of Tutsis; rewarded or praised persons who killed Tutsis; participated in the formulation and implementation of the policies of the Interim Government of 8 April 1994 that were directed to those ends; and mobilized the physical and logistical resources of their respective political parties and the Interim Government ministries controlled by those parties, and the military.

15. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera knowingly and wilfully participated in the joint criminal enterprise, sharing the intent of other participants in the joint criminal enterprise or aware of the foreseeable consequences of their actions. On this basis, each accused bears individual criminal responsibility for these crimes under Article 6 (1) of the Statute of the Tribunal in addition to his responsibility under the same Article for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation and execution of these crimes.

16. All named accused and other participants in the joint criminal enterprise shared the intent and state of mind required for the commission of each of the crimes charged in Counts 2, 3, 4, 6 and 7.

12. Édouard Karemera était Ministre de l'intérieur dans le Gouvernement intérimaire après le 25 mai 1994. À ce titre, il exerçait un pouvoir *de jure* et *de facto* et un contrôle effectif sur l'Administration territoriale régionale, composée des préfets, des sous-préfets et des bourgmestres, sur toute l'étendue du Rwanda. De plus, en tant que Ministre de l'intérieur, Édouard Karemera i) était responsable de la nomination de tous les préfets et bourgmestres du pays et ii) recevait régulièrement des préfets et des bourgmestres des rapports traitant de la sécurité dans leurs circonscriptions administratives respectives.

13. Collectivement, la direction nationale du MRND, en particulier son Comité directeur, ainsi que le Ministère de l'intérieur et le Ministère de la défense, tous deux dirigés par le MRND, ont mis sur pied le «programme de défense civile» sur lequel ils exerçaient leur autorité. En particulier après le 6 avril 1994, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera exerçaient un contrôle effectif sur le réseau des responsables nationaux et régionaux du «programme de défense civile» ainsi que sur les milices *Interahamwe.*

14. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, agissant seuls ou de concert avec d'autres parties à l'entreprise criminelle commune, ont participé à celle-ci de la manière suivante : ils ont conçu, créé et organisé la milice *Interahamwe;* recruté les membres de la milice; fourni des armes ainsi qu'une formation militaire aux intéressés et procédé à leur endoctrinement; acheté des armes qu'ils ont distribuées par la suite à des milices armées, en particulier aux *Interahamwe;* organisé des meetings et des réunions publiques destinés à promouvoir l'idéologie du mouvement «Hutu-Power» et y ont participé; publiquement tenu des propos et accompli des actes allant dans le sens de l'idéologie antitutsie; légitimé le Gouvernement intérimaire lors de réunions internationales et manipulé les articles de presse traitant du génocide; mené des actions de propagande tendant à accélérer la perpétration du génocide; publiquement qualifié les Tutsis de «complices de l'ennemi» ou publiquement souscrit à ce qualificatif; organisé des réunions du MRND à ces fins et participé auxdites réunions; incité, encouragé ou aidé à tuer des Tutsis; récompensé ou complimenté des personnes qui avaient tué des Tutsis; participé à l'élaboration et à la mise en œuvre des politiques du Gouvernement intérimaire du 8 avril 1994 axées sur ces objectifs; et mobilisé les ressources matérielles et logistiques de leurs partis politiques respectifs et des ministères du Gouvernement intérimaire dirigés par ces partis, ainsi que l'armée.

15. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont sciemment et délibérément participé à l'entreprise criminelle commune, partageant la volonté criminelle d'autres parties à l'entreprise ou connaissant les conséquences prévisibles de leurs actes. De ce fait, la responsabilité pénale individuelle de chacun des accusés est engagée à raison de ces crimes au sens du paragraphe 1 de l'article 6 du Statut du Tribunal, en plus de la responsabilité qu'il encourt en application de la même disposition pour avoir planifié, incité à commettre, ordonné ou de toute autre manière aidé et encouragé à planifier, préparer et exécuter les crimes en question.

16. Tous les accusés nommément désignés et les autres parties à l'entreprise criminelle commune partageaient l'intention criminelle et l'état d'esprit requis pour la perpétration de chacun des crimes retenus dans le cadre des chefs d'accusation 2, 3, 4, 6 et 7.

III. COMMAND RESPONSIBILITY

17. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera while holding positions of superior authority, are also individually criminally responsible under Article 6 (3) of the Statute of the Tribunal for the acts of their subordinates in the crimes charged in this indictment.

18. From January 1994 through July 1994, Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera exercised effective control over the following persons or classes of persons :

– members of the *Interahamwe* militias, particularly the *National Committee of the Interahamwe* and those members of the *Interahamwe* leadership that were already in place by 6 April 1994, including Robert Kajuga, Georges Rutaganda, Joseph Setiba, Bernard Maniragaba, Yusuf Munyakazi, among others, and the expanded corps of militiamen that were incorporated under the authority of the territorial administration and the "Hutu Power"-affiliated political parties, including the MRND, in the "civil defense program";
– *préfets, bourgmestres* and *conseillers* that were members of the MRND, and members of their respective *conseils de sécurité* at prefectural and communal levels;
– commanders of the "civil defense program", particularly those military officials that held appointments in the territorial administration, such as Butare *préfet* Col. Alphonse Nteziryayo, Kigali *préfet* Col. Tharcisse Renzaho, and Gitarama *préfet* Maj. Damascene Ukulikiyezu*;*
– administrative personnel in the ministries controlled by the MRND, such as Callixte Kalimanzira, *Directeur de cabinet* in the Ministry of Interior.

19. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera knew or had reason to know that their subordinates were about to commit or had committed the crimes charged in this indictment. The same circuits of information that provided structures of authority for effective control of the militiamen-the territorial administration and MRND and MDR-"Power" political parties-also provided news of the crimes that they committed. Furthermore, the crimes were so widespread and were committed so openly that each accused must have known, or ought to have been aware of them.

20. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera had the material capacity to halt or prevent the crimes or to punish or sanction the subordinates that committed them. Given the procedures established for decision- making and enforcement in the Interim Government, the MRND dominated policymaking for the Interim Government. As the national, executive leadership of the MRND, Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera, through the Ministries of Defense and the Interior, possessed the means to call upon the army, the gendarmerie and communal police to halt, prevent or punish the individuals committing attacks upon the civilian population, or failing that, making it incumbent upon them to denounce the killings and those that committed them.

21. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera failed to take the necessary and reasonable measures to prevent the crimes committed by their subordinates or to punish the perpetrators. Moreover, the accused actively sought to con-

## III. Responsabilité du supérieur hiérarchique

17. En raison de leur qualité de supérieurs hiérarchiques, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera sont aussi pénalement responsables, à titre individuel, des actes accomplis par leurs subordonnés dans le cadre des crimes retenus dans le présent acte d'accusation, en application du paragraphe 3 de l'article 6 du Statut du Tribunal.

18. De janvier à juillet 1994, Édouard Karemera, Mathieu Ngirumpaste et Joseph Nzirorera ont exercé un contrôle effectif sur les personnes ou les catégories de personnes suivantes :

– Les membres des milices *Interahamwe*, en particulier leur Comité national et leurs dirigeants qui étaient déjà en poste au 6 avril 1994, dont Robert Kajuga, Georges Rutaganda, Joseph Setiba, Bernard Maniragaba et Yusuf Munyakazi, entre autres, ainsi que le corps élargi de miliciens qui participait au «programme de défense civile» sous l'autorité de l'Administration territoriale et des partis politiques appartenant au mouvement «*Hutu Power*», notamment le MRND;

– Les préfets, bourgmestres et conseillers qui étaient membres du MRND, ainsi que les membres de leurs conseils de sécurité préfectoraux et communaux respectifs;
– Les responsables du «programme de défense civile», en particulier les officiers de l'armée occupant des postes dans l'Administration territoriale, tels que le colonel Alphonse Nteziryayo, préfet de Butare, le colonel Tharcisse Renzaho, préfet de Kigali, et le major Damascène Ukulikiyezu, préfet de Gitarama;
– Les membres du personnel administratif des ministères dirigés par le MRND, tels que Callixte Kalmimanzira, Directeur de Cabinet au Ministère de l'intérieur.

19. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera savaient ou avaient des raisons de savoir que leurs subordonnés étaient sur le point de commettre ou avaient commis les crimes retenus dans le présent acte d'accusation. Les circuits d'information qui constituaient les structures hiérarchiques permettant d'exercer un contrôle effectif sur les miliciens, à savoir ceux de l'Administration territoriale, du MRND et du MDR-«*Power*», renseignaient également sur les crimes qu'ils commettaient. En outre, ces crimes étaient si généralisés et se commettaient si ouvertement que chacun des accusés a dû ou aurait dû en être au courant.

20. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera avaient le pouvoir matériel de mettre fin aux crimes en question, de les prévenir ou de punir leurs subordonnés qui les commettaient. Compte tenu des mécanismes de prise et de mise en œuvre de décisions adoptés par le Gouvernement intérimaire, le MRND avait la haute main sur l'élaboration de la politique gouvernementale. En leur qualité de responsables administratifs nationaux du MRND, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera avaient, par le biais des Ministères de la défense et de l'intérieur, les moyens de demander à l'armée, à la gendarmerie et à la police communale de faire cesser les attaques lancées contre la population civile, de les prévenir, d'en punir les auteurs ou, à défaut, de se faire un devoir de dénoncer les massacres et les personnes qui les commettaient.

21. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera n'ont pas pris les mesures nécessaires et raisonnables pour empêcher les crimes commis par leurs subordonnés ou en punir les auteurs. En outre, ils se sont employés à dissimuler ces crimes.

ceal these crimes. They (i) employed structures of authority in the territorial administration to dispose of the corpses of victims of the killings expeditiously, attempting to conceal such crimes from international media scrutiny; (ii) used their control of the mass media to mischaracterize the killings, al1 the while encouraging or tacitly aiding and abetting the killings, and (iii) dispatched emissaries of the Interim Government, or themselves undertook missions abroad, to purchase weapons and provisions for the army and the militias and to misinform the world and legitimize the Interim Government, and its crimes, in international forums.

## Charges

### COUNT 1 : CONSPIRACY TO COMMIT GENOCIDE

The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera with Conspiracy to Commit Genocide pursuant to Articles 2 and 6 (1) of the Statute of the Tribunal in that over a period of at least one year leading up to and including 6 April-17 July 1994 *all named accused,* conspired together, and with others, to destroy in whole or in part, the Tutsi racial or ethnic group, committed as follows :

22. Unless otherwise stated all events detailed in present indictment, including the acts and omissions of the accused, took place in Rwanda between 1 January and 31 December 1994.

23. Over the course of several years leading up to and including 1994, particularly after 1992, Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera agreed among themselves, and with the individuals identified in paragraphs 6(i)-(iv), meeting severally at various locations on disparate occasions in the context of their political party and officia1 government activities, to plan and prepare the destruction of Rwanda's Tutsi population, particularly the killing of persons identified as Tutsi and committed acts in furtherance of this agreement.

*Prior to 8 April 1994*

Formation of the *Interahamwe*; meetings & public speeches; financing, military training, stockpiling of firearms and weapons distributions for militias :

24. Over the course of 1993 and 1994 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera agreed among themselves, and with others, and collectively undertook initiatives that were intended to create and extend their own persona1 control, and that of the MRND Steering Committee, over an organized, centrally commanded corps of militiamen that would respond to their call to attack, kill and destroy the Tutsi population.

24.1 Sometime during 1992 Mathieu Ngirumpatse initiated or supported the proposa1 that the *MRND* should establish a "youth wing" that would be called the *Interahamwe.* This MRND "youth wing" would compete with rival "youth

Ils ont i) utilisé la structure hiérarchique de l'Administration territoriale pour se débarrasser hâtivement des corps des victimes des massacres, tentant ainsi de dissimuler ces crimes à la vigilance des médias internationaux; ii) utilisé le contrôle qu'ils exerçaient sur les médias pour dénaturer les massacres tout en les encourageant ou en aidant tacitement à les perpétrer; iii) envoyé des émissaires du Gouvernement intérimaire ou effectué eux-mêmes des missions à l'étranger pour acheter les armes et les approvisionnements de l'armée et des milices, ainsi que pour désinformer la communauté internationale et légitimer le Gouvernement intérimaire et ses crimes lors de réunions internationales.

## Accusations

### CHEF 1 : ENTENTE EN VUE DE COMMETTRE LE GÉNOCIDE

Le Procureur accuse Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera d'entente en vue de commettre le génocide, en application des articles 2 et 6.1 du Statut du Tribunal, en ce que sur une période d'au moins un an qui avait commencé avant le 6 avril et s'est poursuivie jusqu'au 17 juillet 1994, *tous les accusés nommément cités* se sont entendus entre eux et avec d'autres personnes en vue de détruire, en tout ou en partie, le groupe racial ou ethnique tutsi, tel qu'il est indiqué ci-après :

22. Sauf indication contraire, tous les faits exposés dans le présent acte d'accusation, notamment les actes et omissions des accusés, se sont produits au Rwanda entre le 1er janvier et le 31 décembre 1994.

23. Pendant une période de plusieurs années qui va jusqu'en 1994 inclusivement, notamment après 1992, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera se sont entendus entre eux et avec les personnes mentionnées aux alinéas i à iv du paragraphe 6, se réunissant séparément en divers lieux et à différentes occasions dans le cadre de leurs activités au sein du parti et de leurs activités officielles au sein du Gouvernement, pour planifier et préparer la destruction de la population tutsie du Rwanda, en particulier le massacre des personnes considérées comme tutsies. En outre, ils ont commis des actes tendant à l'exécution de cette entente.

*Avant le 8 avril 1994*

Création du mouvement *Interahamwe*; réunions et discours publics; financement et formation militaire des milices; stockage d'armes à feu et distribution d'armes aux dites milices

24. En 1993 et 1994, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera se sont entendus entre eux et avec d'autres personnes pour prendre collectivement des initiatives visant à établir et étendre leur contrôle personnel et celui du Comité directeur du MRND sur un corps de miliciens organisé et centralisé qui répondrait à leur appel lorsqu'ils demanderaient d'attaquer, de tuer et de détruire la population tutsie.

24.1 À une date indéterminée en 1992, Mathieu Ngirumpatse a lancé ou soutenu l'idée que le MRND crée une «organisation des jeunes» du parti qui s'appellerait *Interahamwe*. Cette «organisation des jeunes» du MRND disputerait

wings" of opposition political parties to recruit members for the *MRND.* Over time, the *MRND-Interahamwe* "youth wing" attracted and incorporated unemployed, delinquent youth that often engaged in illegal activity under the auspices of "multi-party politics" and *kibuhoza.*

24.2 In July 1993 Mathieu Ngirumpatse became the national President of the *MRND* political party. During a *MRND* national congress held sometime around June or July 1993 the MRND Central Committee, at that time including Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera, authorized and founded *MRND-Interahamwe* committees at the prefectural level throughout Rwanda, bringing the *MRND* "youth wing" squarely under the control of the MRND prefectural chairmen, who themselves were subject to the authority of the MRND Steering Committee.

24.3 Starting in 1993 Mathieu Ngirumpatse and other national leaders of the MRND political party agreed among themselves, and with civilian authorities in the territorial administration and military authorities in the Ministry of Defense and the FAR, to provide military training and arms to *Interahamwe* militias, and to stockpile firearms from the Ministry of Defense for later distribution to *Interahamwe* militias, intending that *Interahamwe* militias would be deployed to kill and harm Rwanda's Tutsi population.

24.4 In this regard Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera were aware of, and complicit in, decisions taken by Minister of Defense Augustin Bizimana and Ministry of Defense *Directeur de cabinet* Théoneste Bagosora and certain FAR military officers to provide military training to the *Interahamwe* militias in military camps in Kigali, Byumba, Gisenyi and Ruhengeri, notably at Gabiro, Mukamira and Bigogwe camps and in neighbouring forests, including Gishwati in Gisenyi and Akagera in Umutara.

24.5 In furtherance of this conspiracy Mathieu Ngirumpatse ordered, facilitated or assisted the distributions of weapons to *Interahamwe* during 1993 and in early 1994 and also ordered or assisted the concealing of stockpiled firearms so that they would not be removed pursuant to the KWSA [*Kigali Weapons Secure Area*], a disarmament initiative launched by UNAMIR, intending that such weapons would later be distributed to MRND-*Interahamwe.*

24.6 During this period, and continuing through early 1994, Mathieu Ngirumpatse participated in meetings of the MRND party at the prefectural level in Kigali-rural, Kibungo and in several other *préfectures,* during which he presented and endorsed local leaders of the *Interahamwe* to the various regional constituencies of the MRND. Such efforts were a means to expand membership in the *Interahamwe* and to exercise control over the militias through structures of authority in the *MRND* party.

24.7 During late 1993 and early 1994, Mathieu Ngirumpatse chaired meetings of the National Committee of the *Interahamwe* in Kigali. At these meetings, Mathieu Ngirumpatse, in concert with other *Interahamwe* leaders, prepared lists of persons to be lulled and planned a killing campaign against Tutsis and moderate Hutus.

le terrain à ses homologues rivaux des partis de l'opposition à l'effet de recruter des militants pour grossir les rangs du MRND. Avec le temps, le MRND-*Interahamwe*, cette «organisation des jeunes», a attiré et incorporé de jeunes désœuvrés délinquants qui se livraient souvent à des activités illicites sous le couvert du «multipartisme» et du *kubohoza*.

24.2 En juillet 1993, Mathieu Ngirumpatse est devenu Président national du MRND. Au Congrès national de ce parti tenu vers juin ou juillet 1993, le Comité central, dont faisaient partie à l'époque Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, a autorisé la mise sur pied de comités MRND-*Interahamwe* à l'échelon préfectoral sur toute l'étendue du Rwanda, procédé à leur création et placé l' «organisation des jeunes» du MRND entièrement sous le contrôle des présidents préfectoraux du parti qui, eux-mêmes, relevaient de l'autorité du Comité directeur du MRND.

24.3 Des 1993, Mathieu Ngirumpatse et d'autres dirigeants nationaux du MRND se sont entendus entre eux, avec des autorités civiles de l'Administration territoriale et des autorités militaires en poste au Ministère de la défense, ainsi qu'avec les FAR, en vue de faire suivre une formation militaire aux milices *Interahamwe*, de leur fournir des armes et de stocker des armes à feu provenant du Ministère de la défense qui leur seraient distribuées ultérieurement, dans l'intention de déployer ces milices *Interahamwe* par la suite pour qu'elles portent atteinte à l'intégrité des membres de la population tutsie du Rwanda et les tuent.

24.4 À cet égard, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera étaient au fait et complices des décisions prises par Augustin Bizimana, Ministre de la défense, Théoneste Bagosora, Directeur de Cabinet au Ministère de la défense, et certains officiers des FAR en vue de faire suivre une formation militaire aux milices *Interahamwe* dans des camps militaires à Kigali, à Byumba, à Gisenyi et à Ruhengeri, notamment dans les camps de Gabiro, Mukamira et Bigogwe, et dans les forêts environnantes, en particulier la forêt de Gishwati dans la préfecture de Gisenyi et celle d'Akagera dans la préfecture d'Umutara.

24.5 En exécution de ladite entente, Mathieu Ngirumpatse a ordonné des distributions d'armes aux *Interahamwe* en 1993 et au début de 1994, a facilité ces distributions ou a aidé à les effectuer; il a également ordonné la dissimulation d'armes à feu stockées ou aidé à dissimuler celles-ci pour éviter qu'elles ne soient saisies dans le cadre de l'initiative de désarmement de Kigali (Kigali Weapons Secure Area [KWSA]) lancée par la MINUAR, afin de les distribuer plus tard aux éléments du MRND-*Interahamwe*.

24.6 Au cours de cette période et jusqu'au début de 1994, Mathieu Ngirumpatse a participé à des réunions du MRND a l'échelon préfectoral dans les préfectures de Kigali-rural et Kibungo, ainsi que dans plusieurs autres; lors desdites réunions, il a présenté des chefs locaux des *Interahamwe* aux diverses sections régionales du MRND et leur a apporté son soutien. Ces actions visaient à grossir les rangs des *Interahamwe* et à exercer un contrôle sur les milices par le canal de la structure hiérarchique du MRND.

24.7 Vers la fin de 1993 et au début de 1994, Mathieu Ngirumpatse a présidé des réunions du Comité national des *Interahamwe* a Kigali. Lors de ces réunions, il a, de concert avec d'autres chefs des *Interahamwe*, établi des listes de personnes à tuer et planifié une campagne de massacre de Tutsis et de Hutus modérés.

24.8 Mathieu Ngirumpatse and Joseph Nzirorera participated in fundraising activities for the *Interahamwe*. Particularly noteworthy are several meetings organized under the auspices of the MRND political party to arrange collections of money from businessmen and wealthy party members. On a date in February or March 1994, Joseph Nzirorera organized a fundraising banquet for the *Interahamwe* at the Hotel Rebero in Kigali. Persons in attendance included President Juvénal Habyarimana, Seraphin Rwabukumba, Augustin Ngirabatware, Robert Kajuga, among many other notable MRND party-members, several of whom made congratulatory speeches.

25. Over the course of 1993 and early 1994 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera often participated in various MRND political party meetings and addressed public gatherings and rallies where they characterized the Tutsi as "the enemy". These various meetings and gatherings were intended to indoctrinate MRND party members, particularly the MRND-*Interahamwe* "youth wing", with anti-Tutsi sentiment and to generate fear and loathing of the Tutsi as a group among Rwanda's Hutu population. These initiatives were consistent with recommendations made in report from a Special Military Commission chaired by Théoneste Bagosora to devise an agenda to "defeat the enemy militarily, in the media and politically" that Juvénal Habyarimana, at that time Commander in Chief of the *Forces Armées Rwandaises* (*FAR*) as well as Rwandan Head of State, established in December 1991. Army Chief of Staff Déogratias Nsabimana caused the report to be circulated among *FAR* military officers in September 1992.

25.1 On or about 23 October 1993, in particular, Mathieu Ngirumpatse, Jean-Bosco Barayagwiza, among others, participated in a rally at Nyamirambo stadium in Kigali where they made speeches that characterized the Tutsi as accomplices of "the enemy". The rally included animation and pageantry by *Interahamwe*.

25.2 On or about 27 October 1993 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera along with Col. Théoneste Bagosora, Augustin Ngirabatware, among other high-level officials of the MRND, participated in a rally with thousands of persons in attendance at Umuganda Stadium in Gisenyi. Again, those that addressed the crowd, including Mathieu Ngirumpatse and Édouard Karemera, opposed the Arusha Accords and exhorted the crowd to "combat the enemy". *Interahamwe* in *kitenge* uniforms provided security and animation for the event.

25.3 On several occasions in early November 1993, mid-January 1994, mid-February 1994, and March 1994, Mathieu Ngirumpatse addressed public gatherings or rallies at Nyamirambo Stadium in Kigali. The rallies assembled leading politicians that espoused the cause of "Hutu Power" and sometimes ended with chants of "*Tubatsembabasembe*" ["Let us exterminate them"], referring to the Tutsi. Members of the *Interahamwe* participated in the rallies.

26. On or about 29 March 1994 Army Chief of Staff Déogratias Nsabimana held a meeting with the *préfet* of Kigali and the *commandant de secteur* for the city of Kigali to fine tune the structure and organization of a "civil defense" plan. Elements of

24.8 Mathieu Ngirumpatse et Joseph Nzirorera ont participé à des activités de mobilisation de fonds au profit des *Interahamwe*. Il convient de noter en particulier plusieurs réunions organisées sous les auspices du MRND pour recueillir des fonds auprès de commerçants et de riches membres du parti. A une date indéterminée en février ou mars 1994, Joseph Nzirorera a organisé un banquet de mobilisation de fonds au profit des *Interahamwe* à l'hôtel Rebero de Kigali. Parmi les personnes présentes figuraient le Président Juvénal Habyarimana, Séraphin Rwabukumba, Augustin Ngirabatware, Robert Kajuga et beaucoup d'autres membres éminents du MRND. Des discours de félicitations ont été prononcés par plusieurs d'entre elles.

25. Au cours de l'année 1993 et au début de 1994, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont souvent participé à des réunions du MRND et pris la parole lors de rassemblements publics et de meetings où ils ont traité les Tutsis d'«ennemi». Le but de ces divers rassemblements et réunions était d'endoctriner les militants du MRND, en particulier l'«organisation des jeunes» connue sous le nom de MRND-*Interahamwe*, en leur inculquant l'hostilité envers les Tutsis, et de susciter chez la population hutue du Rwanda la peur et la haine des Tutsis en tant que groupe. Ces initiatives cadraient avec les recommandations formulées dans le rapport d'une commission militaire spéciale créée en décembre 1991 par Juvénal Habyarimana, alors commandant en chef des Forces armées rwandaises (FAR) et chef de l'État rwandais, et présidée par Théoneste Bagosora, laquelle avait pour mandat de définir les voies et moyens nécessaires «pour vaincre l'ennemi sur les plans militaire, médiatique et politique». En septembre 1992, le chef d'état-major de l'armée, Déogratias Nsabimana, a fait circuler ce rapport parmi les officiers des FAR.

25.1 Le 23 octobre 1993 ou vers cette date, en particulier, Mathieu Ngirumpatse, Jean-Bosco Barayagwiza et d'autres personnes ont participé a un meeting au stade de Nyamirambo à Kigali, où ils ont fait des discours taxant les Tutsis de complicité avec «l'ennemi». Ce meeting était assorti d'activités d'animation et d'un déploiement de faste organisés par les *Interahamwe*.

25.2 Le 27 octobre 1993 ou vers cette date, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, ainsi que le colonel Théoneste Bagosora, Augustin Ngirabatware et d'autres hauts dirigeants du MRND, ont participé à un meeting rassemblant des milliers de personnes au stade Umuganda à Gisenyi. Une fois de plus, les personnes qui ont pris la parole devant la foule, y compris Mathieu Ngirumpatse et Édouard Karemera, se sont élevées contre les Accords d'Arusha et ont exhorté l'assistance à «combattre l'ennemi». Les *Interahamwe*, vêtus d'uniformes en kitenge, assuraient la sécurité et l'animation de cette manifestation.

25.3 Plusieurs fois au début de novembre 1993, à la mi-janvier 1994, a la mi-février 1994 et en mars 1994, Mathieu Ngirumpatse a pris la parole lors de rassemblements publics ou de meetings au stade de Nyamirambo à Kigali. Les meetings rassemblaient des hommes politiques de haut rang qui épousaient la cause du mouvement «Hutu Power», et les participants se quittaient parfois en scandant «*Tubatsembasembe*» [«Exterminons les»], faisant allusion aux Tutsis. Des membres de la milice *Interahamwe* ont participé à ces meetings.

26. Le 29 mars 1994 ou vers cette date, le chef d'état-major de l'armée, Déogratias Nsabimana, a tenu une réunion avec le préfet de Kigali et le commandant de secteur

the plan included : establishing the *cellule,* an administrative unit in the territorial administration, as the organizational equivalent of the platoon; drawing up lists of reservists resident in Kigali at the level of the *cellule* that would be available to work with soldiers; training civilians to work with reservists and soldiers; stockpiling weapons and ammunitions at the level of the *cellule*; instructing civilians on the use of swords, spears, machetes, bows and arrows; etc. Other documentation of the "civil defense" plan from the same period emphasized the need for secrecy and close collaboration between military commanders, the national *gendarmerie* and political parties "defending the principle of the Republic and Democracy", a reference to the MRND.

27. Over a period of several months leading up to 6 April 1994, Joseph Nzirorera made regular, weekly weekend trips to Mukingo *commune.* During those visits Joseph Nzirorera held meetings with local political and military officials at his mother's Busogo *secteur* residence. Persons that attended those meetings, including Juvenal Kajelijeli, Casimir Bizimungu and Augustin Bizimungu, among others, agreed that they would combat the RPF and oppose the Arusha Accords by exterminating the Tutsi and prepared for attacks against the local Tutsi population by organizing military training for the *Interahamwe* and by stockpiling weapons and munitions and by distributing weapons to *Interahamwe* militiamen for use in future attacks.

*After 8 April 1994*

Formation of an Interim Government to implement a policy of genocide :

28. The assassinations of President Juvénal Habyarimana and Army Chief of Staff Déogratias Nsabimana on the evening of 6 April 1994 created a crisis of leadership for Rwandan civilian and military authorities. When Théoneste Bagosora was unable to take control through structures of authority in the Ministry of Defense or the FAR, extremist elements in the military and the MRND and "Hutu Power" political parties, including Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera agreed among themselves to impose an interim civilian government to fill the power vacuum. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, Col. Théoneste Bagosora, Donat Murego, Frodouald Karamira, Hyacinthe Rafiki Nsengiyumva agreed amongst themselves and with other leading members of the MRND and "Hutu Power" opposition parties to assemble the Interim Government of 8 April 1994 with the intention of using the apparatus and resources of the state, and the legitimacy of state authority, to execute the destruction of Rwanda's Tutsi population.

28.1 The various participants in the conspiracy, including Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera, convened in meetings with Théoneste Bagosora at the Ministry of Defense on morning of 7 April 1994. They met again on the morning and afternoon of 8 April 1994, by which time Presidential Guard soldiers loyal to Col. Théoneste Bagosora, and subject to his effective control, had already killed Prime Minister Agathe Uwilingiyimana, *Parti Social-Démocrate* party chairman Frederick Nzamurambaho, *Parti Libéral* party chair-

de la ville de Kigali dans le but de peaufiner la structure et l'organisation d'un plan de «défense civile». Ce plan comportait les éléments suivants : d'un point de vue organisationnel, faire de la cellule - subdivision administrative du territoire – l'équivalent du peloton; dresser dans chaque cellule des listes de réservistes résidant à Kigali qui pourraient travailler avec les militaires; entraîner des civils à travailler avec les réservistes et les militaires; stocker des armes et des munitions dans les cellules; former des civils au maniement des épées, des lances, des machettes, des arcs et des flèches; etc. D'autres documents ayant trait au plan de «défense civile» qui datent de la même époque insistaient sur la nécessité de la discrétion et d'une étroite collaboration entre les commandants militaires, la gendarmerie nationale et les partis politiques «défendant le principe de la République et la démocratie», faisant ainsi allusion au MRND.

27. Chaque fin de semaine pendant une période de plusieurs mois allant jusqu'au 6 avril 1994, Joseph Nzirorera se rendait dans la commune de Mukingo. Lors de ces déplacements réguliers, il tenait des réunions avec les personnalités politiques et militaires locales chez sa mère, dans le secteur de Busogo. Les participants à ces réunions, dont Juvénal Kajelijeli, Casimir Bizimungu et Augustin Bizimungu, ont décidé d'un commun accord de combattre le FPR et de s'opposer aux Accords d'Arusha en exterminant les Tutsis, et ont préparé des attaques contre la population locale tutsie en organisant la formation militaire des *Interahamwe*, en stockant des armes et des munitions et en distribuant des armes aux miliciens *Interahamwe* en prévision de ces attaques.

*Auprès le 8 avril 1994*

Formation d'un Gouvernement intérimaire pour mettre en œuvre une politique de génocide :

28. L'assassinat du Président Juvénal Habyarimana et du chef d'état-major de l'armée, Déogratias Nsabimana, survenu le soir du 6 avril 1994, a provoqué une crise de pouvoir parmi les autorités civiles et militaires du Rwanda. Théoneste Bagosora n'ayant pu prendre le contrôle de la situation à l'aide de la structure hiérarchique du Ministère de la défense ou des FAR, des éléments extrémistes de l'armée, du MRND et des autres partis politiques appartenant au mouvement «Hutu Power», dont Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, se sont entendus pour imposer un gouvernement civil intérimaire afin de combler le vide du pouvoir. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, le colonel Théoneste Bagosora, Donat Murego, Frodouald Karamira et Hyacinthe Rafiki Nsengiyumva se sont entendus entre eux et avec d'autres membres influents du MRND et des partis d'opposition appartenant au mouvement «Hutu Power» pour former le Gouvernement intérimaire du 8 avril 1994, dans l'intention de s'appuyer sur l'appareil et les ressources de l'État, ainsi que sur la légitimité de l'autorité de l'État, pour détruire la population tutsie du Rwanda.

28.1 Les diverses parties à l'entente, dont Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, se sont réunies avec Théoneste Bagosora au Ministère de la défense dans la matinée du 7 avril 1994. Ils se sont réunis encore dans la matinée et l'après-midi du 8 avril 1994. À ce moment-là, des éléments de la Garde présidentielle fidèles au colonel Théoneste Bagosora et soumis à son contrôle effectif avaient déjà tué le Premier Ministre Agathe Uwilingiyimana, le Président du Parti social-démocrate, Frédéric Nzamurambaho, le Président du Parti

man Landouald Ndasingwa, Constitutional Court President Joseph Kavaruganda, all of who would otherwise have assumed control of the government or whose participation would have been required to constitute a new civilian authority under the terms of the Broad Based Transitional Government anticipated by the Arusha Accords or the 1991 Constitution, facts known to all members of the conspiracy by the afternoon of 7 April 1994

28.2 Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, Justin Mugenzi, Frodouald Karamira, Jean Kambanda, among others, agreed among themselves and with others to place structures of authority in the MRND and "Hutu Power" political parties at the service of the Interim Government, through the Ministry of Interior and the territorial administration, and the military, through the Ministry of Defense and the *FAR*, as a means to mobilize extremist militiamen in the *Interahamwe* and *Impuzamugambi* militias and armed civilians to attack, kill and destroy Rwanda's Tutsi population.

28.3 This agreement was manifested in various orders, directives and instructions issued to *préfets* and *bourgmestres* and to the general population during the course of April, May and June 1994, among them (i) the letter to all *Préfets* from Jean Kambanda regarding *Instructions to restore security in the country* of 27 April 1994; (ii) the *Directives of the Prime Minister to All Préfets on the Organization of Civil Defense* of 25 May 1994; (iii) the letter to all *Préfets* from Édouard Karemera regarding *Implementation of the Prime Minister's directives on the Self-organization of Civilian Defense* of 25 May 1994; (iv) the *Ministerial Instructions to the Préfets of the Préfectures on the Use of Funds Earmarked for the Ministry of Interior and Communal Development for Civil Self-Defense* of rnid-June 1994; and (v) the letter to *Commandant du Secteur* Anatole Nsengiyumva from Édouard Karemera regarding *Opération de ratissage à Kibuye* of 18 June 1994, among others, all of which were issued on the basis of unanimous agreement *[consensus]* during various cabinet meetings *[conseils des ministres]* of the Interim Govemment and derived from recommendations from the MRND Steering Committee, including Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera.

29. These various agreements and initiatives in furtherance of the conspiracy were intended to galvanize anti-Tutsi fear and loathing among the Hutu population and to mold it into a lethal apparatus, in the form of militias trained and armed with resources from the state, for deployment in a campaign of destruction against the Tutsi as a group.

## COUNT 2 : DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera with Direct and Public Incitement to Commit Genocide pursuant to Articles 2, 6 (1) and 6 (3) of the Statute of the Tribunal in that during the period 1 January-17 July 1994 all named accused, directly and publicly incited other persons to destroy in whole or in part, the Tutsi racial or ethnic group, committed as follows :

libéral, Landouald Ndasingwa, et le Président de la Cour constitutionnelle, Joseph Kavaruganda, personnalités qui auraient eu la mainmise sur le gouvernement s'il n'en était pas ainsi ou dont la participation aurait été nécessaire pour constituer une nouvelle autorité civile dans le cadre du gouvernement de transition à base élargie prévu par les Accords d'Arusha ou la Constitution de 1991. Ces faits étaient connus de toutes les parties à l'entente dès l'après-midi du 7 avril 1994.

28.2 Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, Justin Mugenzi, Frodouald Karamira et Jean Kambanda, notamment, se sont entendus entre eux et avec d'autres personnes pour mettre les structures hiérarchiques du MRND et des autres partis politiques appartenant au mouvement «Hutu Power» au service du Gouvernement intérimaire, par le truchement du Ministère de l'intérieur et de l'Administration territoriale, et à celui de l'armée, par le truchement du Ministère de la défense et des FAR, dans le but de mobiliser les éléments extrémistes des milices *Interahamwe* et *Impuzamugambi* ainsi que des civils armés pour attaquer, tuer et détruire la population tutsie du Rwanda.

28.3 Cet accord s'est manifesté par de multiples ordres, directives et instructions adressés aux préfets, aux bourgmestres et à toute la population en avril, mai et juin 1994, dont i) la circulaire adressée par Jean Kambanda à tous les préfets le 27 avril 1994 pour leur donner des *Instructions tendant au rétablissement de la sécurité dans le pays,* ii) les *Directives du Premier Ministre aux préfets relatives* à *l'organisation de l'autodéfense civile,* datées du 25 mai 1994, iii) la lettre adressée par Édouard Karemera à tous les préfets le 25 mai 1994, au sujet de la *Mise en oeuvre des directives du Premier Ministre relatives* à *l'auto-organisation de la défense civile,* iv) les *Instructions ministérielles aux préfets relatives* à *l'utilisation des fonds alloués au Ministère de l'intérieur et du développement communal pour l'autodéfense civile,* datées de la mi-juin 1994, et v) la lettre adressée par Édouard Karemera au Commandant de secteur opérationnel Anatole Nsengiyumva le 18 juin 1994 au sujet de *l'Opération de ratissage* à *Kibuye.* Adoptés sur la base d'un consensus dégagé au cours de diverses réunions du Conseil des ministres du Gouvernement intérimaire, ces ordres, directives et instructions procédaient de recommandations du Comité directeur du MRND, dont faisaient partie Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera.

29. Ces divers accords et initiatives tendant à l'exécution de l'entente avaient pour but d'exacerber la peur et la haine des Tutsis au sein de la population hutue et de transformer cette population en un instrument meurtrier incarné par des milices entraînées et armées avec les ressources de l'État pour être déployées dans une campagne de destruction des Tutsis en tant que groupe.

## CHEF 2 :
## INCITATION DIRECTE ET PUBLIQUE À COMMETTRE LE GÉNOCIDE

Le Procureur accuse Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera d'incitation directe et publique à commettre le génocide, en application de l'articles 2 et des paragraphes 1 et 3 de l'article 6 du Statut du Tribunal, en ce que entre le 1er janvier et le 17 juillet 1994, *tous les accusés nommément cités* ont directement et publiquement incité d'autres personnes à détruire, en tout ou en partie, le groupe racial ou ethnique tutsi, tel qu'il est indiqué ci-après :

30. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera acting alone or in concert with other known or unknown members of a joint criminal enterprise, prepared or otherwise aided and abetted in the planning, preparation and execution of a campaign of propaganda to instigate and incite Hutu, particularly the members of the political party "youth wing" militias, to target Tutsi for attack or to join in or support the killing of the Tutsi population. *All named accused* participated in public meetings and rallies and made public statements, some of which were broadcast in the mass media, that were intended to foment fear and loathing of the Tutsi among Rwanda's Hutu citizens. Furthermore, Mathieu Ngirumpatse, among others, participated in the creation and the financing of the RTLM radio station, which served as a vehicle for disseminating their extremist ideology.

31. Over the course of January through June 1994, Mathieu Ngirumpatse made statements at various public meetings, gatherings or places, or publicly associated himself with statements or acts by other persons on such occasions, that characterized all Tutsi as "the enemy" or as "accomplices of the enemy" or as "accomplices of the RPF" intending to instigate persons in attendance to "fight the enemy" and to physically attack, harm and destroy the Tutsi as a group.

31.1 On several occasions in early November 1993, mid-January 1994, mid-February 1994, and March 1994, Mathieu Ngirumpatse addressed public gatherings or rallies at Nyamirambo Stadium in Kigali. The rallies assembled leading politicians that espoused the cause of "Hutu Power" and sometimes ended with chants of "*Tubatsembasembe*" ["Let us exterminate them"], referring to the Tutsi. Members of the *Interaharnwe* participated in the rallies.

31.2 Toward mid-April 1994 Mathieu Ngirumpatse instigated militiamen at a roadblock in Kibuye to "work", a reference to lulling Tutsi, and promised to provide arms and ammunition for reinforcements to attack the Tutsi.

32. Over the course of January through June 1994 Joseph Nzirorera made statements at various public meetings and gatherings, or publicly associated himself with statements or acts by other persons at such gatherings, to instigate and incite those in attendance to "fight the enemy" and to destroy the Tutsi as a group. Furthermore after 6 April 1994 Joseph Nzirorera often publicly congratulated groups of militiamen for having killed Tutsis, thereby instigating and inciting militiamen and other armed civilians to participate in further attacks against the Tutsi population.

32.1 On or about the evening of 6 April and the morning of 7 April 1994 Joseph Nzirorera engaged in communications with *Interahamwe* militiamen in Mulungo and Nkuli *communes* and exhorted them to start killing the Tutsi population in Ruhengeri. Joseph Nzirorera went so far as to instruct that the killings should begin with one of his own children born of Kiberwa, a Tutsi woman, to instigate militiamen and armed Hutu residents in Mukingo to kill all Tutsi without exception, and instructed that this message be widely circulated.

32.2 On one particular occasion sometime after 6 April 1994 during a grandiose "passing out" ceremony for newly trained *Interahamwe* militias Joseph Nzi-

30. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, agissant seuls ou de concert avec d'autres personnes connues ou inconnues parties à une entreprise criminelle commune, ont préparé ou de toute autre manière aidé et encouragé à planifier, préparer et exécuter une campagne de propagande visant à inciter les Hutus, en particulier les membres des «organisations des jeunes» de partis politiques constituées en milices, à diriger des attaques contre les Tutsis, à participer aux massacres de la population tutsie ou à soutenir ces massacres. *Tous les accusés nommément cités* ont participé à des réunions publiques et à des meetings et ont fait des déclarations publiques, dont certaines ont été diffusées par les médias, qui avaient pour but de susciter la peur et la haine des Tutsis chez les citoyens hutus du Rwanda. De plus, Mathieu Ngirumpatse, entre autres personnes, a contribué à la création et au financement de la station de radio RTLM qui leur servait à diffuser leur idéologie extrémiste.

31. De janvier à juin 1994 inclusivement, Mathieu Ngirumpatse a fait des déclarations à de multiples réunions, rassemblements ou endroits publics - ou a publiquement adhéré aux propos tenus ou aux actes commis dans le même sens par d'autres personnes à ces occasions - dans lesquelles il présentait tous les Tutsis comme «l'ennemi», les «complices de l'ennemi» ou les «complices du FPR» afin d'inciter les personnes présentes à «combattre l'ennemi», à attaquer physiquement les Tutsis, à porter atteinte à leur intégrité et à les détruire en tant que groupe.

31.1 Plusieurs fois au début de novembre 1993, à la mi-janvier 1994, à la mi-février 1994 et en mars 1994, Mathieu Ngirumpatse a pris la parole lors de rassemblements publics ou de meetings au stade de Nyamirambo à Kigali. Les meetings rassemblaient des hommes politiques de haut rang qui épousaient la cause du mouvement «Hutu Power» et les participants se quittaient parfois en scandant «*Tubatsembasembe*» [«Exterminons les»], faisant allusion aux Tutsis. Des membres de la milice *Interahamwe* ont participé à ces meetings.

31.2 Vers la mi-avril 1994, à un barrage routier à Kibuye, Mathieu Ngirumpatse a incité des miliciens à «travailler», c'est-à-dire à tuer les Tutsis, et a promis de leur fournir des armes et des munitions en renfort pour leur permettre d'attaquer les Tutsis.

32. Au cours des mois de janvier à juin 1994 inclusivement, Joseph Nzirorera a fait des déclarations lors de divers rassemblements et réunions publics - ou a publiquement adhéré aux propos tenus ou aux actes commis dans le même sens par d'autres personnes lors de ces rassemblements - incitant les participants à «combattre l'ennemi» et à détruire les Tutsis en tant que groupe. De plus, après le 6 avril 1994, Joseph Nzirorera a souvent félicité publiquement des groupes de miliciens d'avoir tué des Tutsis, incitant de ce fait les miliciens et d'autres civils armés à participer à de nouvelles attaques contre la population tutsie.

32.1 Dans la soirée du 6 avril et la matinée du 7 avril 1994, ou vers ces moments, Joseph Nzirorera s'est entretenu avec des miliciens *Interahamwe* dans les communes de Mukingo et de Nkuli et les a exhortés à commencer à éliminer la population tutsie de la préfecture de Ruhengeri. Il est allé jusqu'à ordonner que les tueries commencent par un de ses enfants, né de Kiberwa, une Tutsie, pour inciter les miliciens et les Hutus armés résidant à Mukingo à tuer tous les Tutsis, et a demandé que ce message soit largement diffusé.

32.2 À une date indéterminée après le 6 avril 1994, au cours d'une grandiose cérémonie «de fin des classes» marquant la clôture de la formation de milices

rorera publicly thanked military instructors and further praised the *Interahamwe*, urging the militiamen to continue in their mission and acknowledging their accomplishments since no single Tutsi in the *commune* had survived.

32.3 On or about 30 April 1994 at a meeting of the *conseil de sécurité* at the Kigali*ville préfecture* office, Joseph Nzirorera publicly thanked the *Interaharnwe* of Kigali for the good work that they were doing and offered them money for the purchase of beer. Tharcisse Renzaho and Laurent Semanza, among others, also participated in the meeting. All participants were aware that *Interahamwe* in Kigali were systematically lulling Tutsi residents at roadblocks and in neighbourhood patrols. When a participant at the meeting asked for an explanation of who the enemy was, Joseph Nzirorera responded that "a Hutu who joined the RPF is Our fool, while a Tutsi who joined the MRND is now the enemy of the country", concluding that "a Tutsi is the enemy of Rwanda". Such remarks were intended to, and had the consequence of, inciting attacks upon all Tutsi.

32.4 On or about 6 May 1994 Joseph Nzirorera participated in a large pacification meeting with high level government officials, including Prime Minister Jean Kambanda, in Ruhengeri *préfecture.* By that time massive killings of Tutsi civilians in Ruhengeri had already substantially eliminated the Tutsi population in the region. Joseph Nzirorera's public association and endorsement of Interim Government ministers and policies were intended to, and had the consequence of, inciting further attacks upon the Tutsi.

32.5 Also sometime in May or June 1994 Joseph Nzirorera, along with Minister of Foreign Affairs Jérôme-Clément Bicamumpaka, participated in a ceremony at the Mukingo *bureau communal* for the re-investiture of Juvenal Kajelijeli as *bourgmestre. Interahamwe* militiamen assembled and paraded for the delegation, whereupon Joseph Nzirorera thanked them for the "excellent work" that they had done, referring to the killings of Tutsis. Such remarks incited militiamen and armed civilians to participate in further attacks against the Tutsi population.

33. During April, May and June 1994 Édouard Karemera made statements at various public meetings and gatherings, or publicly associated himself with statements from other MRND and "Hutu Power" politicians, or publicly championed policies of the Interim Government intended to characterize al1 Tutsi as "the enemy" or as "accomplices of the enemy" or as "accomplices of the RPF", thereby instigating and inciting those in attendance to "fight the enemy" and to physically attack and to destroy the Tutsi as a group.

33.1 On or about 3 May 1994 Édouard Karemera participated in a large meeting called by Interim Government officials at the Kibuye *bureau préfectoral.* Prime Minister Jean Kambanda addressed the gathering and promoted "civil defense" as a means to combat the RPF, reporting that the war was in "all *communes*" in Rwanda. Eliezer Niyitegeka made comments that characterized Tutsi children as "the enemy". Édouard Karemera also addressed the gathering and

*Interahamwe*, Joseph Nzirorera a publiquement remercié les instructeurs militaires et félicité les *Interahamwe*, exhortant les miliciens à poursuivre leur mission tout en reconnaissant leurs réalisations, puisqu'aucun Tutsi de la commune n'avait survécu.

32.3 Le 30 avril 1994 ou vers cette date, lors d'une réunion du conseil de sécurité au bureau de la préfecture de Kigali-ville, Joseph Nzirorera a publiquement remercié les *Interahamwe* de Kigali du bon travail qu'ils accomplissaient et leur a offert de l'argent pour acheter de la bière. Tharcisse Renzaho et Laurent Semanza, entre autres, participaient également à la réunion. Tous les participants savaient que les *Interahamwe* de Kigali tuaient systématiquement les habitants tutsis aux barrages routiers et lors de leurs patrouilles dans les quartiers. Quand l'un d'eux a demandé de définir l'ennemi, Joseph Nzirorera a répondu : «Le Hutu qui a adhéré au FPR est notre idiot, tandis que le Tutsi qui a adhéré au MRND est maintenant l'ennemi du pays». Il a conclu : «Le Tutsi est l'ennemi du Rwanda»**.** Ces remarques avaient pour but et ont eu pour conséquence d'inciter à attaquer tous les Tutsis.

32.4 Le 6 mai 1994 ou vers cette date, Joseph Nzirorera a participé à une grande réunion de pacification avec des personnalités gouvernementales de haut rang, notamment le Premier Ministre Jean Kambanda, dans la préfecture de Ruhengeri. À ce moment-là, les tueries massives de civils tutsis perpétrées dans la préfecture de Ruhengeri avaient déjà éliminé une partie importante de la population tutsie de la région. Le fait que Joseph Nzirorera s'associe et donne son appui, publiquement, aux ministres et aux politiques du Gouvernement intérimaire avait pour but et a eu pour conséquence de susciter d'autres attaques contre les Tutsis.

32.5 En outre, à une date indéterminée en mai ou en juin 1994, Joseph Nzirorera, accompagné de Jérôme-Clément Bicamumpaka, Ministre des affaires étrangères, a participé, au bureau communal de Mukingo, à la cérémonie de réinstallation de Juvénal Kajelijeli dans ses fonctions de bourgmestre. Les miliciens *Interahamwe* se sont réunis et ont défilé pour la délégation, après quoi Joseph Nzirorera les a remerciés de l'«excellent travail» qu'ils avaient accompli, faisant allusion aux massacres de Tutsis. Ces remarques ont incité les miliciens et les civils armés à participer à d'autres attaques contre la population tutsie.

33. Dans le courant des mois d'avril, de mai et de juin 1994, Édouard Karemera a fait des déclarations à divers rassemblements et réunions publics, s'est publiquement associé aux déclarations faites par d'autres hommes politiques membres du MRND et du mouvement «*Hutu Power*», ou s'est publiquement fait le champion des politiques du Gouvernement intérimaire visant à présenter tous les Tutsis comme «l'ennemi», les «complices de l'ennemi» ou les «complices du FPR», incitant ainsi les participants à «combattre l'ennemi», à attaquer physiquement les Tutsis et à les détruire en tant que groupe.

33.1 Le 3 mai 1994 ou vers cette date, Édouard Karemera a participé à une grande réunion convoquée par des personnalités membres du Gouvernement intérimaire au bureau préfectoral de Kibuye. Le Premier Ministre Jean Kambanda s'est adressé aux participants et a plaidé en faveur de la «défense civile» comme moyen de combattre le FPR, faisant remarquer que la guerre sévissait dans «toutes les communes» du Rwanda. Éliézer Niyitegeka a fait des observations dans lesquelles

paid tribute to the *Interahamwe* and called upon them to "flush out, stop and combat the enemy" in collaboration with the "youth wings" of the other parties. The speeches and some of the commentary from that meeting were re-broadcast to the nation by Radio Rwanda several days later on or about 9 May 1994.

33.2 On or about 16 May 1994, President Sindikubwabo, accompanied by Édouard Karemera, held a "security" meeting in Kibuye during which he thanked Kibuye *préfet* Clement Kayishema for accomplishing his mission, referring to the killings of Tutsi in Kibuye.

COUNT 3 : GENOCIDE

The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera with Genocide pursuant to Articles 2, 6 (1) and 6 (3) of the Statute of the Tribunal in that during the period 1 January-17 July 1994 *all named accused* were responsible for killing or causing serious bodily or mental harm to members of the Tutsi population, or deliberately inflicting conditions of life upon the Tutsi population that were calculated to bring about its physical destruction, with the intent to destroy, in whole or in part, the Tutsi racial or ethnic group, committed as follows :

Or alternatively

COUNT 4 : COMPLICITY IN GENOCIDE

The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera with Complicity in Genocide pursuant to Articles 2 and 6 (1) of the Statute of the Tribunal in that during the period 1 January-17 July 1994 *all named accused* instigated or provided the means to other persons to kill or cause serious bodily or mental harm to members of the Tutsi population, or to deliberately inflict conditions of life upon the Tutsi population that were calculated to bring about its physical destruction, knowing that those other persons intended to destroy, in whole or in part, the Tutsi racial or ethnic group, committed as follows :

34. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera acting alone or in concert with individuals described in paragraphs 6 (i)-(iv), planned, instigated, ordered, committed, or otherwise aided and abetted the killing or causing serious bodily or mental h m to members of the Tutsi population.

35. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera planned and executed a killing campaign against the Tutsi population by formulating, articulating, publicizing, and legitimizing policies of the Interim Government of 8 April 1994 that were used to dismantle any resistance to the campaign in the territorial administration and in civil society, including the dismissal and replacement of *préfets* and *bourgmestres* and civil servants who did not support the killing campaign.

il qualifiait les enfants tutsis d'«ennemi». Édouard Karemera s'est également adressé aux participants : rendant hommage aux *Interahamwe*, il a exhorté ceux-ci à «déloger, stopper et combattre l'ennemi» en collaboration avec les «organisations des jeunes» des autres partis. Plusieurs jours plus tard, le 9 mai 1994 ou vers cette date, les discours prononcés et une partie des observations faites lors de cette réunion ont été rediffusés à la nation par Radio Rwanda.

33.2 Le 16 mai 1994 ou vers cette date, le Président Sindikubwabo, accompagné d'Édouard Karemera, a tenu à Kibuye une réunion de «sécurité» au cours de laquelle il a remercié le préfet de Kibuye, Clément Kayishela, d'avoir accompli sa mission, faisant allusion aux massacres de Tutsis dans la préfecture de Kibuye.

### CHEF 3 : GENOCIDE

Le Procureur accuse Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera de Génocide, en application de l'article 2 et des paragraphes 1 et 3 de l'article 6 du Statut du Tribunal, en ce que *tous les accusés nommément cités* ont été responsables, entre le 1er janvier et le 17 juillet 1994, du meurtre de membres de la population tutsie, d'atteintes graves à leur intégrité physique ou mentale ou de la soumission intentionnelle de cette population à des conditions d'existence devant entraîner sa destruction physique, ces crimes étant commis dans l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi;

Ou subsidiairement,

### CHEF 4 : COMPLICITÉ DANS LE GÉNOCIDE

Le Procureur accuse Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera de Complicité dans le génocide, en application des articles 2 et 6 (1) du Statut du Tribunal, en ce que entre le 1er janvier et le 17 juillet 1994, *tous les accusés nommément cités* ont incité des personnes à tuer les membres de la population tutsie, à porter gravement atteinte à leur intégrité physique ou mentale et à soumettre intentionnellement cette population à des conditions d'existence devant entraîner sa destruction physique, ou ont fourni à ces personnes les moyens de commettre les crimes précités, tout en sachant qu'elles avaient l'intention de détruire, en tout ou en partie, le groupe racial ou ethnique tutsi, comme il est indiqué ci-après :

34. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, agissant seuls ou de concert avec les personnes mentionnées aux alinéas i à iv du paragraphe 6, ont planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à commettre le meurtre de membres de la population tutsie ou des atteintes graves à leur intégrité physique ou mentale.

35. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont planifié et mené à bien une campagne de massacres dirigée contre la population tutsie en concevant, élaborant, propageant et légitimant des politiques du Gouvernement intérimaire du 8 avril 1994 employées pour vaincre toute résistance à cette campagne dans l'Administration territoriale et la société civile, y compris la destitution et le remplacement des préfets, bourgmestres et fonctionnaires qui ne soutenaient pas la campagne de massacres.

36. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera planned and executed a state-endorsed program of "civilian self defense" whereby officials in the territorial administration [*préfets, bourgmestres* and *conseillers*] and officials in the MRND political party recruited civilians, usually local Hutu youth, and consolidated them with political party "youth wing" militias under the authority of retired military officers and reservists. In so doing *all named accused* collaborated with segments of the military and enlisted the resources and logistics of the Ministry of Defense and the *Forces Armées Rwandaises* and structures of authority in the territorial administration, governed by the Ministry of the Interior, to distribute firearms to political party "youth wing" militias and to legitimize and control the setting up of roadblocks and the tracking and killing of civilians at such roadblocks. Furthermore, this "civilian self defense" corps was deployed in armed patrols to identify, search out and kill the Tutsi population.

37. Over the weekend of 8-10 April 1994 soldiers and militiamen set up roadblocks in Kigali and checked the identity cards of passers-by and killed most of those who were identified as Tutsi. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera exercised control over *Interahamwe* at the roadblocks and were aware of the killings, as demonstrated by their directions to militiamen to stop the killings temporarily when international journalists present in Kigali began to issue reports on the widespread killing that criticized the government.

38. On or about 10 April 1994 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera convened a meeting with the national leadership of the *Interahamwe* at the *Hôtel des Diplomates* that included participation from the recently appointed Interim Government ministers. Mathieu Ngirumpatse ordered and instigated the *Interahamwe* leaders to control their men and to invoke the authority of the Interim Government to organize the removal corpses from the streets. The campaign was deemed one of "pacification", though essentially, and practically, it was a means of exerting control and direction over *Interahamwe* militias so that the killings would be focused on the most important targets first, the Tutsi intellectuals, and so that the killings would proceed with greater discretion, and in fact was a means to aid and abet the killing.

39. Even as they attempted to control the killings at roadblocks, Mathieu Ngirumpatse and Joseph Nzirorera made arrangements with Théoneste Bagosora to obtain firearms from the Ministry of Defense and caused such weapons to be distributed to militiamen in Kigali, intending that they be used to attack and kill the Tutsi population.

40. On or about 11 April 1994 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera participated in a meeting at the *Hôtel des Diplomates* in Kigali attended by members of the Interim Government and most *préfets.* The purpose of the meeting was to mobilize the territorial administration. During this meeting, the *préfets* in attendance made reports on the "security" situation in their respective

36. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont planifié et mis en œuvre un programme d'«auto défense civile» soutenu par l'État dans le cadre duquel les autorités de l'administration territoriale [préfets, bourgmestres et conseillers] et les dirigeants du MRND recrutaient des civils, en général des membres de la jeunesse hutue locale, pour les intégrer dans l'«organisation des jeunes» du parti constituée en milices et placée sous l'autorité d'officiers militaires à la retraite et de réservistes. Ce faisant, *tous les accusés nommément cités* ont collaboré avec des sections de l'armée et mis à contribution les ressources et la logistique du Ministère de la défense et des Forces armées rwandaises, ainsi que la structure hiérarchique de l'Administration territoriale relevant du Ministère de l'intérieur, pour distribuer des armes à feu aux «organisations des jeunes» de partis politiques constituées en milices et pour légitimer et contrôler la mise en place de barrages routiers ainsi que la recherche et l'élimination de civils à ces barrages routiers. En outre, ce corps d'«autodéfense civile» était déployé en patrouilles armées pour identifier, rechercher et tuer les membres de la population tutsie.

37. Au cours du week-end du 8 au 10 avril 1994, des militaires et des miliciens ont mis en place des barrages routiers à Kigali, vérifié les cartes d'identité des passants et tué la plupart de ceux qui avaient été identifiés comme étant des Tutsis. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera exerçaient un contrôle sur les *Interahamwe* tenant ces barrages routiers et étaient au courant des tueries, comme l'atteste le fait qu'ils ont ordonné aux miliciens d'arrêter temporairement celles-ci quand des journalistes internationaux présents à Kigali ont commencé à critiquer le Gouvernement dans leurs dépêches traitant des massacres généralisés qui se commettaient à l'époque.

38. Le 10 avril 1994 ou vers cette date, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont tenu une réunion avec les dirigeants nationaux des *Interahamwe* à l'Hôtel des diplomates. Y participaient également des membres nouvellement désignés du Gouvernement intérimaire. Mathieu Ngirumpatse a donné aux chefs des *Interahamwe* l'ordre de contrôler leurs hommes et d'invoquer l'autorité du Gouvernement intérimaire pour organiser le ramassage des cadavres dans les rues et les y a incités. La campagne était considérée comme une opération de «pacification» même si, sur le plan pratique, elle était essentiellement un moyen de contrôler et d'orienter les milices *Interahamwe* de manière à ce que les tueries soient concentrées d'abord sur les cibles les plus importantes, à savoir les intellectuels tutsis, et se commettent avec une plus grande discrétion. En fait, c'était une façon d'aider et d'encourager les massacres.

39. Alors même qu'ils essayaient de contrôler les tueries aux barrages routiers, Mathieu Ngirumpatse et Joseph Nzirorera se sont arrangés avec Théoneste Bagosora pour obtenir des armes à feu du Ministère de la défense et les ont fait distribuer aux miliciens de Kigali afin qu'elles soient utilisées pour attaquer et tuer la population tutsie.

40. Le 11 avril 1994 ou vers cette date, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont participé à une réunion à l'Hôtel des diplomates à Kigali en compagnie de membres du Gouvernement intérimaire et de la plupart des préfets. L'objet de la réunion était de mobiliser l'administration territoriale. Les préfets qui s'y trouvaient ont présenté des rapports sur la «sécurité» dans leurs régions respec-

regions. Butare and Gitarama *préfectures* were labelled inactive because the killings of Tutsi had not begun on a massive scale.

41. By 12 April 1994 soldiers and militiamen responding to orders and instigations of attacks from national leaders of the MRND and highly placed government officials, including Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera, had killed thousands of civilians in Kigali and throughout Rwanda. The victims were primarily of Tutsi ethnic or racial identification but also included persons deemed to be political opponents to "Hutu Power".

42. On or about 12 April 1994 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera accompanied the Interim Government in its flight to Gitarama as RPF troops moved towards Kigali.

43. Over the course of the next two months, until early June 1994, the Murambi Training School in Gitarama served as the temporary headquarters of the Interim Government. High level officials of those political parties represented in the Interim Government, including Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera convened on a regular basis throughout that period, with each party meeting separately to consider policy matters, after which the various ministers of the respective parties convened in the *conseils des ministres* to set the policy for the government. The *conseils des ministres* or various other meetings of Interim Government ministers or political party leaders convened on numerous occasions throughout that period, almost on a daily basis, but notably on 16, 17, 18, 21, 22, 23 and 27 April 1994 and 25 May.

44. During these numerous cabinet meetings the Interim Government adopted directives and issued instructions to the *préfets* and the *bourgmestres*. The decisions, which were then passed on to the general public, were intended to instigate and aid and abet further attacks against the Tutsi population. In order to ensure that the directives and instructions were carried out Jean Kambanda's Interim Government designated a minister from each *préfecture* to be responsible for what was termed "pacification". Interim Government ministers were dispatched to their *préfectures* of origin to incite further killings and to exercise control over the militias. During several *conseils des ministres* the various ministers made requests for weapons to distribute in their respective home *préfectures*, knowing and intending that the weapons would be used to attack and kill the Tutsi population.

45. On or about 17 April 1994 the *conseil des ministres* of the Interim Government convened to review the status of office-holders in the territorial administration. They removed the *préfets* of Butare and Kibungo, both of whom were known to have opposed the attacks upon the Tutsi population, and appointed several new préfets that embraced the Interim Government's policy of targeting Tutsi civilians as "the enemy". These decisions on appointments of *préfets* were broadcast to the nation in a Radio Rwanda communiqué read by Minister of Information Eliézer Niyitegeka on or about that same day. The new office-holders would be installed on 19 April.

46. The Interim Government also controlled the appointments, promotions and transfers of military officers throughout the country. Officers in the gendarmerie that were perceived as not supporting the Interim Government policy of attacking the civilian Tutsi population were transferred from the interior of the country, where they were duty-

tives. Les préfectures de Butare et de Gitarama ont été jugées inactives, du fait que le massacre des Tutsis ne s'y commettait pas encore sur une grande échelle.

41. Au 12 avril 1994, des militaires et des miliciens répondant aux ordres et incitations à l'attaque émanant des dirigeants nationaux du MRND et de fonctionnaires haut placés, dont Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, avaient déjà tué des milliers de civils à Kigali et sur toute l'étendue du Rwanda. Les victimes étaient principalement des membres du groupe ethnique ou racial tutsi, mais il y avait également des personnes considérées comme des adversaires politiques du mouvement «Hutu Power».

42. Le 12 avril 1994 ou vers cette date, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont accompagné le Gouvernement intérimaire lorsque celui-ci se réfugiait à Gitarama pour échapper aux troupes du FPR qui faisaient route vers Kigali.

43. Au cours des deux mois qui ont suivi, jusqu'au début de juin 1994, le Centre de formation de Murambi, sis à Gitarama, a servi de siège provisoire du Gouvernement intérimaire. De hauts dirigeants des partis politiques représentés au Gouvernement intérimaire, dont Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, se sont régulièrement réunis tout au long de cette période, les membres de chaque parti se réunissant séparément pour examiner la politique à suivre; après quoi les ministres des divers partis se réunissaient en Conseil des ministres pour fixer la politique du Gouvernement. Des réunions du Conseil des ministres, d'autres réunions des membres du Gouvernement intérimaire ou celles des dirigeants de partis politiques se sont tenues maintes fois tout au long de cette période, presque quotidiennement, mais notamment les 16, 17, 18, 21, 22, 23 et 27 avril et le 25 mai 1994.

44. Au cours de ces nombreuses réunions du Conseil des ministres, le Gouvernement intérimaire a adopté des directives et donné des instructions aux préfets et aux bourgmestres. Ces décisions, transmises au grand public, visaient à l'inciter, à réunions du Conseil des ministres, les divers membres du Gouvernement des armes à distribuer dans leurs préfectures d'origine pour permettre ont demandé d'attaquer et d'éliminer la population tutsie, en sachant qu'elles seraient utilisées à cet effet.

45. Le 17 avril 1994 ou vers cette date, le Conseil des ministres du Gouvernement intérimaire s'est réuni pour revoir le statut des fonctionnaires de l'Administration territoriale. Il a limogé les préfets de Butare et de Kibungo qui s'étaient notoirement opposés aux attaques dirigées contre la population tutsie et a nommé plusieurs nouveaux préfets solidaires de la politique du Gouvernement intérimaire tendant à faire passer les civils tutsis pour «l'ennemi». Le même jour ou vers cette date, la nation a été informée de la nomination de ces préfets par un communiqué de Radio Rwanda lu par le Ministre de l'information Éliézer Niyitegeka. L'installation des nouveaux titulaires des postes a eu lieu le 19 avril.

46. Le Gouvernement intérimaire avait également la haute main sur les nominations, avancements et mutations des officiers de l'armée sur toute l'étendue du territoire. Les officiers de la gendarmerie soupçonnés de ne pas soutenir la politique adoptée par le Gouvernement intérimaire à l'effet de lancer des attaques contre la population civile tutsie

bound to maintain security, to the battlefront with the RPF in or near Kigali, so that the attacks against the Tutsi in Butare, Kibuye and elsewhere would not be impeded. The Interim Government also recalled into active service certain retired military officers that were closely associated with extremist currents in the Habyarimana government. These retired colonels were then installed as regional managers of the "civil defense".

47. On or about 18 April 1994 Édouard Karemera, Mathieu Ngirumpatse, Justin Mugenzi, Eliezer Niyitegeka, Jean-Bosco Barayagwiza, among others, participated in a meeting at the Murambi Training School during which the *préfet* and several *bourgmestres* from Gitarama *préfecture* requested Prime Minister Jean Kambanda to provide reinforcements to protect the Tutsi population and to restore order in the region. Instead, several Interim Government ministers and political party leaders, notably Édouard Karemera, Mathieu Ngirumpatse, and Justin Mugenzi, instigated Gitarama delegation to stop protecting the Tutsi population and instead to allow killings of Tutsi civilians by *Interahamwe* to proceed.

48. On or about 19 April 1994, Interim President Sindikubwabo addressed a public rally in Butare *préfecture* and encouraged those that did not adopt the government program to "step aside". Thereafter, killings of Tutsi civilians started or accelerated in Butare. The rally was also the occasion on which the Interim Government publicly deposed the only Tutsi *préfet* in Rwanda, Jean-Baptiste Habyalimana of Butare, a member of the *Parti Libéral*, and replaced him by Sylvain Nsabimana.

49. On or about 19 April 1994, Interim Government Minister Justin Mugenzi, travelled to Kibungo *préfecture* to participate in the public installation of Anaclet Rudakubana as préfet. Justin Mugenzi ordered or instigated attacks against the Tutsi population, emphasizing the new *préfet*'s mission as the elimination of the Tutsis.

50. On or about 25 April 1994, Félicien Kabuga organized a meeting in Gisenyi to create a *Fonds de Défense Nationale* to support the Interim Govemment in "combating the enemy and its accomplices". By 25 April 1994 *all named accused* knew or had reason to know that militiamen armed by the military were incorporated in systematic attacks against the Tutsi population in Gisenyi and throughout Rwanda and that the *Fonds de Défense Nationale* was intended to re-provision the militias. The funds were deposited in an account in the *Banque Commerciale de Rwanda* to be used for the purchase of weapons for the army and the *Interahamwe*. Shortly thereafter Lt. Col. Anatole Nsengiyumva distributed weapons to militiamen in Gisenyi that were used to kill Tutsi men, women and children.

se voyaient mutés de l'intérieur du pays, ou ils étaient tenus de maintenir la sécurité, au front à Kigali ou dans ses environs pour combattre le FPR, afin de laisser libre cours aux attaques menées contre les Tutsis dans les préfectures de Butare et de Kibuye ou dans d'autres circonscriptions territoriales. Le Gouvernement intérimaire a également rappelé certains officiers de l'armée à la retraite qui avaient des liens étroits avec les courants extrémistes du gouvernement Habyarimana. Ces colonels à la retraite ont été ensuite installés dans les fonctions de responsables régionaux de la «défense civile».

47. Le 18 avril 1994 ou vers cette date, Édouard Karemera, Mathieu Ngirumpatse, Justin Mugenzi, Éliézer Niyitegeka et Jean-Bosco Barayagwiza, entre autres personnes, ont participé à une réunion au Centre de formation de Murambi. Au cours de cette réunion, le préfet et plusieurs bourgmestres de la préfecture de Gitarama ont demandé au Premier Ministre Jean Kambanda de leur fournir des renforts pour protéger la population tutsie et rétablir l'ordre dans la région. Plusieurs membres du Gouvernement intérimaire et dirigeants de partis politiques, notamment Édouard Karemera, Mathieu Ngirumpatse et Justin Mugenzi, ont plutôt incité la délégation de Gitarama à cesser de protéger les Tutsis et à laisser les *Interahamwe* continuer le massacre des civils tutsis.

48. Le 19 avril 1994 ou vers cette date, le Président par intérim Sindikubwabo a pris la parole au cours d'un meeting populaire tenu dans la préfecture de Butare pour encourager les personnes qui n'étaient pas solidaires du programme du Gouvernement à «céder la place». Après cela, les massacres de civils tutsis ont commencé ou se sont accélérés dans la préfecture de Butare. C'est également à l'occasion de ce meeting que le Gouvernement intérimaire a publiquement limogé Jean-Baptiste Habyalimana, préfet de Butare et unique préfet tutsi du Rwanda qui était membre du Parti libéral, et l'a remplacé par Sylvain Nsabimana.

49. Le 19 avril 1994 ou vers cette date, Justin Mugenzi, ministre du Gouvernement intérimaire, s'est rendu dans la préfecture de Kibungo pour participer à l'encourager et à l'aider à perpétrer d'autres attaques contre la population tutsie. Pour s'assurer de la mise en œuvre de ces directives et instructions, le Gouvernement intérimaire de Jean Kambanda a confié à un ministre originaire de chaque préfecture la responsabilité de ce qu'on appelait alors la «pacification». Les membres du Gouvernement intérimaire ont été envoyés dans leurs préfectures d'origine pour inciter à la poursuite des massacres et exercer un contrôle sur les milices. Lors de plusieurs l'installation publique d'Anaclet Rudakubana dans ses fonctions de préfet. Justin Mugenzi a ordonné des attaques contre la population tutsie ou incité à perpétrer de telles attaques en soulignant que la mission du nouveau préfet était d'éliminer les Tutsis.

50. Le 25 avril 1994 ou vers cette date, Félicien Kabuga a organisé une réunion à Gisenyi en vue de créer un Fonds de défense nationale pour aider le Gouvernement intérimaire à «combattre l'ennemi et ses complices». Au 25 avril 1994, *tous les accusés nommément cités* savaient ou avaient des raisons de savoir que des miliciens armés par les militaires participaient à des attaques systématiques dirigées contre la population tutsie dans la préfecture de Gisenyi et sur toute l'étendue du Rwanda et que le Fonds de défense nationale devait servir à réapprovisionner les milices. Les sommes versées étaient déposées dans un compte à la Banque commerciale du Rwanda et devaient servir à l'achat d'armes destinées à l'armée et aux *Interahamwe*. Peu de temps après, dans la préfecture de Gisenyi, le lieutenant-colonel Anatole Nsengiyumva a distribué des armes aux miliciens qui s'en sont servis pour tuer des hommes, des femmes et des enfants tutsis.

51. On 27 April 1994 the *conseils des ministres* again addressed the "civil defense". By letter of the same date Prime Minister Jean Kambanda issued "Instructions to restore security in the country", also addressed to All *Préfets,* reiterating the Interim Govemment policy of making all citizens responsible for "unmasking the enemy and its accomplices" and ordered or authorized the setting up of roadblocks, knowing that the roadblocks were being used to identify the Tutsi and their "accomplices" for the purpose of killing them. The *conseil des ministres* convened again on 29 and 30 April.

52. On or about 3 May 1994 Édouard Karemera participated in a large meeting called by Interim Govemment officials at the Kibuye *bureau préfectoral.* Prime Minister Jean Kambanda addressed the gathering and again promoted "civil defense" as a means to combat the RPF, reporting that the war was in "all *communes*" in Rwanda. Édouard Karemera also addressed the gathering and paid tribute to the MRND-*Interahamwe* and called upon them to "flush out, stop and combat the enemy" in collaboration with "youth wings" of the other parties, and by doing so instigated the killing of the Tutsi ethnic group. The speeches and some of the commentary from that meeting were re-broadcast to the nation by Radio Rwanda several days later on or about 9 May 1994.

53. On a date unknown between 1 May-30 June 1994 Joseph Nzirorera, along with Interim Minister of Foreign Affairs Jérôme-Clément Bicamumpaka, participated in a ceremony at the Mukingo *bureau communal* for the re-investiture of Juvenal Kajelijeli as *bourgmestre. Interahamwe* militiamen assembled and paraded for the delegation, whereupon Joseph Nzirorera thanked them for the "excellent work" that they had done, referring to the killings of Tutsis.

54. Throughout April, May and June 1994 local officials in political parties and the territorial administration organized attacks against the Tutsi that took refuge in the Bisesero hills, resulting in the deaths of tens of thousands of Tutsi men, women and children. Groups of *Interahamwe* and *gendarmes* brought in from Gisenyi, Cyangugu and Kigali reinforced local attackers in Kibuye during several large scale attacks in rnid-May. Well-coordinated attacks on 13 and 14 May 1994 caused the deaths of several thousands of persons.

55. On or about 16 May 1994, President Sindikubwabo, accompanied by Édouard Karemera, held a "security" meeting in Kibuye during which he thanked Kibuye *préfet* Clement Kayishema for accomplishing his mission, referring to the killings of Tutsi in Kibuye, thereby aiding and abetting those killings.

56. On or about 17 May 1994, during a meeting of the *conseil des ministres,* the Interim Government implemented measures to manage the "civil defense force", formally entrusting the Minister of Defense, the Minister of the Interior, the Minister of Primary and Secondary Education, the Minister of Youth and Sports, the Minister for Family Affairs, and the Minister of Tourism with responsibility for the "civil defense program".

51. Le 27 avril 1994, le Conseil des ministres s'est de nouveau penché sur la question de la «défense civile». Le même jour, le Premier Ministre Jean Kambanda a adressé à tous les préfets une circulaire pour leur donner des «Instructions tendant au rétablissement de la sécurité dans le pays». Rappelant dans cette circulaire la politique du Gouvernement intérimaire qui consistait à charger tous les citoyens de la responsabilité de «démasquer l'ennemi et ses complices», il a ordonné ou autorisé la mise en place de barrages routiers, tout en sachant que les barrages servaient à identifier les Tutsis et leurs «complices» pour les tuer. Le Conseil des ministres s'est réuni à nouveau les 29 et 30 avril.

52. Le 3 mai 1994 ou vers cette date, Édouard Karemera a participé à une grande réunion convoquée par des personnalités membres du Gouvernement intérimaire au bureau préfectoral de Kibuye. Le Premier Ministre Jean Kambanda s'est adressé aux participants et a plaidé en faveur de la «défense civile» comme moyen de combattre le FPR, faisant remarquer que la guerre sévissait dans «toutes les communes» du Rwanda. Édouard Karemera s'est également adressé aux participants : rendant hommage aux membres du MRND-*Interahamwe*, il a exhorté ceux-ci à «déloger, stopper et combattre l'ennemi» en collaboration avec les «organisations des jeunes» des autres partis. Ce faisant, il incitait au massacre du groupe ethnique tutsi. Plusieurs jours plus tard, le 9 mai 1994 ou vers cette date, les discours prononcés et une partie des observations faites lors de cette réunion ont été rediffusés à la nation par Radio Rwanda.

53. À une date indéterminée entre le 1er mai et le 30 juin 1994, Joseph Nzirorera, accompagné de Jérôme-Clément Bicamumpaka, Ministre des affaires étrangères par intérim, a participé, au bureau communal de Mukingo, à la cérémonie de réinstallation de Juvénal Kajelijeli dans ses fonctions de bourgmestre. Les miliciens *Interahamwe* se sont réunis et ont défilé pour la délégation, après quoi Joseph Nzirorera les a remerciés de «l'excellent travail» qu'ils avaient accompli, faisant allusion aux massacres de Tutsis.

54. Tout au long des mois d'avril, de mai et de juin 1994, des dirigeants locaux de partis politiques et de l'administration territoriale ont organisé des attaques contre les Tutsis qui s'étaient réfugiés sur les collines de Bisesero, provoquant ainsi la mort de dizaines de milliers d'hommes, de femmes et d'enfants tutsis. Des groupes *d'Interahamwe* et de gendarmes amenés des préfectures de Gisenyi, de Cyangugu et de Kigali ont prêté main-forte aux assaillants locaux dans la préfecture de Kibuye lors de plusieurs attaques de grande envergure lancées à la mi-mai. Les attaques bien coordonnées des 13 et 14 mai 1994 ont fait plusieurs milliers de morts.

55. Le 16 mai 1994 ou vers cette date, le Président Sindikubwabo, accompagné d'Édouard Karemera, a tenu à Kibuye une réunion de «sécurité» au cours de laquelle il a remercié Clément Kayishema, préfet de Kibuye, d'avoir accompli sa mission, faisant allusion aux massacres de Tutsis dans la préfecture de Kibuye, ce qui revenait à aider et encourager à commettre ces massacres.

56. Le 17 mai 1994 ou vers cette date, lors d'une réunion du Conseil des ministres, le Gouvernement intérimaire a mis en œuvre des mesures de gestion des «forces de défense civile», confiant officiellement la responsabilité du «programme de défense civile» aux Ministres de la défense, de l'intérieur, de l'enseignement primaire et secondaire, de la jeunesse et des sports, de la famille et du tourisme.

57. On or about 25 May 1994, Édouard Karemera, as the Minister of the Interior, issued a letter to all *Préfets* regarding *Implementation of the Prime Minister's directives on the Self-organization of Civilian Defense.* Its purpose was to legitimize the distribution of weapons to the militiamen and the massacres of the civilian population. As part of the "civil defense" program, the Interim Government, by ministerial decision, appointed several military officers to lead the "self defense committee" established in each *préfecture.* Some of these officers took an active part in the massacres, including Col. Alphonse Nteziryayo in Butare, who subsequently replaced Sylvain Nsabimana as Butare *préfet* when the Interim Government yet again deemed authorities in Butare insufficiently aggressive in the campaign of violence against the Tutsi.

58. Among the newly appointed regional leaders of the "civil defense" was Maj. Damascene Ukulikiyeyezu, designated for Gitarama *préfecture.* When the Interim Government appointed several new *sous-préfets* for Gitarama, Interim Govemment Minister for Youth and Sports Callixte Nzabonimana, originally from Gitarama, and the new appointees supported Maj. Damascene Ukulikiyeyezu, then operating as *de facto préfet* in Gitarama, in directing the resources of the *préfecture* toward the ends of the "civil defense" : extermination of the Tutsi in Gitarama. The Interim Government deposed the former *préfet* of Gitarama in early June 1994, after which he went into hiding, one of the few deposed *préfets* that managed to escape the wrath of the Interim Government's campaign of violence. Both Jean-Baptiste Habyalimana, of Butare, and Godfroide Ruzindana, from Kibungo, were killed shortly after the Interim Government removed them.

59. On several occasions on dates unknown in June 1994 Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera participated in meetings with influential businessmen linked to the MRND political party and "Hutu Power". The purpose of the meetings was to raise funds to buy weapons to be distributed to soldiers, *Interahamwe* and other militias. At that time *all named accused* knew or had reason to know that *Interahamwe* and other militias were systematically attacking the civilian Tutsi population in Gisenyi and throughout Rwanda and that re-provisioning of militiamen would lead to further killings of civilians.

60. On or about 17 June 1994 the Interim Government convened in a *conseil des ministres,* whereupon it decided to request reinforcements from Gisenyi *commandant de secteur* Lt. Col. Anatole Nsengiyumva for further attacks upon surviving Tutsi in the Bisesero hills in Kibuye *préfecture.* Minister of Interior Édouard Karemera participated in the *conseil des ministres* and made the forma1 written request to Lt. Col. Nsengiyumva the following day. Attacks against those Tutsi that had survived the major attacks in May and early June continued with reinforcements of *Interahamwe* from Gisenyi, Cyangugu and Kigali, causing many deaths.

57. Le 25 mai 1994 ou vers cette date, Édouard Karemera, en sa qualité de Ministre de l'intérieur, a adressé à tous les préfets une lettre portant sur la Mise en œuvre des directives du Premier Ministre relatives à l'auto-organisation de la défense civile. Cette lettre avait pour but de légitimer la distribution d'armes aux miliciens et le massacre de la population civile. Dans le cadre du programme de «défense civile», le Gouvernement intérimaire a nommé, par décision ministérielle, plusieurs officiers de l'armée à la tête des «comités d'autodéfense» créés dans chaque préfecture. Certains de ces officiers ont activement participé aux massacres, notamment le colonel Alphonse Nteziryayo, nommé dans la préfecture de Butare qui a par la suite remplacé Sylvain Nsabimana au poste de préfet de Butare lorsque le Gouvernement intérimaire a estimé une fois de plus que les autorités de Butare n'étaient pas suffisamment agressives dans la campagne de violence lancée contre les Tutsis.

58. Parmi les responsables régionaux de la «défense civile» nouvellement désignés figurait le major Damascène Ukulikiyeyezu, nommé dans la préfecture de Gitarama. Après que le Gouvernement intérimaire eut nommé plusieurs nouveaux sous-préfets dans cette préfecture, Callixte Nzabonimana, Ministre de la jeunesse et des sports du Gouvernement intérimaire, lui-même originaire de Gitarama, et les responsables fraîchement nommés ont aidé le major Damascène Ukulikiyeyezu, qui assumait à l'époque les fonctions de préfet de facto de Gitarama, à affecter les ressources de la préfecture à la réalisation de l'objectif de la défense civile», à savoir l'extermination des Tutsis dans cette région. Le Gouvernement intérimaire a destitué l'ancien préfet de Gitarama au début de juin 1994. S'étant caché par la suite, celui-ci est l'un des rares préfets relevés de leurs fonctions qui ont réussi à échapper à la fureur de la campagne de violence orchestrée par le Gouvernement intérimaire. Jean-Baptiste Habyalimana, préfet de Butare, et Godefroid Ruzindana, préfet de Kibungo, ont été tués peu après leur destitution par le Gouvernement intérimaire.

59. Plusieurs fois en juin 1994, à des dates indéterminées, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont participé à certaines réunions avec des commerçants influents liés au MRND et au mouvement «*Hutu Power*». Ces réunions étaient destinées à mobiliser des fonds pour acheter des armes à distribuer aux militaires, aux *Interahamwe* et aux autres milices. À cette époque, *tous les accusés nommément cités* savaient ou avaient des raisons de savoir que les *Interahamwe* et les autres milices attaquaient systématiquement la population civile tutsie dans la préfecture de Gisenyi et sur toute l'étendue du Rwanda et que le réapprovisionnement des miliciens provoquerait d'autres massacres de civils.

60. Le 17 juin 1994 ou vers cette date, le Gouvernement intérimaire s'est réuni en Conseil des ministres et a décidé d'inviter le lieutenant-colonel Anatole Nsengiyumva, commandant de secteur de Gisenyi, à fournir des renforts pour que d'autres attaques soient lancées contre les rescapés tutsis réfugiés sur les collines de Bisesero, dans la préfecture de Kibuye. Le lendemain, Édouard Karemera, Ministre de l'intérieur qui avait participé a cette réunion du Conseil des ministres, a adressé une demande écrite officielle dans ce sens au lieutenant-colonel Nsengiyumva. Les attaques subies par les Tutsis qui avaient survécu à celles de grande envergure lancées en mai et au début de juin ont continué lorsque des renforts d'*Interahamwe* sont venus des préfectures de Gisenyi, de Cyangugu et de Kigali. Elles se sont soldées par la mort de nombreuses personnes.

61. During June and July 1994 the Interim Government assembled regularly in *conseils des ministres* and various other meetings to manage the affairs of state, which at that time included provisioning militias and the army for continued attacks against the Tutsi population.

62. Joseph Nzirorera planned, prepared, ordered, committed and aided and abetted attacks against the Tutsi population in Ruhengeri *préfecture*.

62.1 Prior to January 1994, and continuing through to late June 1994, Joseph Nzirorera made regular weekend trips to Ruhengeri *préfecture* to plan, prepare and organize the killing of the Tutsi population.

62.2 Joseph Nzirorera held meetings in Ruhengeri with local and regional civilian and military authorities, including Casimir Bizimungu, president of the MRND in Ruhengeri, Col. Augustin Bizimungu, *commandant de secteur* in Ruhengeri, Juvenal Kajelijeli, intermittently *bourgmestre* of Mukingo *commune*, and Esdras Baheza, a businessman in Mukingo, among others. The meetings took place once a week on average, usually on the weekend.

62.3 The meetings usually took place at the Busogo *secteur* residence of Joseph Nzirorera's mother or at Joseph Nzirorera's Mukingo *commune* residence. Meetings were also held at the ISIMBI building in Busogo *secteur*, the local headquarters of the *Interahamwe*, and at the residences of other MRND leaders. During those meetings Joseph Nzirorera and others present agreed to combat the RPF and to oppose the Arusha Accords by exterminating the Tutsi population.

62.4 During those meetings Joseph Nzirorera and others agreed to provide financial support, weapons, uniforms, provisions, and logistical and administrative support for the creation, military training, indoctrination and organization of *Interahamwe* militias.

62.5 Between June and October 1993, Joseph Nzirorera also Co-founded the *Amihindure*, a related group of militiamen in Nkuli and Mukingo communes within the broader category of the *Interahamwe*. Juvenal Kajelijeli recruited, trained and organized the *Amihindure*, who operated under the control of Joseph Nzirorera and Juvenal Kajelijeli.

62.6 Prior to April 1994 the *Amihindure* ["Volcanic Lava Force"] was composed of approximately 80 young men. All members were of Hutu racial or ethnic identity. The *Amihindure* wore *Interahamwe kitenge* uniforms, provided by Joseph Nzirorera, and received military training and firearms from FAR officers from the nearby Mukamira military camp. Joseph Nzirorera regularly supervised the military training of the *Amihindure* and addressed the recruits in various meetings and gatherings, at which time he explained that their mission was to exterminate al1 Tutsi throughout Ruhengeri *préfecture* and to combat the RPF.

62.7 After 6 April 1994 the *Amihindure* expanded significantly in number. During April, May and June of 1994 Joseph Nzirorera continued to provide material and logistical support, including military training, weapons, provisions, and indoctrination to *Amihindure* and *Interahamwe* militiamen in Mukingo and Nkuli *communes*. Joseph Nzirorera addressed the expanded Amihindure during meet-

61. En juin et juillet 1994, le Gouvernement intérimaire s'est réuni régulièrement en Conseil des ministres et a tenu diverses autres réunions pour vaquer aux affaires de l'État qui, à l'époque, comprenaient l'approvisionnement des milices et de l'armée afin que se poursuivent les attaques lancées contre la population tutsie.

62. Joseph Nzirorera a planifié, préparé, ordonné, commis et aidé et encouragé à commettre des attaques contre la population tutsie de la préfecture de Ruhengeri.

62.1 Dès avant janvier 1994 et jusque vers la fin de juin 1994, Joseph Nzirorera se rendait régulièrement, le week-end, dans la préfecture de Ruhengeri en vue de planifier, de préparer et d'organiser le massacre de la population tutsie.

62.2 Joseph Nzirorera a tenu des réunions dans la préfecture de Ruhengeri avec les autorités civiles et militaires locales et régionales, dont Casimir Bizimungu, Président du MRND dans la préfecture de Ruhengeri, le colonel Augustin Bizimungu, commandant de secteur de Ruhengeri, Juvénal Kajelijeli, bourgmestre par intermittence de la commune de Mukingo, et Esdras Baheza, commerçant dans la même commune. Les réunions se tenaient en moyenne une fois pas semaine, habituellement le week-end.

62.3 Ces réunions se déroulaient en général chez la mère de Joseph Nzirorera, dans le secteur de Busogo, ou chez Joseph Nzirorera lui-même, dans la commune de Mukingo. Des réunions se tenaient également à l'immeuble ISIMBI, quartier général local des *Interahamwe* sis dans le secteur de Busogo, et chez d'autres dirigeants du MRND. Lors de ces réunions, Joseph Nzirorera et d'autres participants ont décidé d'un commun accord de combattre le FPR et de s'opposer aux Accords d'Arusha en exterminant la population tutsie.

62.4 Toujours lors de ces réunions, Joseph Nzirorera et d'autres personnes ont convenu de fournir des fonds, des armes, des uniformes, des provisions et un appui logistique et administratif pour permettre de créer des milices *Interahamwe*, de leur donner une formation militaire, de les endoctriner et de les organiser.

62.5 Entre juin et octobre 1993, Joseph Nzirorera a également participé à la création des *Amihindure*, groupe de miliciens des communes de Nkuli et de Mukingo faisant partie de la grande famille des *Interahamwe*. Juvénal Kajelijeli recrutait les membres de la milice *Amihindure* qui menaient leurs activités sous son contrôle et celui de Joseph Nzirorera, les formait et organisait la milice.

62.6 Avant avril 1994, la milice *Amihindure* [la «Force de la lave»] était constituée d'environ 80 jeunes gens, tous appartenant au groupe racial ou ethnique hutu. Les *Amihindure* portaient les uniformes en tissu *kitenge* des *Interahamwe* que leur fournissait Joseph Nzirorera et suivaient une formation militaire assurée par les officiers des FAR en poste au camp militaire voisin de Mukamira qui leur donnaient également des armes à feu. Joseph Nzirorera supervisait régulièrement l'entraînement des *Amihindure* et a pris la parole devant les recrues lors de divers rassemblements et réunions pour leur expliquer que leur mission était d'exterminer tous les Tutsis de la préfecture de Ruhengeri et de combattre le FPR.

62.7 Après le 6 avril 1994, l'effectif des *Amihindure* s'est sensiblement accru. Au cours des mois d'avril, de mai et de juin 1994, Joseph Nzirorera a continué à fournir un appui matériel et logistique aux miliciens *Amihindure* et *Interahamwe* des communes de Mukingo et de Nkuli, notamment en assurant leur formation militaire, en leur donnant des armes et des provisions et en les endoctrinant. Joseph Nzirorera a pris la parole devant le groupe élargi des *Amihindure*

ings, gatherings and rallies, at which times he instigated them to exterminate the Tutsi population.

62.8 Joseph Nzirorera participated in decisions taken at a meeting at his mother's Busogo *secteur* residence on the evening of 6 April 1994 or the morning of 7 April 1994 or both. Other participants at one or the other of those meetings were Casimir Bizimungu, Augustin Bizimungu, and Juvenal Kajelijeli. During the meeting that took place on or about the early morning of 7 April 1994 Joseph Nzirorera agreed with the other participants and ordered that *Interahamwe* militias and locally recruited armed civilians should attack and kill the Tutsi population in Mulungo and Nkuli *communes.*

62.9 Some time thereafter, Juvenal Kajelijeli ordered and instigated *Interahamwe* and *Amihindure* in Mukingo and Nkuli *communes* to attack and kill the Tutsi population. Hundreds of unarmed Tutsi men, women, children and elderly persons were killed and their homesteads burned. Among those killed were Rukara and his brother Lucien, a woman named Joyce, a man named Yamweri and six members of his family, Swalisi, Kaboyi and ten members of his family, Bakiga, Philip Mungarurire, Abel Muhinda, Sebirayi, Sebageni, and Mudiyakoni.

62.10 During the course of 7 April 1994 Juvenal Kajelijeli, among others, executed the decisions taken with Joseph Nzirorera, Casimir Bizimungu and Augustin Bizimungu earlier that morning by ordering and commanding members of the *Interahamwe* and other militiamen and armed civilians to attack and kill persons sheltered in the Busogo parish church.

62.11 Following those generalized attacks on the Tutsi in Ruhengeri of 7 April 1994 Joseph Nzirorera made regular telephone calls to the Mukingo *bureau communal* for updates on the progress of the killings and to order further attacks against the Tutsi population. On or about 9 April 1994 Joseph Nzirorera telephoned the *sous-préfecture* office in Busengo to find out if any Tutsi were hiding there. A few days later a group of *Interahamwe* armed with firearms attacked the *sous-préfecture* office and killed over 40 persons.

62.12 On or about 14 April 1994 gendarmes and *Interahamwe* attacked displaced Tutsi civilians that were sheltered in the Court of Appeals building in Kigombe *commune,* killing hundreds of Tutsi men, women and children. Joseph Nzirorera, along with *commandant de secteur* Col. Augustin Bizimungu and other regional authorities, were responsible for ordering the attack and knew or had reason to know of the attack and that the perpetrators were persons over whom they exercised effective control. Subsequent to the killings Joseph Nzirorera participated in public gatherings with *Interahamwe* militiamen and local and regional civilian and military authorities in Ruhengeri, many of who were known to have authorized or participated in the attack. On those occasions Joseph Nzirorera praised militiamen for the killings of Tutsi throughout the *préfecture.*

lors de réunions, rassemblements et meetings pour les inciter à exterminer la population tutsie.

62.8 Joseph Nzirorera a participé aux décisions prises lors d'une réunion tenue chez sa mère, dans le secteur de Busogo, dans la soirée du 6 ou la matinée du 7 avril 1994 ou à ces deux moments. Parmi les autres participants à l'une ou l'autre de ces réunions figuraient Casimir Bizimungu, Augustin Bizimungu et Juvénal Kajelijeli. Au cours de la réunion qui s'est tenue tôt le matin du 7 avril 1994 ou vers ce moment, Joseph Nzirorera et les autres participants ont ordonné d'un commun accord que les miliciens *Interahamwe* et les civils armés recrutés localement attaquent et tuent les membres de la population tutsie dans les communes de Mukingo et de Nkuli.

62.9 Quelque temps après, Juvénal Kajelijeli a ordonné aux *Interahamwe* et aux *Amihindure* des communes de Mukingo et de Nkuli d'attaquer et de tuer les membres de la population tutsie et les a incités à agir de la sorte. Des centaines d'hommes, de femmes, d'enfants et de personnes âgées non armés appartenant à l'ethnie tutsie ont été tués et leurs maisons incendiées. Parmi les personnes tuées figuraient Rukara et son frère Lucien, une femme appelée Joyce, un homme du nom de Yamweri et six membres de sa famille, Swalisi, Kaboyi et dix membres de sa famille, Bakiga, Philip Mungarurire, Abel Muhinda, Sebirayo, Sebageni et Mudiyakoni.

62.10 Le 7 avril 1994, Juvénal Kajelijeli, entre autres personnes, a mis à exécution les décisions qu'il avait prises plus tôt dans la matinée avec Joseph Nzirorera, Casimir Bizimungu et Augustin Bizimungu, en ordonnant aux *Interahamwe*, aux autres miliciens et aux civils armés d'attaquer et de tuer les personnes réfugiées dans l'église paroissiale de Busogo.

62.11 Après ces attaques généralisées lancées le 7 avril 1994 contre les Tutsis de la préfecture de Ruhengeri, Joseph Nzirorera a téléphoné régulièrement au bureau communal de Mukingo pour s'informer de l'évolution des tueries et ordonner de nouvelles attaques contre la population tutsie. Le 9 avril 1994 ou vers cette date, Joseph Nzirorera a téléphoné au bureau de la sous-préfecture de Busengo pour demander si des Tutsis s'y cachaient. Quelques jours plus tard, un groupe d'*Interahamwe* munis d'armes à feu a attaqué le bureau de la sous-préfecture et tué plus de 40 personnes.

62.12 Le 14 avril 1994 ou vers cette date, des gendarmes et des miliciens *Interahamwe* ont attaqué des civils tutsis déplacés qui avaient trouvé asile à l'immeuble de la Cour d'appel dans la commune de Kigombe, tuant des centaines d'hommes, de femmes et d'enfants tutsis. Cette attaque a été ordonnée par Joseph Nzirorera, le colonel Augustin Bizimungu, commandant de secteur, et d'autres autorités régionales qui en étaient au courant ou avaient des raisons d'en être au courant et savaient que les assaillants étaient des personnes sur lesquelles ils exerçaient un contrôle effectif. Après les tueries, Joseph Nzirorera a participé à des rassemblements publics avec des miliciens *Interahamwe* et des autorités civiles et militaires locales et régionales de la préfecture de Ruhengeri dont bon nombre avaient notoirement autorisé l'attaque ou participé à celle-ci. À ces occasions, il a félicité les miliciens pour les massacres de Tutsis perpétrés sur toute l'étendue de la préfecture.

63. Joseph Nzirorera also planned, prepared, ordered, committed and aided and abetted attacks against the Tutsi population in Kigali-*ville préfecture* and in other regions of Rwanda.

63.1 On a date unknown between 6 April and 30 April 1994 Joseph Nzirorera arrived at the Canadian Embassy in Kigali searching for the wife of President of the Supreme Court Joseph Kavaruganda. While there, Joseph Nzirorera observed certain Tutsi in the area and told militiamen at a nearby roadblock to kill the Tutsi or be killed themselves. Later that same day, the militiamen killed several Tutsi that had taken shelter in the courtyard of the Canadian Embassy, saying that they were doing so on Nzirorera's orders. Among those killed were a man named Innocent, a man named Jean-Claude, Joseph Rutaremare, Jean-Claude Ndufatanye, Alphonse Burakeye, and Pierre Uwamahoro.

63.2 On a date unknown between 7-12 April 1994 Joseph Nzirorera prepared, aided and abetted or committed killings of Tutsis in Remera, Kigaliville *préfecture*, by providing information about certain Tutsis that were in hiding to a leader of the *Interahamwe* militias and by providing a vehicle, provisions, and instructions to the *Interahamwe* so that those persons could be forced out of hiding and killed. Among those killed were Aloys Karekezi, his wife, and son.

64. Édouard Karemera planned, prepared, ordered, instigated and aided and abetted attacks against the Tutsi population in Kibuye *préfecture*.

64.1 Toward the end of April 1994 Édouard Karemera arrived in Mwendo commune, Kibuye préfecture, and addressed local administrative authorities and a small crowd that gathered to greet him, whereupon he explained that Tutsis in Bisesero were attacking Hutus and "… now that [they had] finished Tutsis of this area and the problem is there in Bisesero …" that they should go to Bisesero to help Hutus there to kill Tutsis.

64.2 On or about 13 May 1994, national and regional political authorities from Kibuye that were known to collaborate with Édouard Karemera, and who were present for Édouard Karemera's address during the meeting at the Kibuye *préfecture* office on 3 May 1994, arrived in Bisesero. Among them were Minister of Information Eliezer Niyitegeka, Kibuye *préfet* Clement Kayishema, businessman Obed Ruzindana, among other authorities, including several *bourgmestres* and *conseillers*, accompanied by *Interahamwe* militiamen, soldiers and gendarmes. These same authorities ordered, instigated and directed large-scale attacks against Tutsi civilians in Bisesero over the course of several days. Militiamen and soldiers taking orders from such authorities surrounded, searched out and combed the hills to kill Tutsis with firearms, machetes and clubs.

64.3 Attacks against the Tutsi of Bisesero continued through late June 1994, particularly after 17 June 1994 when Minister of Interior Édouard Karemera, on behalf of the Interim Government, requested military authorities to send reinforcements from Gisenyi to eliminate any surviving Tutsis in Bisesero. The requested "*ratissage*" ["mopping up" operation] was intended to destroy the Tutsi

63. Joseph Nzirorera a aussi planifié, préparé, ordonné, commis et aidé et encouragé à commettre des attaques contre la population tutsie dans la préfecture de Kigali-ville et dans d'autres régions du Rwanda.

63.1 À une date inconnue entre le 6 et le 30 avril 1994, Joseph Nzirorera est arrivé à l'ambassade du Canada à Kigali à la recherche de l'épouse de Joseph Kavaruganda, Président de la Cour de cassation. Pendant qu'il y était, il a remarqué la présence de Tutsis dans les environs et a demandé à des miliciens qui se trouvaient à un barrage routier tout près de là de tuer ces Tutsis, sinon ils seraient eux-mêmes tués. Plus tard ce jour-là, les miliciens ont tué plusieurs Tutsis qui avaient trouvé refuge dans la cour de l'ambassade du Canada, disant qu'ils agissaient sur ordre de Nzirorera. Parmi les personnes tuées figuraient un homme appelé Innocent, un autre prénommé Jean-Claude, Joseph Rutaremare, Jean-Claude Ndufatanye, Alphonse Burakeye et Pierre Uwamahoro.

63.2 À une date inconnue entre le 7 et le 12 avril 1994, Joseph Nzirorera a préparé, aidé et encouragé à commettre ou commis le meurtre de Tutsis à Remera dans la préfecture de Kigali-ville, en fournissant à un des chefs des miliciens *Interahamwe* des renseignements sur certains Tutsis qui se cachaient et en donnant aux *Interahamwe* un véhicule, des provisions et les instructions nécessaires pour qu'ils fassent sortir ces personnes de leur cachette et les tuent. Parmi les personnes tuées figuraient Aloys Karekezi, sa femme et son fils.

64. Édouard Karemera a planifié, préparé, ordonné, incité à commettre et aidé et encouragé à commettre des attaques contre la population tutsie dans la préfecture de Kibuye.

64.1 Vers la fin d'avril 1994, Édouard Karemera est arrivé dans la commune de Mwendo (préfecture de Kibuye) et a pris la parole devant les autorités administratives locales et un petit groupe de personnes venues le saluer. Il leur a expliqué que les Tutsis étaient en train d'attaquer les Hutus à Bisesero et que «maintenant qu'[ils en avaient] terminé avec les Tutsis de cette région et qu'un problème se posait à Bisesero», ils devaient s'y rendre pour aider les Hutus à tuer les Tutsis.

64.2 Le 13 mai 1994 ou vers cette date sont arrivées à Bisesero des autorités politiques nationales et régionales de la préfecture de Kibuye qui collaboraient notoirement avec Édouard Karemera et avaient été présentes lorsque celui-ci avait pris la parole à la réunion tenue le 3 mai 1994 au bureau préfectoral de Kibuye. Parmi ces autorités se trouvaient - escortés par des miliciens *Interahamwe*, des militaires et des gendarmes - Éliézer Niyitegeka, Ministre de l'information, Clément Kayishema, préfet de Kibuye, Obed Ruzindana, commerçant, et d'autres personnalités, dont plusieurs bourgmestres et conseillers. Ces mêmes autorités ont ordonné, incité à lancer et dirigé des attaques à grande échelle menées durant plusieurs jours contre les civils tutsis à Bisesero. Des miliciens et des militaires recevant des ordres de ces autorités ont encerclé et ratissé les collines pour tuer les Tutsis à l'aide d'armes à feu, de machettes et de massues.

64.3 Les attaques subies par les Tutsis de Bisesero ont continué jusque vers la fin de juin 1994, en particulier après le 17 juin, lorsque le Ministre de l'intérieur Édouard Karemera, au nom du Gouvernement intérimaire, a demandé aux autorités militaires d'envoyer des renforts de la préfecture de Gisenyi aux fins d'éliminer tous les rescapés tutsis de Bisesero. Le «ratissage» demandé était

of Kibuye completely and to conceal the crimes of the preceding months that would be revealed by the accounts of survivors.

65. By the time the Interim Government fled Rwanda in mid-July 1994 hundreds of thousands of unarmed men, women and children had been killed as a direct result of policies initiated and authorized by the MRND and affiliated "Hutu Power" political parties and executed through the instrumentalities of the state. Cumulatively the acts and omissions of Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera furthered the objectives of the joint criminal enterprise to destroy the Tutsi as a group and to exterminate the political opponents of "Hutu Power". This joint criminal enterprise was the means by which *all named accused* and other persons that favoured, or sought to benefit from, the political regime of the MRND party-state attempted to combat the RPF and to perpetuate "Hutu Power" in Rwanda.

66. In Ruhengeri *préfecture* during early-mid April 1994, Kigali-ville *préfecture* during April 1994, Butare *préfecture* during mid-late April 1994, Kibuye *préfecture* during May - June 1994, and Gitarama *préfecture* during April and May 1994, and throughout Rwanda, *Interahamwe* and militiamen raped and sexually assaulted Tutsi women and girls throughout Rwanda, causing them serious bodily or mental harm. Such serious bodily or mental harm inflicted upon Tutsi women and girls was intended to destroy the capacity of persons of Tutsi ethnic or racial identity to sustain themselves physically or psychologically as a group, or to reproduce themselves as a group. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera were aware that rape was the natural and foreseeable consequence of the execution of the joint criminal enterprise and knowingly and willfully participated in that enterprise.

## COUNT 5 : RAPE AS A CRIME AGAINST HUMANITY

The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera with Rape as a Crime Against Humanity pursuant to Articles 3, 6 (1) and 6 (3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, *all named accused* were responsible for raping persons or causing persons to be raped, as part of a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds, committed as follows :

67. Between 6 April 1994 and 17 July 1994 throughout Rwanda there were widespread or systematic attacks against a civilian population based on Tutsi ethnic or racial identification or political opposition to the MRND and "Hutu Power" political parties, as described in detail in paragraphs 34 through 66.

68. As part of these widespread or systematic attacks, *Interahamwe* and other militiamen raped Tutsi women and girls in Ruhengeri *préfecture* during early-mid April 1994, Kigali-ville *préfecture* during April 1994, Butare *préfecture* during mid-late

destiné à détruire complètement les Tutsis de la préfecture de Kibuye et à dissimuler les crimes des mois précédents qui auraient pu transparaître des récits faits par les rescapés.

65. Au moment où le Gouvernement intérimaire fuyait le Rwanda à la mi-juillet 1994, des centaines de milliers d'hommes, de femmes et d'enfants non armés avaient été tués, leur élimination étant l'une des conséquences directes des politiques élaborées et autorisées par le MRND et les partis politiques appartenant comme lui au mouvement «Hutu Power» et mises en oeuvre par le truchement de l'appareil de l'État. Ensemble, les actes et omissions d'Édouard Karemera, de Mathieu Ngirumpatse et de Joseph Nzirorera ont concouru à la réalisation des buts de l'entreprise criminelle commune visant à détruire les Tutsis en tant que groupe et à exterminer les adversaires politiques du mouvement «Hutu Power». Cette entreprise criminelle commune était le moyen par lequel *tous les accusés nommément cités* et d'autres personnes qui étaient solidaires du régime politique du parti-État MRND ou cherchaient à en profiter tentaient de combattre le FPR et de pérenniser le mouvement «*Hutu Power*» au Rwanda.

66. Dans la préfecture de Ruhengeri pendant la première moitié d'avril 1994, dans la préfecture de Kigali-ville en avril 1994, dans la préfecture de Butare pendant la seconde moitié d'avril 1994, dans la préfecture de Kibuye en mai et juin 1994, dans la préfecture de Gitarama en avril et mai 1994 et dans toutes les autres préfectures du Rwanda, des *Interahamwe* et d'autres miliciens ont commis des viols et des actes de violence sexuelle sur les femmes et les filles tutsies, portant gravement atteinte à leur intégrité physique ou mentale. Ces atteintes graves avaient pour but de détruire l'aptitude des personnes appartenant au groupe ethnique ou racial tutsi à survivre physiquement ou psychologiquement ou à se reproduire en tant que groupe. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera savaient que le viol était la conséquence naturelle et prévisible de l'exécution de l'entreprise criminelle commune, mais ils ont sciemment et délibérément participé à cette entreprise.

### CHEF 5 :
### VIOL CONSTITUTIF DE CRIME CONTRE L'HUMANITÉ

Le Procureur accuse Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera de Viol constitutif de Crime contre l'humanité, en application de l'article 3 et des paragraphes 1 et 3 de l'article 6 du Statut du Tribunal, en ce que le 6 avril et le 17 juillet 1994 ou entre ces dates, sur toute l'étendue du territoire du Rwanda, *tous les accusés nommément cités* ont violé ou fait violer des personnes dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, comme il est indiqué ci-après.

67. Entre le 6 avril et le 17 juillet 1994, il y a eu sur toute l'étendue du Rwanda des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance au groupe ethnique ou racial tutsi ou de son opposition politique au MRND et aux partis politiques appartenant au mouvement «Hutu Power», comme il est exposé en détail aux paragraphes 34 à 66.

68. Dans le cadre de ces attaques généralisées ou systématiques, des *Interahamwe* et d'autres miliciens ont violé des femmes et des filles tutsies dans la préfecture de Ruhengeri au cours de la première moitié d'avril 1994, dans la préfecture de Kigali-

April 1994, Kibuye *préfecture* during May-June 1994, and Gitarama *préfecture* during April and May 1994.

69. These rapes were the natural and foreseeable consequence of the object of the joint criminal enterprise to destroy the Tutsi as a group. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera were aware that rape was the natural and foreseeable consequence of the execution of the joint criminal enterprise and knowingly and wilfully participated in that enterprise.

70. Rape against Tutsi women between 6 April 1994 and 17 July 1994 was so widespread and so systematic that Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera knew or had reason to know that *Interahamwe* and other militiamen were about to commit these crimes or that they had committed them. The accused had the material capacity to halt or prevent the rapes, or to punish or sanction those that committed these crimes, but failed to take the necessary and reasonable measures to prevent the rapes or to punish the perpetrators.

## COUNT 6 : EXTERMINATION AS A CRIME AGAINST HUMANITY

The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera with Extermination as a Crime Against Humanity pursuant to Articles 3, 6 (1) and 6 (3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, *all named accused* were responsible for killing persons, or causing persons to be killed, as part of a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds, committed as follows :

71. Between 6 April 1994 and 17 July 1994 throughout Rwanda there were widespread or systematic attacks against a civilian population based on Tutsi ethnic or racial identification or political opposition to the MRND and "Hutu Power" political parties, as described in detail in paragraphs 34 through 66.

72. As part of these widespread or systematic attacks, Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera acting alone or in concert with other known or unknown members of a joint criminal enterprise, planned, ordered, organized and committed killings of Tutsi civilians or political opponents of "Hutu Power" as described in detail in paragraphs 34 to 66.

73. As part of these widespread or systematic attacks, members of the *Interahamwe*; *préfets*, *bourgmestres* and *conseillers* that were members of the MRND, and members of their respective *conseils de sécurité* at prefectural and communal levels; commanders of the "civil defense program"; and administrative personnel in the ministries controlled by the MRND, committed killings of Tutsi civilians or political opponents of "Hutu Power" as described in detail in paragraphs 34 to 66.

ville en avril 1994, dans la préfecture de Butare pendant la seconde moitié d'avril 1994, dans la préfecture de Kibuye en mai et juin 1994 et dans la préfecture de Gitarama en avril et mai 1994.

69. Ces viols étaient la conséquence naturelle et prévisible de l'objet de l'entreprise criminelle commune visant à détruire les Tutsis en tant que groupe. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera savaient que le viol était la conséquence naturelle et prévisible de l'exécution de l'entreprise criminelle commune, mais ils ont sciemment et délibérément participé à cette entreprise.

70. Les viols commis sur les femmes tutsies entre le 6 avril et le 17 juillet 1994 étaient si généralisés et systématiques qu'Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera savaient ou avaient des raisons de savoir que les *Interahamwe* et d'autres miliciens étaient sur le point de perpétrer ces crimes ou les avaient perpétrés. Les accusés avaient le pouvoir matériel de mettre fin à ces viols, de les prévenir ou d'en punir les auteurs, mais ils n'ont pas pris les mesures nécessaires et raisonnables pour empêcher les viols en question ou punir les personnes qui les commettaient.

### CHEF 6 :
### EXTERMINATION CONSTITUTIVE DE CRIME CONTRE L'HUMANITÉ

Le Procureur accuse Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera d'extermination constitutive de crime contre l'humanité, en application de l'article 3 et des paragraphes 1 et 3 de l'article 6 du Statut du Tribunal, en ce que le 6 avril et le 17 juillet 1994 ou entre ces dates, sur toute l'étendue du territoire du Rwanda, *tous les accusés nommément cités* ont 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 raciale, comme il est indiqué ci-après.

71. Entre le 6 avril et le 17 juillet 1994, il y a eu sur toute l'étendue du Rwanda des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance au groupe ethnique ou racial tutsi ou de son opposition politique au MRND et aux partis politiques appartenant au mouvement «Hutu Power H, comme il est exposé en détail aux paragraphes 34 à 66.

72. Dans le cadre de ces attaques généralisées ou systématiques, Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, agissant seuls ou de concert avec d'autres personnes connues ou inconnues parties à une entreprise criminelle commune, ont planifié, ordonné, organisé et commis des meurtres de civils tutsis ou d'adversaires politiques du mouvement «Hutu Power», comme il est exposé en détail aux paragraphes 34 à 66.

73. Toujours dans le cadre de ces attaques généralisées ou systématiques, les miliciens *Interahamwe*, les préfets, bourgmestres et conseillers qui militaient au MRND, ainsi que les membres de leurs conseils de sécurité préfectoraux et communaux respectifs, les responsables du «programme de défense civile» et les membres du personnel administratif des ministères dirigés par le MRND ont tué des civils tutsis ou des adversaires politiques du mouvement «Hutu Power», comme il est exposé en détail aux paragraphes 34 à 66.

COUNT 7 : SERIOUS VIOLATIONS OF ARTICLE 3 CORNRNON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II : KILLING AND CAUSING VIOLENCE TO HEALTH AND PHYSICAL OR MENTAL WELL-BEING

The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera with Killing and Causing Violence to Health and Physical or Mental Well-Being as a Serious Violation of Article 3 Comrnon to the Geneva Conventions and Additional Protocol II pursuant to Articles 4, 6 (1) and 6 (3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, *all named accused* were responsible for killing, seriously harming, and for otherwise treating in a cruel manner persons taking no active part in the hostilities in connection with an armed conflict not of an international nature.

74. Between 1 January 1994 and 17 July 1994 there existed in Rwanda a state of non international armed conflict within the meaning of Articles 1 and 2 of Protocol II Additional to the Geneva Conventions of 12 August 1949.

75. The belligerents in the non-international armed conflict were the FAR and the RPF. The parties to that conflict were bound by the rules contained in Article 3 Common to the Geneva Conventions and Additional Protocol II.

76. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera acting alone or in concert with other known or unknown members of a joint criminal enterprise, planned, ordered, organized and committed killings of Tutsi civilians throughout Rwanda, as described in detail in paragraphs 34 to 66.

77. Members of the *Interahamwe*; *préfets*, *bourgmestre* and *conseillers* that were members of the MRND, and members of their respective *conseils de sécurité* at prefectural and communal levels; commanders of the "civil defense program"; and administrative personnel in the ministries controlled by the MRND, committed killings of Tutsi civilians throughout Rwanda as described in detail in paragraphs 34 to 66.

78. The Tutsi civilians that were killed were persons taking no active or direct part in the hostilities, or persons who has ceased to take part in the hostilities, and were thus persons protected by the terms of Common Article 3 of the Geneva Conventions and Protocol II.

79. The killing of Tutsi civilians was closely related to the armed conflict. Edouard Karemera, Mathieu Nigirumpatsen and Joseph Nzirorera used the environment and the context of the non-international armed conflict and the resources of the state, including the territorial administration and structures of authority in the MRND and the MDR-"Power" political parties, and the physical and logistical resources of the military, to achieve the criminal goal of destroying the Tutsi as a group, particularly the killing of Tutsi civilians.

80. Edouard Karemera, Mathieu Ngirumpaste, and Joseph Nzirorera ordered or instigated killings of Tutsi civilians and political opponents as a means to eliminate possible support for the RPF from within the country, as a bargaining chip to force the RPF to agree to its terms for a cease-fire, and as acts of reprisal and vengeance

## CHEF 7 : VIOLATIONS GRAVES DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÈVE ET DU PROTOCOLE ADDITIONNEL II : MEURTRE ET ATTEINTES PORTÉES À LA SANTÉ ET AU BIEN-ÊTRE PHYSIQUE OU MENTAL DE PERSONNES

Le Procureur accuse Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera de Meurtre et d'atteintes portées à la santé et au bien-être physique ou mental de personnes, crimes constitutifs de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, en application de l'article 4 et des paragraphes 1 et 3 de l'article 6 du Statut du Tribunal, en ce que le 6 avril et le 17 juillet 1994 ou entre ces dates, sur toute l'étendue du territoire du Rwanda, *tous les accusés nommément cités* ont été responsables de meurtres, d'atteintes graves et/ou de traitements cruels commis sur des personnes qui ne prenaient pas une part active aux hostilités, dans le cadre d'un conflit armé ne présentant pas un caractère international.

74. Entre le 1er janvier et le 17 juillet 1994, il existait au Rwanda un conflit armé ne présentant pas un caractère international au sens des articles 1 et 2 du Protocole additionnel II aux Conventions de Genève du 12 août 1949.

75. Les parties à ce conflit armé étaient les FAR et le FPR. Elles étaient liées par les dispositions de l'article 3 commun aux Conventions de Genève et celles du Protocole additionnel II.

76. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, agissant seuls ou de concert avec d'autres personnes connues ou inconnues parties à une entreprise criminelle commune, ont planifié, ordonné, organisé et commis des meurtres de civils tutsis sur toute l'étendue du territoire rwandais, comme il est exposé en détail aux paragraphe 34 à 66.

77. Les miliciens *Interahamwe*, les préfets, bourgmestres et conseillers qui militaient au MRND, ainsi que les membres de leurs conseils de sécurité préfectoraux et communaux respectifs, les responsables du «programme de défense civile» et les membres du personnel administratif des ministères dirigés par le MRND ont tué des civils tutsis sur toute l'étendue du territoire rwandais, comme il est exposé en détail aux paragraphes 34 à 66.

78. Les civils tutsis tués étaient des personnes ne participant pas activement ou directement aux hostilités ou des personnes qui avaient cessé d'y participer. Ils étaient donc des personnes protégées au sens de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II.

79. Le massacre de ces civils tutsis était étroitement lié au conflit armé. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont utilisé l'environnement et le contexte du conflit armé ne présentant pas un caractère international, les ressources de l'État, notamment l'Administration territoriale, les structures hiérarchiques du MRND et du MDR- «Power», ainsi que les ressources matérielles et logistiques de l'armée, pour réaliser leur dessein criminel consistant à détruire les Tutsis en tant que groupe, en particulier par le massacre des civils tutsis.

80. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera ont ordonné ou incité à commettre des meurtres de civils tutsis et d'adversaires politiques afin d'éliminer tout soutien possible au FPR dans le pays, de s'en servir comme moyen de pression pour obliger le FPR à accepter le cessez-le-feu à leurs conditions, et comme

for RPF advances on the battlefield. Consequently, the killings were closely related to the armed conflict.

The acts and omissions of Edouard Karemera, Mathieu Ngirumpaste, and Joseph Nzirorera, details herein are punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Kigali, this 23 day of February 2005.

[Signed] : Hassan Bubacar Jallow

***

mesures de représailles et de vengeance contre les progrès du FPR sur le front. En conséquence, les massacres étaient étroitement liés au conflit armé.

Les actes et omissions d'Édouard Karemera, de Mathieu Ngirumpatse et de Joseph Nzirorera exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut du Tribunal.

Arusha, le 23 février 2005.

[Signé] : Hassan Bubacar Jallow

***

## *Decision on Joseph Nzirorera's Motion to Request the Cooperation of the Government of a State Article 28 of the Statute 23 February 2005 (ICTR-98-44-PT)*

(Original : French)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera– Cooperation of the States, Conditions to request a cooperation of the state, Cumulative criteria – Interpretation of the Statute – Equality of arms between parties – Motion granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 66 (C) and 73 (A); Statute, art. 28 and 28 (2) (c)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on the Ex Parte Defence Motion for orders to the United Nations Department of Peace-Keeping Operations for the Production of Documents, 9 March 2004 (ICTR-98-44)*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Tihomir Blaskic, *Decision 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)*

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

SITTING as Trial Chamber III (the "Chamber") composed of Judges Dennis C.M. Byron, president, Emile Francis Short and Gberdao Gustave Kam,

BEING SEIZED of a Motion to Request Cooperation from the Government of a State[1], filed by Counsel for Joseph Nzirorera (the "Defence") on 6 September 2004,

CONSIDERING the Prosecutor's Response to the Motion filed on 13 September 2004,

CONSIDERING the Statute of the Tribunal (the "Statute"), in particular its article 28, and the Rules of Procedure and Evidence (the "Rules"),

HEREBY DECIDES as follows solely on the basis of briefs filed by the parties, pursuant to Rule 73 (A) of the Rules :

[1] The name of the State is indicated in the confidential annex attached to the present Decision (p. 5). The annex has been placed under seal in conformity with the implementation of the various Chamber orders on the protection of witnesses.

INTRODUCTION

1. Although the appeal regarding the continuation of proceedings was still pending[2], the parties in this case have continued to file motions. The motions in question have remained pending. After the Presiding Judge was assigned in November 2004, a Status Conference was held on 26 November 2004 during which the Defence for Joseph Nzirorera mentioned that the motions which it had filed and which were still pending, only six, including the instant motion, would require to be dealt with by the Chamber[3]. On 14 February 2005, after authorizing the Prosecutor to file a separate amended Indictment against Rwamakuba and an amended Indictment against Karemera, Ngirumpatse and Nzirorera[4], the Chamber now deems it self in a position to consider the said motions.

SUBMISSIONS OF THE PARTIES

*The Defence*

2. The Defence is requesting the Chamber to grant the request for cooperation from the Government of a State in order that it may obtain the following documents relating to a prosecution witness[5] :

– Copies of all holding or charging documents in the investigation or prosecution of the witness in question which contain a description of the charges being investigated or lodged against the witness or any facts upon which those charges are based; and
– Copies of any statements made by him to the judicial or law enforcement authorities of the State in question.

The Defence holds that the documents have been identified with specificity and would help it assess the credibility of the witness in question. It also refers to the initiatives taken in vain to obtain the documents from the authorities of the State in question.

*The Prosecutor*

3. The Prosecutor is not challenging the motion, but is of the view that the disclosure of the documents may prejudice ongoing investigations in the said State. Con-

[2] *The Prosecutor v. Édouard Karemera. Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44-AR15*bis*.2 *(Karemera et al.),* Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.,* Reasons for Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material (AC), 20 October 2004.

[3] Oral Decision, T. of 26 November 2004, pp. 1-2.,

[4] *Karemera et al.,* Decision on Severance of Andre Rwamakuba and For leave to file amended Indictment (TC), 14 February 2005.

[5] The pseudonym of this witness is mentioned in the annex to the present Motion which is under seal.

sequently, he requested the Chamber to grant that State leave to apply for an *in camera* sitting in conformity with Rule 66 (C) of the Rules. The Prosecutor also requests that the Chamber serves all parties with copies of any document transmitted by the State in question.

## DELIBERATIONS

4. Article 28, paragraph 2 (c), of the Statute provides that the States shall cooperate with the Tribunal by responding without undue delay to any request for assistance related to the service of documents. The Chamber recalls that according to well-established case-law of this Tribunal[6] regarding the interpretation of this provision, motions for requesting the assistance of a State shall be granted only if the three following conditions are met by the applicant :

– He must identify as far as possible the documents he requires;
– He must indicate how such documents are relevant to the trial; and
– He must prove that the steps taken to secure the documents prior to submitting any request for cooperation pursuant to Article 28 were not successful.

5. In the present instance, with respect to the first condition, the Chamber notes that the documents required by the Defence have been sufficiently identified, and listed in his Motion and are limited in number. Regarding the second condition, the Chamber holds that even though it does not know their contents, the documents could be relevant to the assessment of the credibility of the Prosecution witness in question, without making any pronouncement as to the effects of the documents on the outcome of the trial or on its admissibility as evidence. Lastly, regarding the third condition, the Chamber notes that the Defence, despite the reasonable efforts it made, has been unable to obtain access to the documents requested. The Chamber concludes that the conditions for the issuance of a request for cooperation from a State have been met.

6. With respect to the Prosecutor's counter-motion to request authorization to apply the measures set forth in Rule 66 (C) of the Rules, the Chamber notes that this provision applies only to the Prosecutor. Moreover, the measure is of no interest to the Prosecutor. Consequently, the Prosecutor's request is inadmissible. However, though neither the Statute nor the Rules expressly provide for this, States can always plead exceptional circumstances based, for example, on security in order to be relieved of the obligation to cooperate, and it is for the requested country to mention this and refer the matter to the chamber[7].

7. Lastly, the Chamber grants the Prosecutor's second request for additional disclosure, on the basis of equality of arms between parties, so that the documents requested by the Defence may be served on al1 the parties to the instant case.

---

[6] *Prosecutor v. Tihomir Blaskic,* Case n° IT-95-14-AR108, Judgment on the Request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 32.

[7] *Karemera et al.,* Decision on the Ex *Parte* Defence Motion for orders to the United Nations Department of Peace-Keeping Operations for the Production of Documents (TC), 9 March 2004, para. 18.

FOR THE FOREGOING REASONS, THE CHAMBER :

I. GRANTS the Defence Motion;

II. REQUESTS that the Government of the State whose name appears in the annex to render the necessary assistance so that all the parties to the instant case may receive, as soon as possible, the following documents relating to the witness whose name also appears in the annex :

– Copies of all holding or charging documents in the investigation or prosecution of the witness in question which contain a description of the charges being investigated or lodged against the witness or any facts upon which those charges are based; and

– Copies of any statements made to the judicial or law enforcement authorities of the State in question.

III. REQUESTS the Registrar to transmit the present Decision to the Government of the State referred to in the annex of this Decision and inform the Chamber of the action taken in response thereto.

Done in French, in Arusha, on 23 February 2005.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du gouvernement français Article 28 du Statut 23 février 2005 (ICTR-98-44-PT)*

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Coopération de la France, Rapport du juge d'instruction Jean-Louis Bruguière, Requête non pertinente – Qualification de conflit armé interne, Participation de l'Ouganda à l'assassinat du président Habyarimana – Requête non pertinente*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 46, 54, 73 (A) et 73 (F); Statut, art. 28*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Edouard Karemera et al., *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused, 29 septembre 2003 (ICTR-98-44)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Tihomir Blaskić, *Arrêt relatif à la Requête de la République de Croatie aux fins d'examen de la Décision de la Chambre de première instance II du 18 juillet 1997, 29 octobre 1997 (IT-95-14)*

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

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Dennis C. M. Byron, Président, Emile Francis Short et Gberdao Gustave Kam;

SAISI de la requête intitulée «Motion for Request for Cooperation to Government of France» déposée par la Défense de l'accusé Joseph Nzirorera le 14 avril 2004 (la «requête» et l'«accusé»);

CONSIDÉRANT la réponse du Procureur à la requête de Joseph Nzirorera, déposée le 20 avril 2004 et la réplique de la Défense de Nzirorera à cette réponse, déposée le 21 avril 2004;

CONSIDÉRANT le Statut du Tribunal (le «Statut») notamment en son article 28, et le Règlement de procédure et de preuve (le «Règlement»);

STATUE comme suit, sur la base des soumissions écrites des parties, conformément à l'article 73 (A) du Règlement.

INTRODUCTION

1. Alors que l'appel sur la continuation du procès était toujours pendant[1], les parties en la présente affaire ont continué de déposer des requêtes. Ces requêtes sont restées pendantes. Après la désignation du Président de l'affaire en novembre 2004, une Conférence de mise en état a eu lieu le 26 novembre 2004, au cours de laquelle la Défense de Joseph Nzirorera a admis que des requêtes qu'elle a déposées et qui étaient encore pendantes, six seulement, dont la présente, nécessiteraient que la Chambre en dispose[2]. Après avoir autorisé, le 14 février2005, le dépôt par le Procureur d'un acte d'accusation amendé séparé contre Rwamakuba et d'un acte d'accusation amendé pour Karemera, Ngirumpatse et Nzirorera[3], la Chambre considère qu'elle peut à présent traiter de ces requêtes.

ARGUMENTS DES PARTIES

*La requête de la Défense*

2. En vertu des Articles 28 du Statut et 54 du Règlement, la Défense prie la Chambre de demander au Gouvernement français de produire le rapport du juge d'instruction Jean-Louis Bruguière, sur les circonstances de l'assassinat de l'ancien Président rwandais Juvénal Habyarimana à Kigali le 6 avril 1994. S'appuyant sur des coupures de presse et une déclaration d'un ancien officier de l'Armée Patriotique Rwandaise («APR»), la Défense soutient que le rapport conclut à la responsabilité du Front Patriotique Rwandais («FPR») au regard de cet assassinat.

3. La Défense prétend que les trois conditions établies par la jurisprduence du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY»), notamment dans l'affaire *Blaskic,* en vue d'obtenir la coopération d'un Etat sont réunies en l'espèce[4].

– En premier lieu, la Défense soutient que le document demandé serait identifié avec suffisamment de précision, de sorte que le Gouvernement français n'aurait aucune difficulté à le localiser.
– En second lieu, la Défense estime que ce document serait pertinent en l'espèce en vue de contredire la thèse du Procureur selon laquelle l'accusé serait impliqué dans une entente en vue d'exterminer les Tutsi. Le rapport en question comporterait des

[1] *Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba,* Affaire n° TPIR-98-44-AR15*bis* 2 *(Karemera et al.),* Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 septembre 2004; *Karemera et al.,* Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material (AC), 22 octobre 2004.

[2] Décision orale, T. 26 novembre 2004, pp. 1-2.

[3] *Karemera et al.,* Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment (TC), 14 février 2005.

[4] La Défense se réfère essentiellement à l'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, rendu le 29 octobre 1997 par la Chambre d'appel du TPIY dans l'affaire *Le Procureur c. Tihomir Blaskic,* Affaire n° IT-95-14-AR108

éléments établissant la responsabilité du FPR dans la destruction de l'avion présidentiel le 6 avril 1994**.** Or, selon la Défense, s'il était établi que le FPR est en réalité responsable de l'assassinat du Président Habyarimana, l'accusé ne pourrait être tenu responsable d'avoir participé à une quelconque planification des massacres survenus dès le 6 avril 1994**.** Ceux-ci seraient uniquement le fruit d'une réaction spontanée de la population au décès de leur dirigeant, réaction à l'égard de laquelle l'accusé n'aurait eu aucune emprise. La Défense souligne également que si le rapport démontrait que l'accusé n'avait pas été impliqué dans l'assassinat, il s'agirait d'un élément de preuve propre à atténuer la culpabilité de ce dernier conformément à l'article 68 du Règlement.

– En troisième lieu, la Défense soutient qu'elle a effectivement tenté d'obtenir directement des autorités françaises le rapport en adressant en ce sens, mais en vain, un courrier à l'attention du Chef de la Direction des Affaires juridiques du Ministère des Affaires étrangères français, dès le mois de décembre 2003. De même, lors d'une entrevue entre le Conseil de la Défense et le juge d'instruction Bruguière à Paris (France), en janvier 2004, celui-ci aurait explicitement refusé de lui communiquer une copie de son rapport.

4. En outre, la Défense soutient que le rapport dont question, contiendrait des preuves de l'implication de l'Ouganda dans la commission de l'assassinat du Président Habyarimana. Cet élément factuel serait central quant à la qualification du conflit, qui ne serait dès lors plus seulement interne.

*La réponse du Procureur*

5. Le Procureur rappelle que la Chambre a déjà rejeté, le 29 septembre 2003, une précédente requête de la Défense de Joseph Nzirorera visant à la communication dudit rapport Bruguière[5], ainsi que les demandes répétées de la Défense pour la communication de divers documents liés à l'assassinat du Président Habyarimana[6]. Il considère que la Défense n'apporte aucun élément nouveau dans la présente requête. En se fondant sur ses précédentes réponses aux requêtes de la Défense, notamment sur sa réponse en date du 18 août 2003[7], le Procureur réitère que la question est sans

[5] *Karemera et al.,* Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused, 29 septembre 2003

[6] *Karemera et al.,* Décision sur la requête de la Défense aux fins que soit ordonné au .Procureur de diiigenter une enquête sur les circonstances de l'accident de l''avion du Président Habyarimana (TC), 2 juin 2000; *Decision on the Request to Governments of United States of America, Belgium, France, and Germany for Cooperation* (TC), 4 septembre 2003; *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (TC), 29 septembre 2003; *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* (TC), 7 octobre 2003; *Decision on Accused Nzirorera's Motion for inspection of Materials* (TC), 5 février 2004; *Decision on the Defence Request for Certification to Appeal the Decision on Accused Nzirorera"s Motion for Inspection of Material* (TC), 26 février 2004.

[7] *Cf. Prosecutor's Consolidated Supplemental Response to (i) the Defence Motion for Inspection of Items "Material to the Preparation of the Defence"; (ii) Motion for Disclosure of Exculpatory Material; (iii) the Defence Motion for Request for Cooperation to the Governrnents of United States, Belgium, France and Germany".*

influence sur l'affaire en cause, et conclut que le rapport du juge Bruguière n'est pas pertinent en l'espèce.

6. Le Procureur soutient par ailleurs que la requête de Joseph Nzirorera est fantaisiste, et demande à la Chambre d'ordonner au Greffier de surseoir au paiement des honoraires et des frais relatifs à la requête conformément à l'article 73 (F) du Règlement.

*La réplique de la Défense*

7. La Défense prétend que non seulement il serait inapproprié de lui imposer des sanctions en l'espèce mais qu'en outre, cela constituerait une violation du principe de l'égalité des armes car seuls les Conseils de la Défense pourraient être sanctionnés en vertu de l'article 73 (F) du Règlement, le Procureur échappant à une telle sanction.

DELIBERATIONS

8. La Chambre rappelle que dans sa Décision du 29 septembre 2003[8] elle a rejeté la requête de la Défense aux fins de communication par le Procureur du rapport du juge Bruguière, parce que le requérant n'avait pas apporté la preuve que l'intimé avait ce document en sa possession. Cette décision est sans pertinence en la présente espèce, puisque la Chambre est, à présent, saisie d'une demande en coopération de la France.

9. Conformément à une jurisprudence bien établie de ce Tribunal[9], la coopération d'un État peut être sollicitée en vertu de l'article 28 du Statut pour autant que

i) la partie requérante identifie autant que possible les documents ou les informations demandés,

ii) indique dans quelle mesure ces documents ou informations sont pertinents pour toute question soulevée devant le juge; et

iii) expose les démarches qu'elle a entreprises en vue d'obtenir l'assistance de l'Etat en question.

10. La Chambre constate que les informations foumies dans la requête sont suffisamment précises pour identifier le document requis et que la Défense avait elle-même entrepris des démarches pour obtenir le rapport Bruguière, et conclut que les conditions i) et iii) sont remplies.

11. En ce qui concerne la pertinence du rapport du juge d'instruction Bruguière (condition ii)), la Chambre note qu'une partie de l'argumentation de la Défense coïncide avec l'argumentation ayant prévalu autrefois à la communication du rapport

[8] *Karemera et al., Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused.*

[9] *Le Procureur c. Tihomir Blaskic,* Affaire n° IT-95-14-AR108, 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.

interne de Michael Hourigan[10]. La Chambre rappelle que, par la suite, la jurisprudence a établi que la responsabilité éventuelle du FPR ou de ses agents dans l'assassinat du Président Habyarimana n'avait aucune incidence sur l'imputation des actes criminels commis en 1994 au Rwanda. De sorte que l'argumentaire de la Défense ne saurait aujourd'hui aboutir, la finalité ne pouvant être atteinte. De plus, dans la mesure où le Procureur ne se fonde pas sur une éventuelle responsabilité de l'accusé dans l'ssassinat du président rwandais, pour soutenir l'allégation d'entente en vue d'exterminer les Tutsi, la Chambre conclut que la prétention de la Défense est infondée, et que le rapport requis est dès lors sans pertinence, à cet égard.

12. La Défense allègue par ailleurs qu'il découle de ce rapport que l'Ouganda serait impliqué dans ledit assassinat du Président Habyarimana, et qu'une telle participation affecterait la qualification du conflit armé. Dans cette seule mesure le raisonnement de la Défense aurait pu prospérer si cette participation ponctuelle pouvait modifier la qualification du conflit armé. Car, de l'avis de la Chambre, même s'il est prouvé que l'Ouganda a participé à l'assassinat du président rwandais le 6 avril 1994, ce fait ne modifie en rien la nature du conflit armé qui s'est déroulé au Rwanda. Ce conflit armé demeure non international tant qu'il n'est prouvé que des forces armées étrangères ont pris part aux affrontements, et se sont opposées aux Forces armées rwandaises (FAR).

13. En conséquence, la Chambre doit conclure que la seconde condition, celle de la pertinence, n'est pas remplie, et qu'il ne saurait être fait droit à la requête. Toutefois, la Chambre considère que la requête de la Défense n'était pas fantaisiste parce que les arguments y présentés ne sont pas superficiels ni inutilement répétitifs par rapport à des requêtes antérieures.

14. La Chambre rappelle aux parties que la mise en oeuvre de l'article 73 (F) du Règlement est de sa propre initiative. Il n'en résulte pas que les parties ne puissent pas suggérer à la Chambre d'exercer son pouvoir *proprio motu*, et il n'est ni dans l'intérêt de la justice ni dans l'impératif de débats sereins que les parties usent et abusent d'une telle possibilité. La Chambre rappelle par ailleurs que, même si l'article 73 (F) du Règlement ne peut logiquement s'appliquer qu'à la Défense, l'article 46 offre suffisamment de latitude pour sanctionner tout abus de procédure du Procureur, sans compter que l'égalité des armes entre les parties implique que l'article 73 (F) dans son esprit soit applicable aux Conseils de l'accusation.

[10] *Le Procureur c. Clément Kayishema,* Affaire n° TPIR-95-1-A, Arrêt (deuxième requête de C. Kayishema aux fins de présentation à la Chambre d'appel de nouveaux moyens de preuve à partir du mémorandum rédigé par M. Hourigan) (AC), 28 septembre 2000. La Chambre d'appel dit dans cet arrêt : «CONSIDERANT que le mémorandum Hourigan n'était bien entendu pas disponible lors du procès en première instance, mais que sa teneur, que le requérant cite, ne pouvait avoir un rapport avec les questions relatives au génocide sur lesquelles la Chambre de première instance devait se prononcer; qu'il n'est pas dès lors dans l'intérêt de la justic de l'admettre comme moyen de preuve supplémentaire en appel».

PAR CES MOTIFS, LA CHAMBRE
REJETTE la Requête en tous ses moyens.

Fait en français à Arusha, le 23 février 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du gouvernement d'un certain Etat Article 28 du Statut 23 février 2005 (ICTR-98-44-T)*

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera– Coopération des Etats, Conditions pour réquérir la coopération d'un Etat, Conditions cumulatives – Interprétation du Statut – Egalité des armes entre les parties – Requête acceptée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 66 (C) et 73 (A); Statut, art. 28 et 28 (2) (c)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Edouard Karemera et al., *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused, 29 septembre 2003 (ICTR-98-44)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Tihomir Blaskić, *Arrêt relatif à la Requête de la République de Croatie aux fins d'examen de la Décision de la Chambre de première instance II du 18 juillet 1997, 29 octobre 1997 (IT-95-14)*

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

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Dennis C. M. Byron, Président, Emile Francis Short et Gberdao Gustave Karn;

SAISI d'une requête concernant la coopération du gouvernement d'un certain État[1], déposée par la Défense de l'accusé Joseph Nzirorera (la «Défense») le 6 *septembre* 2004;

CONSIDÉRANT la réponse du Procureur à la requête, déposée le 13 septembre 2004;

CONSIDÉRANT le Statut du Tribunal (le «Statut») notamment en son article 28, et le Règlement de procédure et de preuve (le «Règlement»);

STATUE comme suit, sur la base des mémoires écrits des parties, conformément à l'article 73 (A) du Règlement.

## INTRODUCTION

1. Alors que l'appel sur la continuation du procès était toujours pendant[2], les parties en la présente affaire ont continué de déposer des requêtes. Ces requêtes sont restées pendantes. Après la désignation du Président de l'affaire en novembre 2004, une Conférence de mise en état a eu lieu le 26 novembre 2004, au cours de laquelle la Défense de Joseph Nzirorera a admis que des requêtes qu'elle a déposées et qui étaient encore pendantes, six seulement, dont la présente, nécessiteraient que la Chambre en dispose[3]. Après avoir autorisé, le 14 février 2005, le dépôt par le Procureur d'un acte d'accusation amendé séparé contre Rwamakuba et d'un acte d'accusation amendé pour Karemera, Ngirumpatse et Nzirorera[4], la Chambre considère qu'elle peut à présent traiter de ces requêtes.

## ARGUMENTS DES PARTIES

*Défense*

2. La Défense demande à la Chambre de faire droit à une demande d'assistance du gouvernement d'un État en vue d'obtenir l'expédition des documents suivants, relatifs à un témoin à charge[5] :

[1] Le nom de cet Etat est indiqué à l'annexe confidentielle de la présente Décision (p. 5). La mise sous scellés de l'annexe découle de la mise en oeuvre des diverses ordonnances de la Chambre portant protection des témoins à charge.

[2] *Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba,* Affaire n° TPIR-98-44-AR15bis.2 *(Karemera et al.), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material* (AC), 28 septembre 2004; *Karemera et al., Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material* (AC), 22 octobre 2004.

[3] Décision orale, T. du 26 novembre 2004, pp. 1-2.

[4] *Karemera et al., Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment* (TC), 14 February 2005

[5] Le pseudonyme de ce témoin à charge est repris à l'annexe de la présente Décision, mise sous scellés.

i) copie de tous les documents du dossier d'instruction ou de mise en accusation relatif au témoin en question, mentionnant les charges qui font l'objet de l'enquête ou retenues contre ce dernier ainsi que les faits sur lesquels ces allégations reposent; et

ii) copie de toutes ses déclarations faites devant les autorités judiciaires ou policières de l'État en question.

La Défense soutient que les documents requis sont suffisamment identifiés, et qu'ils lui permettraient de mettre en cause la crédibilité du témoin en question. Elle mentionne par ailleurs les initiatives qu'elle a prises en vain pour obtenir ces documents des autorités de l'Etat requis.

*Procureur*

3. Le Procureur ne s'oppose pas à la requête, mais estime que la communication des documents demandés pourrait compromettre d'autres poursuites criminelles dans l'État requis. Par conséquent, il demande à la Chambre d'autoriser cet État à présenter ses arguments en vue d'obtenir la tenue éventuelle d'une audience à huis clos, conformément à l'article 66 (C) du Règlement. Le Procureur demande également à la Chambre que tous les documents communiqués par l'État en question soient divulgués aux deux parties.

## DÉLIBÉRATIONS

4. Conformément à l'article 28 paragraphe 2 (c) du Statut, les Etats sont tenus de coopérer avec le Tribunal en répondant sans retard à toute demande d'assistance concernant l'expédition de documents. La Chambre rappelle que, selon une jurisprudence bien établie de ce Tribunal[6] en interprétation de cette disposition, il ne peut être fait droit aux requêtes visant à obtenir l'assistance d'un État que si trois conditions cumulatives sont réunies par le requérant :

i) identifier avec autant de précision que possible les documents qu'il requiert;

ii) démontrer la pertinence de ces documents en l'espèce; et

iii) démontrer que les efforts déployés en vue d'obtenir ces documents, et préalablement à toute demande de coopération en vertu de l'article 28, n'ont pas abouti.

5. En l'espèce, s'agissant de la première condition, la Chambre note que les documents requis par la Défense ont été suffisamment identifiés et énumérés dans sa requête, et sont limités en nombre. Quant à la seconde condition, la Chambre est d'avis que ces documents pourraient se révéler pertinents quant à l'évaluation de la crédibilité du témoin à charge en question, même si elle n'a pas connaissance de leur contenu, et sans se prononcer sur l'incidence de ces documents sur l'issue du procès ou sur leur admissibilité au titre de preuve. Enfin, en ce qui concerne la troisième condition la Chambre note que, malgré les efforts raisonnables qu'elle a déployés, la

[6] *Le Procureur c. Tihomir Blaskic,* Affaire n° IT-95-14-AR108, 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, para. 32.

Défense n'a pas pu avoir accès aux documents demandés. La Chambre conclut que les conditions pour la délivrance d'une demande de coopération s'adressant à un État sont satisfaites.

6. S'agissant de la requête reconventionnelle du Procureur aux fins d'autoriser l'application des mesures visées à l'article 66 (C) du Règlement, la Chambre constate que cette disposition s'applique exclusivement au Procureur. De plus, le Procureur n'a pas d'intérêt à une telle mesure. En conséquence la demande du Procureur est irrecevable. Toutefois, même si ni le Statut ni le Règlement ne le prévoient expressément, les Etats peuvent toujours exciper de circonstances exceptionnelles liées à leur sécurité par exemple, pour être dispensés de coopérer, et il revient à l'Etat requis d'en faire mention et d'en saisir la Chambre[7].

7. La Chambre, enfin, fait droit à la seconde demande du Procureur aux fins d'une communication supplémentaire, sur la base de l'égalité des armes entre les parties, de sorte que les documents demandés par la Défense devront être communiqués à toutes les parties à la présente affaire.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT à la requête de la Défense;

II. DEMANDE au gouvernement de l'État, dont le nom figure en annexe, de donner toute l'assistance nécessaire pour que toutes les parties à la présente affaire reçoivent aussitôt que possible les documents suivants relatifs au témoin dont le nom figure aussi dans l'annexe :

   i) copie de tous les documents du dossier d'instruction ou de mise en accusation relatif au témoin en question, mentionnant les charges qui font l'objet de l'enquête ou retenues contre ce dernier ainsi que les faits sur lesquels ces allégations reposent; et

   ii) copie de toutes les déclarations faites devant les autorités judiciaires ou policières de l'Etat en question.

III. DEMANDE au Greffier de transmettre la présente décision au gouvernement de l'État nommé dans l'annexe de cette décision et de rendre compte à la Chambre de la suite qui lui aura été donnée.

Fait en français à Arusha, le 23 février 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[7] *Karemera et al.,* Décision relative à la requête de la Défense aux fins de faire injonction au Département des opérations de maintien de la paix des Nations Unies de produire certains documents (TC), 9 mars 2004*,* para. 18.

## *Decision on Motion to Vacate Sanctions Rules 73 (F) and 120 of the Rules of Procedure and Evidence 23 February 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Sanction against the Defense Counsel, Non-payment of fees, Requirement of a warning prior to the imposition of sanctions, Absence of appellate review, Reasons for sanction, Frivolous Motion, Abuse of process – Equality of arms principle, Sanctions against the members of the Office of the Prosecutor- Right to a fair trial – Interest of Justice – Power of the Chamber, Effective power to regulate its own proceedings, Power to reconsider a decision, New Circumstances – By analogy interpretation of the Rules of Procedure and Evidence – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 46, 46 (A), 73, 73 (F) and 120*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza, *Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (ICTR-97-19); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on Nyiramasuhuko's Motion for Reconsideration of the Decision of the "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and abuse of process'", 20 May 2004 (ICTR-98-42); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Counsel's Appeal from Rule 73 (F) Decisions, 9 June 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's 'Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73* bis *(E)', 14 July 2004 (ICTR-98-41); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwa-

## *Décision relative à la requête intitulée Motion to Vacate Sanctions Articles 73 (F) et 120 du Règlement de procédure et de preuve 23 février 2005(ICTR-98-44-T)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatseet Joseph Nzirorera – Sanction de conseils de la défense, Sursis au paiement d'honoraires, Nécessité d'un avertissement, Absence de mécanisme d'appel, Motifs de sanction, Requête fantaisiste, Abus de procédure – Egalité des armes, Sanctions des membres du Bureau du Procureur – Droit de l'accusé a un procès équitable – Intérêt de la justice – Pouvoir de la Chambre, Pouvoir de réglementer sa procédure, Pouvoir de réexaminer une décision, Circonstances nouvelles – Interprétation par analogie du Règlement de procédure et de preuve – Requête rejetée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 46, 46 (A), 73, 73 (F) et 120*

*Jurisprudences internationales citées :*

*T.P.I.R. : Chambre d'appel,* Le Procureur c. Jean Bosco Barayagwiza, *Arrêt (Demande du Procureur en révision ou réexamen), 31 mars 2000 (ICTR-97-19); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 juillet 2003 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Pauline Nyiramasuhuko et consorts, *Décision relative à la requête de Nyiramasuhuko aux fins de réexamen de la «Décision relative a la requête de la Défense en certification d'appel de la Décision sur la requête de la Défense relative à l'arrêt des procédures et à l'abus de procédure», 20 mai 2004 (ICTR-98-42); Chambre d'appel,* Le Procureur c. Edouard Karemera, *Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba, Decision on Counsel's Appeal from Rule 73 (F) Decisions, 9 juin 2004 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Décision concernant la deuxième requête du Procureur en réexamen de la Décision de la Chambre de première instance intitulée «Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73* bis *(E)» 14 juillet 2004 (ICTR-98-41); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 28 septembre 2004 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Motifs de la décision de la Chambre d'appel intitulée Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 octobre 2004 (ICTR-98-44); Chambre de première*

makuba, *Decision on Severance of André Rwamakuba and for leave to file amended Indictment, 14 February 2005 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C.M. Byron, Presiding, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Motion to vacate sanctions" ("Motion"), filed by the Defence of Joseph Nzirorera ("Defence") on 6 July 2004;

CONSIDERING the Prosecutor's Response thereto, filed on 12 July 2004 and Nzirorera's Reply's Brief thereto, filed on 22 July 2004;

HEREBY DECIDES the Motion pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

## INTRODUCTION

1. While the appeal on continuation of the trial was pending before the Appeals Chamber[1], the parties in the present case continued to file motions. Those motions remained pending. Upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that six of those motions filed by Nzirorera, including the current Motion, were still pending[2]. Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera[3], the Chamber may now address these Motions.

## ARGUMENTS OF THE PARTIES

### *Defence Motion*

2. The Defence submits that Rule 73 (F) of the Rules, as applied by the Tribunal, violates the principle of equality of arms. It contends that sanctions have been imposed against Defence Counsel in all major trials held at the Tribunal, while the Prosecutor has never been more than warned. The application of the Rule in this way

[1] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case No. ICTR-98-44-AR15*bis*.2 (*Karemera et al.*), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[2] See Oral Decision, T. 26 November 2004, pp. 1-2.

[3] *Karemera et al.*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

*instance,* Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba, *Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005 (ICTR-98-44)*

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

SIEGEANT en la Chambre de première instance III, composée des juges Dennis C.M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»),

SAISI de la requête intitulée *Motion to vacate sanctions* (la «Requete»), déposée le 6 juillet 2004 par la Défense de Joseph Nzirorera (la «Défense»),

VU la réponse du Procureur a ladite Requête, déposée le 12 juillet 2004, et la réplique de Nzirorera a ladite réponse, déposée le 22 juillet 2004,

STATUANT sur la Requête conformément à l'article 73 du Règlement de procédure et de preuve (le «Règlement»),

## INTRODUCTION

1. Tandis que l'appel sur la continuation du procès était pendant devant la Chambre d'appel[1], les parties en l'espèce ont continué à déposer des requêtes. Ces dernières sont restées pendantes. Après la nomination du Président de la Chambre, une conférence de mise en état a eu lieu le 26 novembre 2004 et c'est a ce moment qu'on s'est rendu compte que six de ces requêtes déposées par Nzirorera, y compris la présente, étaient encore pendantes[2]. Après avoir autorisé, le 14 février 2005, le dépôt d'un acte d'accusation modifie distinct contre Rwamakuba et d'un acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera[3], la Chambre peut à présent statuer sur lesdites requêtes.

## ARGUMENTS DES PARTIES

### *Requête de la Défense*

2. La Defense soutient que le paragraphe 73 (F) du Règlement, dans l'application qu'en fait le Tribunal, viole le principe de l'égalité des armes. Elle prétend que des sanctions ont

[1] *Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-AR15 *bis*. 2 (Karemera et consorts), *Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material* (Chambre d'appel), 28 septembre 2004; *Karemera et consorts*, Motifs de la decision de la Chambre d'appel intitulée *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material* (Chambre d'appel), 22 octobre 2004.

[2] Voir Décision orale, compte rendu de l'audience du 26 novembre 2004, p. 1 et 2.

[3] *Karemera et consorts,* Decision relative à la disjonction de l'instance d'André Rwamakuba et a l'autorisation de déposer un acte d'accusation modifié (Chambre de première instance), 14 février 2005.

would discourage the Defence from bringing motions, and would affect the right to a fair trial. The Defence relies on jurisprudence of the International Criminal Tribunal for Former Yugoslavia ("ICTY") and European Court of Human Rights on equality of arms[4]. The Defence also claims that five specific sanctions decided by the Chamber against it were unwarranted and unjust. It submits that the Decision of 4 September 2003, rejecting the Motion and denying the payment of any costs or fees, was based on a wrong principle because the request sought the very same relief ordered by the ICTY in other cases[5]. The Decision of 29 September 2003 and the sanction imposed thereby would be also wrong because, contrary to the Chamber's view, the Decision granting protective measures to Prosecution witnesses would clearly apply to all "potential Prosecution witnesses" and not only to protected witnesses[6]. The filing of a Motion would have therefore been necessary. The Defence alleges that the denial to pay half of the fees and costs associated with its Motion, decided on 7 October 2003, was based on the failure to appreciate that, the legal basis and items requested in the motions were different, justifying the filing of two separate motions[7]. It contends that the sanction decided in the Decision of 29 March 2004 should be removed because the motion raised a legitimate legal issue for which there was no applicable precedent, and failure to have raised that objection would have precluded the possibility of raising it on appeal[8]. For the same reason, it claims the withdrawal of the sanction imposed by the Decision of 29 March 2004 on the Motion to dismiss the indictment as void *ab initio*[9]. Finally, the Defence alleges that if the sanctions are not vacated, its Lead Counsel will be obliged to report them to his State Bar, which could result in the loss of public or judicial employment opportunities in the future.

*Prosecution*

3. The Prosecution opposes the Motion. It argues that, pursuant to the jurisprudence of both *ad hoc* Tribunals, the Defence does not meet the standard for reconsideration[10]. It further considers that there is insufficient data upon which to conclude with

[4] *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999; European Court of Human Rights (ECHR), *Papageorgiou v. Greece*, 9 May 2003; ECHR, *Dombo Beheer B.V. v. The Netherlands*, 27 October 1993; ECHR, *Suominen v. Finland*, 1 July 2003; ECHR, *Lanz v. Austria*, 31 January 2002.

[5] *Karemera et al.*, Decision on the Defence Motion to Order the Government of Rwanda to Show Cause (TC), 4 September 2003.

[6] *Karemera et al.*, Decision on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu, and Omar Serushago (TC), 29 September 2003.

[7] *Karemera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003.

[8] *Karemera et al.*, Décision relative à la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence : Chapitre VII de la Charte des Nations Unies (TC), 29 March 2004.

[9] *Karemera et al.*, Décision relative aux requêtes de Karemera et Nzirorera aux fins d'invalidation de l'acte d'accusation pour vices de procédure et forme (TC), 29 March 2004.

été prises à l'encontre de conseils de la Défense dans tous les principaux procès qui se déroulent devant le Tribunal alors que le Procureur, lui, n'a fait l'objet que d'avertissements. Une telle application de cette disposition est de nature à décourager la Défense d'introduire des requêtes et a porter atteinte au droit des accusés à un procès équitable. La Défense s'appuie sur la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») et de la Cour européenne des droits de l'homme concernant le principe de l'égalité des armes[4]. La Défense allègue en outre que cinq des sanctions qui lui ont été imposées par la Chambre étaient injustifiées et injustes. Elle affirme que la décision du 4 septembre 2003 dans laquelle la Chambre a rejeté la requête de la Défense et lui a refusé le paiement de ses honoraires et frais était fondée sur un principe erroné puisque la mesure demandée était exactement la même qui a été prononcée par le TPIY dans d'autres affaires[5]. La décision du 29 septembre 2003 et la sanction qui y est imposée sont aussi erronées pour le motif que, contrairement aux conclusions de la Chambre, la décision relative aux mesures de protection des témoins à charge s'applique manifestement a tous les «témoins à charge potentiels» et non pas seulement aux témoins protégés[6]. Le dépôt d'une requête était donc nécessaire. La Défense soutient que dans sa décision du 7 octobre 2003 lui refusant le paiement de la moitié de ses honoraires et frais afférents à sa requête, la Chambre n'a pas tenu compte du fait que le fondement juridique et les pièces demandées dans chacune des requêtes étaient différentes, ce qui justifiait le dépôt de deux requêtes distinctes[7]. Elle prétend que la sanction imposée dans la décision du 29 mars 2004 devrait être levée car la requête soulevait une question juridique légitime au sujet de laquelle il n'existait aucun précédent et que le défaut de la poser à ce stade aurait exclu toute possibilité de la soulever en appel[8]. Pour les mêmes raisons, elle demande le retrait de la sanction imposée dans la Décision du 29 mars 2004 relative à la requête tendant a obtenir le rejet de l'acte d'accusation pour cause de nullité *ab initio*[9]**.** Enfin, la Défense fait valoir que si les sanctions ne sont pas annulées, le conseil principal sera obligé d'en aviser le Barreau de son Etat, ce qui, a l'avenir, pourrait être un obstacle a toute possibilité d'emploi dans le secteur public ou judiciaire.

*Le Procureur*

3. Le Procureur s'oppose à la Requête. Il fait valoir que celle-ci ne remplit pas les critères établis dans la jurisprudence des deux Tribunaux *ad hoc* pour qu'il soit pro-

[4] *Le Procureur c. Dusko Tadic,* affaire n° IT-94-1-A, Jugement (Chambre d'appel), 15 juillet 1999; Cour européenne des droits de l'homme (CEDH), *Papageorgiou c. Grèce, 9 mai 2003*; CEDH, *Dombo Beheer 8. V. c. Pays-Bas,* 27 octobre 1993, CEDH, *Suominen c. Finland,* 1er juillet 2003; CEDH, *Lanz c. Autriche,* 31 janvier 2002.

[5] *Karemera et consorts,* Décision relative à la requête de la Défense aux fins d'une ordonnance prescrivant au Gouvernement rwandais de s'expliquer (Chambre de première instance), 7 octobre 2003.

[6] *Ibid*., Décision sur la requête de la Défense aux fins d'obtenir l'autorisation d'interroger les témoins à charge potentiels Jean Kambanda, Georges Ruggiu et Omar Serushago (Chambre de première instance), 29 septembre 2003.

[7] *Ibid*., Décision sur la requête de la Défense en communication de moyens de preuve *à* décharge (Chambre de première instance), 7 octobre 2003.

[8] *Ibid*., Décision relative a la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence : Chapitre VII de la Charte des Nations Unies (Chambre de première instance), 29 mars 2004.

[9] *Ibid*., Décision relative aux requêtes de Karemera et Nzirorera aux fins d'invalidation de l'acte d'accusation pour vices de procédure et forme (Chambre de première instance), 29 mars 2004.

any degree of statistical confidence that there is any appreciable disparity in sanctions enforcement.

*Defence Reply*

4. The Defence argues that three circumstances intervened since the Decisions imposing sanctions were rendered : first, the Trial Chamber is reconstituted with a new presiding Judge; second, the President's Decision of 26 January 2004[11] and the Appeals Chamber's Decision of 9 June 2004[12] have ruled for the first time that sanctions imposed under Rule 73 (F) of the Rules are not subject to review of any kind; and third, the Appeals Chamber has stated that "Trial Chambers should use the power to impose sanctions cautiously"[13]. The Defence also asserts that the only provision providing the possibility to impose sanction on the Prosecutor would be Rule 46 (A) of the Rules, which prohibits the imposition of sanctions without a prior warning, a requirement not requested by Rule 73 (F).

DELIBERATIONS

5. On the merits, the Chamber will consider separately the question of the consistency of Rule 73 (F) of the Rules as applied by the Tribunal with the equality of arms principle, on one hand, and the specific sanctions imposed on the Lead Counsel for the Accused Nzirorera by the Chamber, on the other hand.

*On the Equality of Arms*

6. Rule 73 (F) of the Rules prescribes that in addition to the sanctions provided by Rule 46, sanctions may be imposed against Counsel if he or she brings a Motion, including a preliminary Motion, which, in the Chamber's view, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part of fees associated with the motion and/or costs thereof. The Chamber is of the view that such a Rule, which grants a court or a tribunal an effective power to regulate its own proceedings, including the conduct of the parties, is reasonably required in any judicial system. The power to impose sanctions should, however, be exercised cautiously,

[10] *The Prosecutor v. Hazim Delic*, Case No. IT-96-21-A, Decision on Hazim Delic's Emergency Motion to Reconsider Denial of Request of Provisional Release (AC), 1 June 1999; *The Prosecutor v. Eliezer Niyitegeka*, No. ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003 (AC), 19 December 2003.

[11] *Karemera et al.*, Decision on Lead Counsel's Request to the President for Review of Sanctions Imposed Pursuant to Rule 73(F), 26 January 2004.

[12] *Karemera et al.*, Decision on Counsel's Appeal from Rule 73 (F) Decisions (AC), 9 June 2004.

[13] *Karemera et al.*, Decision on Interlocutory Appeals Regarding Participation of *Ad Litem* Judges (AC), 11 June 2004.

cédé au réexamen de la décision[10]. Il estime en outre qu'on ne dispose pas de données suffisantes permettant de conclure avec un certain degré de certitude statistique qu'il existe une grande disparité dans l'application des sanctions.

*Réponse de la Défense*

4. Selon la Défense, trois événements se sont produits depuis que les décisions imposant des sanctions ont été rendues : premièrement, la Chambre de première instance a été reconstituée avec, sa tête, un nouveau juge président; deuxièmement, il a été jugé pour la première fois, dans la décision rendue par le Président le 26 janvier 2004[11] et dans celle de la Chambre d'appel du 9 juin 2004[12], que les sanctions imposées en application du paragraphe 73 (F) du Règlement ne sont sujettes a aucune révision et troisièmement, la Chambre d'appel a déclaré que «les Chambres de première instance devraient exercer le pouvoir d'imposer des sanctions avec circonspection»[13] [traduction]. La Défense soutient aussi que la seule disposition qui permet de prendre des sanctions contre le Procureur serait le paragraphe 46 (A) du Règlement, qui les interdit cependant sans avertissement préalable, condition absente du paragraphe 73 (F).

DÉLIBÉRÉ

5. Sur le fond, la Chambre examinera séparément la question de la compatibilité du paragraphe 73 (F) du Règlement tel qu'appliqué par le Tribunal avec le principe de l'égalité des armes, d'une part, et les sanctions spécifiques qu'elle a prises a l'encontre du conseil principal de Nzirorera, d'autre part.

*Sur l'égalité des armes*

6. Le paragraphe 73 (F) du Règlement prévoit qu'outre les sanctions envisagées a l'article 46 du Règlement, des sanctions peuvent être imposes au conseil qui dépose une requête, y compris une exception préjudicielle, qui, de l'avis de la Chambre, est fantaisiste ou constitue un abus de procédure. La Chambre peut demander qu'il soit sursis au paiement d'une partie ou de la totalité des honoraires qui sont dus au titre de la requête dépose, et/ou des frais y relatifs. Elle estime que tout système judiciaire connait normalement ce genre de disposition, qui reconnait à une juridiction le pouvoir effectif de réglementer sa propre procédure, y compris le comportement des parties. Toutefois, le pouvoir d'imposer des sanctions doit être exercé avec circonspection

[10] *Le Procureur c. Hazim Delic,* affaire n° IT-96-21-A, Ordonnance de la Chambre d'appel relative a la requête urgente de Hazim Delic aux fins de reconsidérer le rejet de sa demande de mise en liberté provisoire (Chambre d'appel), 1er juin 1999; *Le Procureur c. Eliezer N iyitegeka,* affaire n° ICTR-96-14-A, *Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003* (Chambre d'appel), 19 décembre 2003.

[11] *Karemera et consorts,* Décision du Président relative aux requêtes du conseil principal en révision des sanctions infligées en application de l'article 73 (F) du Règlement ,26 janvier 2004.

[12] *Ibid*., *Decision on Counsel's Appeal from Rule 73 (F) Decisions* (Chambre d'appel), 9 juin 2004.

[13] *Ibid*., *Decision on interlocutory Appeals regarding Participation of* Ad Litem *Judges* (Chambre d'appel), 11 juin 2004 .

bearing in mind the interests of justice and the right to a fair trial. The need for caution is also emphasized by the absence of appellate review[14].

7. The wording of Rule 73 (F) of the Rules does not distinguish between Counsel for the Prosecution or the Defence. The specific power to order non-payment of fees associated with a Motion, which could only refer to Defence Counsel, because of the system for remuneration, is merely included among the sanctions that the Chamber could impose. There is nothing in the Rule which removes the power of the Chamber to impose sanctions of any other kind on Prosecution Counsel. The Chamber also notes that the power to impose sanctions pursuant to Rule 46 (A) of the Rules when the conduct of any Counsel remains "offensive or abusive, obstructs the proceedings or is otherwise contrary to the interests of justice" is additional to the power contained in Rule 73 (F). The requirement of a warning prior to the imposition of sanctions is equally applicable to Counsel for both sides. The Chamber does not consider that any discrimination or violation of the equality of arms may arise since the power to impose sanctions may be applied to either the Prosecution or the Defence.

8. The Chamber notes that the situations addressed by the jurisprudence quoted by the Defence were not similar to the present case and, therefore, do not support its Motion. The Chamber is also not satisfied with the statistical arguments raised by the Defence. Numerous motions were filed by the Defence in contrast to the few filed by the Prosecution and the Defence has not shown that, for similar behavior, the Prosecution was only warned, while the Lead Counsel for Nzirorera was sanctioned. No statistical analysis was made which could permit any conclusion on the existence of any discriminatory application of the Rule 73 (F) of the Rules.

*On the Specific Sanctions Imposed on the Lead Counsel for Nzirorera*

9. The Rules do not contain any specific power for a Chamber to reconsider decisions on motions. But as an analogy it is noted that, pursuant to Rule 120 of the Rules, a Trial Chamber may review a judgment, at the request of a party, where a new fact has been discovered which was not known to the moving party at the time of the proceedings before the Trial Chamber and could not have been discovered through the exercise of due diligence. In *Barayagwiza Case*[15], the Appeals Chamber stated that the mechanism of review requires satisfaction of four criteria :

> "there must be a new fact; this fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision"[16].

[14] *Karemera et al.*, Decision on Counsel's Appeal from Rule 73 (F) Decisions (AC), 9 June 2004.

[15] *The Prosecutor v. Jean-Bosco Barayagwiza*, Case n° ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, paras. 37 and seq. (*Barayagwiza* Decision).

[16] *Barayagwiza* Decision, para. 41.

en gardant a l'esprit l'intérêt de la justice et le droit de l'accusé a un procès équitable. La circonspection s'impose d'autant plus qu'il n'existe aucun mécanisme d'appel[14].

7. Le paragraphe 73 (F) du Règlement ne fait aucune distinction entre les membres du Bureau du Procureur et les avocats de la Défense. Le pouvoir de refuser le paiement des honoraires afférents à une requête qui ne peut s'appliquer qu'aux conseils de la Défense, en raison du système de rémunération qui leur est propre, n'est qu'une des sanctions que peut prendre la Chambre. Cette disposition n'interdit nullement à la Chambre d'imposer d'autres sanctions aux membres du Bureau du Procureur. La Chambre relève aussi que le pouvoir de prendre des sanctions en application du paragraphe 46 (A) du Règlement lorsque le comportement d'un conseil «reste offensant ou injurieux, entrave la procédure ou va autrement a l'encontre des intérêts de la justice» vient s'ajouter à celui prévu au paragraphe 73 (F). La nécessite d'un avertissement avant d'imposer des sanctions s'applique de la même manière aux conseils des deux bords. La Chambre ne croit pas qu'il puisse y avoir discrimination ou violation du principe de l'égalité des armes puisque le pouvoir de prendre des sanctions s'exerce aussi bien a l'endroit des membres du Bureau du Procureur que des conseils de la Défense.

8. La Chambre relève que les cas visés par la jurisprudence invoquée par la Défense ne présentent aucune similitude avec l'espèce et n'appuient donc pas sa requête. Elle n'est pas non plus convaincue par les arguments d'ordre statistique avancés par la Défense. Celle-ci a en effet déposé de nombreuses requêtes alors que le Procureur n'en a déposé que très peu et elle n'a pas démontré que, pour un même comportement, le Procureur n'a reçu qu'un avertissement alors que le conseil principal de Nzirorera était sanctionné. Aucune analyse statistique n'a été faite permettant de conclure a l'existence d'une application discriminatoire du paragraphe 73 (F) du Règlement.

*Sur les sanctions spécifiques imposées au conseil principal de Nzirorera*

9. Le Règlement ne confère pas expressément aux Chambres le pouvoir de réexaminer des décisions relatives à des requêtes. On peut cependant faire remarquer, par analogie, qu'en vertu de l'article 120 du Règlement, elles peuvent, à la demande d'une partie, réviser un jugement s'il est découvert un fait nouveau qui n'était pas connu de la partie intéressée lors de la procédure devant une Chambre de première instance et dont la découverte n'avait pas pu intervenir malgré toutes les diligences effectuées. Dans l'affaire Barayagwiza[15], la Chambre d'appel a dit que le recours en révision est subordonné la réunion des quatre critères suivants :

> «l'existence d'un fait nouveau; ce fait nouveau ne doit pas avoir été connu de la partie intéressée au moment du procès en première instance; la non-découverte du fait nouveau ne doit pas être due au manque de diligence de la part de la partie intéressée qui, en plus, doit rapporter la preuve que le fait nouveau aurait pu être un élément décisif de la décision prise en première instance»[16].

---

[14] *Ibid*., *Decision on Counsel's Appeal from Rule 73(F) Decisions* (Chambre d'appel), 9 juin 2004 .

[15] *Le Procureur c. Jean-Bosco Barayagwiza,* affaire n° ICTR-97-19-AR72, Décision sur la demande du Procureur en révision ou réexamen (Chambre d'appel), 31 mars 2000, paras. 37 et suiv. (Décision *Barayagwiza)*.

[16] Décision *Barayagwiza,* para. 41.

The power to reconsider decisions on motions has been exercised on a number of occasions by the Tribunal[17]. Reconsideration is, however, an exceptional measure that is available only in particular circumstances, including new circumstances that have arisen since the filing of the impugned Decision that affects its premise[18].

10. The Chamber has addressed the arguments raised by the Defence in its Motion in relation to each impugned Decisions. First, it is noted that one of the impugned decisions, filed on 29 September 2003, has already been reconsidered. The application was rejected on the ground that none of the reasons submitted constituted special circumstances warranting reconsideration. The Chamber is of the view that repeated reconsideration would be inconsistent with the interests of justice and the principle of *res judicata*. Accordingly, the request to reconsider the Decision of 29 September 2003 is rejected. Second, the Chamber notes that, in each case for which reconsideration is sought, the Defence's contention is only based on the assumption that the Chamber made an error in the application of the law to the relevant facts, and that, consequently, its discretionary power was exercised on wrong principles. The application of law however does not constitute a new fact that could lead to reconsideration. The Chamber also considers that contrary to Nzirorera's contentions, the changed composition of the Bench, the lack of competence of the President and of the Appeals Chamber to review Decisions imposing sanctions and the Appeals Chamber statement on the duty to be cautious in the imposition of sanctions, do not constitute new circumstances which could affect the basis of the impugned Decisions and could justify their reconsideration. The Chamber notes that the sanctions may lead to consequences in Lead Council home jurisdiction; however, the Chamber does not consider it as one of the criteria for reconsideration. The Chamber is therefore not satisfied that the Defence has shown the existence of circumstances that were not known at the time of the impugned Decisions and which could have affected their outcome.

FOR THE ABOVE REASONS, THE CHAMBER
DENIES the Motion.

Arusha, 23 February 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[17] *The Prosecutor v. Théoneste Bagosora et al*., Case n° ICTR-98-41-T (*Bagosora et al*. Case), Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003; *The Prosecutor v. Pauline Nyiramasuhuko*, Case n° ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Reconsideration of the Decision of the "Decision on Defence Motion for Certification to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and abuse of process'" (TC), 20 May 2004; *Bagosora et al*. Case, Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E)" (TC), 14 July 2004.

[18] *Ibid*.

Le Tribunal a exercé a plusieurs reprises son pouvoir de réexaminer des décisions relatives à des requêtes[17]. Le réexamen est toutefois une mesure exceptionnelle qui ne s'applique qu'en des circonstances bien particulières, notamment lorsque des faits nouveaux sont survenus depuis le dépôt de la décision contestée et en changent l'assise[18].

10. La Chambre a examine les arguments avancés par la Défense dans sa Requête au regard de chacune des décisions contestées. Notons tout d'abord qu'une de celles-ci, déposée le 29 septembre 2003, a déjà fait l'objet d'un réexamen. La demande en réexamen a été rejetée pour le motif qu'aucun des moyens soulevés n'invoquait des circonstances particulières le justifiant. La Chambre estime que les réexamens à répétition seraient contraires à l'intérêt de la justice et au principe de la chose jugée. En conséquence, la requête aux fins de réexamen de la décision du 29 septembre 2003 est rejetée. Deuxièmement, la Chambre relève que dans tous les cas ou le réexamen est demandé, la Défense reproche toujours à la Chambre d'avoir fait une application erronée du droit aux faits pertinents et d'avoir par conséquent exercé son pouvoir d'appréciation en se fondant sur des principes erronés. Or, l'application du droit ne constitue pas un fait nouveau pouvant donner lieu à un réexamen. La Chambre fait aussi remarquer que, contrairement a ce qu'affirme Nzirorera, la nouvelle composition de la Chambre, l'incompétence du Président et de la Chambre d'appel à réexaminer les décisions imposant des sanctions et la déclaration de la Chambre d'appel sur la nécessité d'agir avec circonspection dans l'imposition des sanctions ne constituent pas des circonstances nouvelles susceptibles de remettre en cause le fondement des décisions contestées et de justifier leur réexamen. La Chambre prend acte du fait que les sanctions peuvent avoir des conséquences pour le conseil principal dans son pays, mais elle ne considère pas qu'il s'agit là d'un critère justifiant le réexamen. Elle n'est donc pas convaincue que la Défense a établi l'existence de circonstances qui n'étaient pas connues au moment ou les décisions contestées ont été rendues et qui auraient pu influer sur l'issue qui leur a été donnée.

PAR CES MOTIFS, LE TRIBUNAL

REJETTE la requête.

Fait en anglais à Arusha, le 23 février 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[17] *Le Procureur c. Théoneste Bagosora et consorts*, affaire n° ICTR-98-41-T (affaire Bagosora et consorts), *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001* (Chambre de première instance), 18 juillet 2003 : *Le Procureur c. Pauline Nyiramasuhuko*, affaire n° ICTR-97-21-T, Décision relative à la requête de Nyiramasuhuko aux fins de réexamen de la «Décision relative a la requête de la Défense en certification d'appel de la Décision sur la requête de la Défense relative à l'arrêt des procédures et à l'abus de procédure» (Chambre de première instance), 20 mai 2004; *Affaire Bagosora et consorts,* Décision concernant la deuxième requête du Procureur en réexamen de la Décision de la Chambre de première instance intitulée «*Decision on Prosecutor's Motion for leave to vary the Witness List pursuant to Rule 73* bis *(E)*» (Chambre de première instance), 14 juillet 2004.

[18] *Id.*

## *Decision on Disclosure of Witness Reconfirmation Statements Rule 66 (A) (ii) of the Rules of Procedure and Evidence 23 February 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – General obligation of disclosure by the Prosecution to the Defence, Distinction between statements and internal documents, Qualification of witness'answers as statements – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 66 (A) (ii), 70 (A) and 73*

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Eliezer Niyitegeka, *Judgement, 9 July 2004 (ICTR-96-14); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, *Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment, 14 February 2005 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

SEING SEIZED of Nzirorera "Motion for Disclosure of Witness Reconfirmation Statements", filed on 22 July 2004 ("Motion");

CONSIDERING the Prosecution Response, filed on 27 July 2004, and Joseph Nzirorera's Reply Brief thereto, filed on 29 July 2004;

HEREBY DECIDES the Motion pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules"),

## *Décision sur la requête intitulée Motion for Disclosure of Witness Reconfirmation Statements Article 66 (A) (ii) du Règlement de procédure et de preuve 23 février 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatseet Joseph Nzirorera – Obligation générale de communication du Procureur, Distinction entre déclarations et documents internes, Qualification de la réponse des témoins comme déclarations – Requête acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 66 (A) (ii), 70 (A) et 73*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre d'appel,* Le Procureur c. Eliezer Niyitegeka, *Jugement, 9 juillet 2004 (ICTR-96-14); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procès avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments, 28 septembre 2004 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Motifs de la décision de la Chambre d'appel intitulée Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 octobre 2004 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba, *Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005 (ICTR-98-44)*

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

SIÉGEANT en la Chambre de première instance III composée des juges Demis C. M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam («la Chambre»),

SAISI de la requête de Nzirorera intitulée «*Motion for Disclosure of Witness Reconfirmation Statements*», déposée le 22 juillet 2004 («la requête»),

VU la réponse du Procureur déposée le 27 juillet 2004, et le mémoire en réplique de Joseph Nzirorera, déposé le 29 juillet 2004,

STATUE sur ladite requête conformément à l'article 73 du Règlement de procédure et de preuve (le «Règlement»).

## INTRODUCTION

1. While the appeal on continuation of the trial was pending before the Appeals chamber[1], the parties in the present case continued to file motions. Those motions remained pending. Upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that six of those motions filed by Nzirorera, including the current Motion, were still pending[2]. Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera[3], the Chamber may now address these Motions.

## ARGUMENTS OF THE PARTIES

### *Defence Motion*

2. The Defence for Nzirorera ("Defence") claims that, according to the Appeals Chamber Judgement in the case *Prosecutor v. Niyitegeka*[4], Witness Reconfirmation Statements have to be distinguished from internal documents under Rule 70 of the Rules and are subject to disclosure pursuant to Rule 66 (A) (ii) of the Rules. It contends that they are material to the preparation of the Defence within the meaning of Rule 66 (B) of the Rules and affect the credibility of Prosecution evidence according to Rule 68 (A) of the Rules. It therefore requests the disclosure of all Witness Reconfirmation Statements of any witness whom the Prosecution intends to cal1 during the trial.

### *Prosecution Response*

3. The Prosecution opposes Nzirorera's motion. It claims that Witness Reconfirmation Statements are not statements within the meaning of Rule 66 (A) of the Rules, but internal memoranda subject to non-disclosure under Rule 70 of the Rules. The Prosecution recalls that this was also the position of the Chamber which had decided on 13 May 2004 that they were protected under Rule 70 of the Rules[5]. It emphasizes that if a witness amends his or her original statement, these amendments are indicated on the reconfirmation form, and disclosed. The Prosecution attaches an Affirmation by the Commander of the Investigative Section of the Office of the Prosecutor in support of its submission. It finally alleges that even if the Chamber decided that these

[1] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case n° ICTR-98-44-AR15*bis*.2 (*Karemera et al.*), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nziorera's Motion for leave to Consider New Material (AC), 28 September 2004; Karemera et al., Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[2] See Oral Decision, T. 26 November 2004, pp. 1-2.

[3] *Karemera et al.*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

[4] *The Prosecutor v. Eliezer Niyitegeka*, Case n° ICTR-96-14-A, Judgement (AC), 9 July 2004 (Niyitegeka Appeals Judgement).

[5] Oral Decision, 13 May 2004, T. 13 May 2004, p. 9.

INTRODUCTION

1. Tandis que le recours contre la continuation du procès était pendant devant la Chambre d'appel[1], les parties en l'espèce ont continué à déposer des requêtes. Celles-ci étaient toujours pendantes. Après nomination du Président de la Chambre, une conférence de mise en état s'est tenue le 26 novembre 2004, au cours de laquelle il a été relevé que six des requêtes déposées par Nzirorera, y compris celle en cause, étaient toujours pendantes[2]. Ayant autorisé le Procureur le 14 février 2005 à déposer un acte d'accusation modifié distinct contre Rwamakuba et un acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera[3] la Chambre peut à présent examiner lesdites requêtes.

ARGUMENTS DES PARTIES

*Requête de la Défense*

2. La Défense de Nzirorera («la Défense») soutient qu'il ressort de l'arrêt de la Chambre d'appel en l'affaire Le Procureur c. Niyitegeka[4] que les déclarations confirmant les dires antérieurs des témoins doivent être distinguées des documents internes au regard de l'article 70 du Règlement et doivent être communiquées conformément à l'article 66 (A) (ii) du Règlement. Elle fait valoir qu'elles sont nécessaires à la défense de l'accusé au sens de l'article 66 (B) du Règlement et portent atteinte à la crédibilité des moyens de preuve à charge selon l'article 68 (A) du Règlement. Elle demande en conséquence la communication de toutes les déclarations confirmant les dires antérieurs de tout témoin que le Procureur entend appeler à la barre au cours du procès.

*Réponse du Procureur*

3. Le Procureur s'oppose à la requête de Nzirorera. Il affirme que les déclarations confirmant les dires antérieurs des témoins ne sont pas des déclarations au sens de l'article 66 (A) du Règlement, mais plutôt des notes internes qui n'ont pas à être communiquées en vertu de l'article 70 du Règlement. Le Procureur rappelle que c'était également la position de la Chambre qui avait décidé le 13 mai 2004 que les déclarations confirmant les dires antérieurs des témoins étaient protégées au regard de l'article 70 du Règlement[5]. Il souligne que si un témoin modifie sa déclaration originale, les modifications sont indiquées sur le formulaire de confirmation et communiquées à la Défense. A l'appui de ses arguments, le Procureur joint une déclaration solennelle du commandant de la Section des

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-AR15*bis* 2 (Karemera et consorts), Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procès avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments (Chambre d'appel), 28 septembre 2004; *Karemera et consorts*, Motifs de la décision de la Chambre d'appel intitulée «Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material» (Chambre d'appel), 22 octobre 2004.

[2] Voir décision orale, compte rendu de l'audience du 26 novembre 2004, pp. 1 à 3.

[3] *Karemera et consorts*, Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005.

[4] *Le Procureur c. Eliezer Niyitegeka*, affaire n° ICTR-96-14-A, Arrêt, 9 juillet 2004 (arrêt Niyitegeka).

[5] Décision orale, 13 mai 2004, Compte rendu de l'audience du 13 mai 2004, p. 11.

forms were subject to disclosure, the Prosecution would not have violated a disclosure obligation which did not exist until the Appeals Chamber Judgement of 9 July 2004.

*Defence Reply*

4. The Defence submits that it does not understand the Prosecution's objection to its Motion since it declares in its Response that any additional information provided during the reconfirmation process is always disclosed. It advances additional arguments on the relevance of the Reconfirmation Witness Statements to the assessment of the credibility of Prosecution evidence.

DELIBERATIONS

5. The *Niyitegeka* Appeals Judgement, for the first time, drew a clear distinction between "statements" which must be disclosed and "interna1 documents" which are not subject to disclosure[6]. The Judgement has clarified that once a question has been put to a witness, the resulting record is not an internal note protected from disclosure by Rule 70 (A) of the Rules, but is part of a witness statement and is governed by the general disclosure obligation pursuant to Rule 66 (A) (ii) of the Rules[7].

6. The Chamber notes that Witness Reconfirmation Statements indicate whether the witness confirms the statement she or he has previously made to an investigator and whether she or he makes any minor or major amendments to that statement. Even though the Prosecution attaches the notation "internal memorandum", the document reflects questions put to the witness and the witness' answer. The Chamber is therefore of the view that Witness Reconfirmation Statements are not internal documents, but are subject to the general obligation of disclosure by the Prosecution to the Defence.

7. However, it is clear that a document which is not in the possession or accessible to the Prosecution cannot be subject to disclosure[8]. Accordingly, the Prosecution's obligation to disclose arises as soon as it obtains the Witness Reconfirmation Statements.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion,

AND ORDERS the Prosecution to disclose all Witness Reconfirmation Statements forthwith.

Arusha, 23 February 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[6] *Niyitegeka* Appeals Judgement, para. 34.
[7] *Niyitegeka* Appeals Judgement, para. 34.
[8] *Niyitegeka* Appeals Judgement, para. 35.

enquêtes du Bureau du Procureur. Il soutient enfin que même si la Chambre avait décidé que ces formulaires devaient être communiqués, le Procureur n'aurait pas violé une obligation de communication qui n'existait pas avant l'arrêt du 9 juillet 2004.

*Réplique de la Défense*

4. La Défense soutient qu'elle ne comprend pas pourquoi le Procureur s'oppose à sa requête puisqu'il déclare dans sa réponse que lorsque le témoin fournit des renseignements supplémentaires au moment de confirmer sa déclaration antérieure, ceux-ci sont toujours communiqués à la Défense. Elle développe également d'autres arguments sur l'intérêt des déclarations de confirmation pour apprécier la crédibilité des éléments de preuve du Procureur.

DÉLIBÉRÉ

5. Dans l'arrêt *Niyitegeka,* la Chambre d'appel a pour la première fois opéré une nette distinction entre les «déclarations» qui doivent être communiquées et les «documents internes» qui n'ont pas à être communiqués[6]. La Chambre d'appel a précisé qu'une fois qu'une question a été posée à un témoin, la réponse qui en découle n'est pas une note interne n'ayant pas à être communiquée en vertu de l'article 70 (A) du Règlement, mais fait partie de la déclaration du témoin et est assujettie à l'obligation générale de communication instituée par l'article 66 (A)(ii) du Règlement[7]

6. La Chambre relève que les déclarations de confirmation indiquent si le témoin confirme ou non sa déclaration antérieure recueillie par un enquêteur et s'il y apporte ou non des modifications mineures ou importantes. Quand bien même le Procureur apposerait la mention «note interne» sur le document, celui-ci reproduit les questions posées au témoin et les réponses qu'il a fournies. La Chambre estime par conséquent que les déclarations confirmant les dires antérieurs des témoins ne sont pas des documents internes, mais qu'elles doivent être communiquées en vertu de l'obligation générale de communication dont est tenu le Procureur envers la Défense.

7. Toutefois, il est évident qu'un document qui n'est pas en la possession du Procureur ou auquel il ne peut avoir accès ne saurait être communiqué[8]. Aussi le Procureur n'a-t-il l'obligation de communiquer les déclarations confirmant les dires antérieurs des témoins que dès qu'il les obtient.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la Requête;

ET ORDONNE au Procureur de communiquer sans délai toutes les déclarations confirmant les dires antérieurs des témoins.

Fait à Arusha, le 23 février 2005, en anglais.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[6] Arrêt Niyitegeka, para. 34.
[7] *Id.*
[8] *Ibid*., para. 35.

## *Order*
## *Rules 54 and 90* bis *of the Rules of Procedure and Evidence*
## *3 March 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Omar Serushago – Transfer of detained witness – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 54 and 90* bis

*International Case cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Prosecutor's Motion to Renew and Extend the Transfer Order of 2 October 2002 for Detained Prosecution Witness Omar Serushago" ("Prosecution Motion"), filed *ex parte* on 5 August 2004;

HEREBY ORDERS pursuant to Rules 54 of the Rules of Procedure and Evidence ("Rules").

1. While the appeal on continuation of the trial was pending before the Appeals Chamber[1], the Prosecution filed a motion seeking renewal and extension of the transfer of the detained witness Omar Serushago. During that period, there was no bench

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case No. ICTR-98-44-AR15*bis*.2 (*Karemera et al.*), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.*, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

## *Ordonnance*
## *Articles 54 et 90* bis *du Règlement de procédure et de preuve*
## *3 mars 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Omar Serushago – Transfert de témoin détenu – Requête acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 54 et 90* bis

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procès avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments, 28 septembre 2004 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Motifs de la décision de la Chambre d'appel intitulée Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 octobre 2004 (ICTR-98-44)*

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

SIEGEANT en la Chambre de première instance III, composée des juges Demis C. M. Byron, Président de Chambre, Emile Short et Gberdao Gustave Kan (la «Chambre»),

SAISI de la requête du Procureur intitulée *Prosecutor's Motion to Renew and Extend the Transfer Order of 2 October 2002 for Detained Prosecution Wi!ness Omar Serushago* (la «Requête du Procureur»), déposée unilatéralement le 5 août 2004.

ORDONNE CE QUI SUIT conformément à l'article 54 du *Règlement de procédure et de preuve* (le «Règlement») :

1. Le recours contre la continuation du procès était encore pendant devant la Chambre d'appel[1] quand le Procureur a déposé une requête tendant à renouveler et à proroger

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-AR15bis.2 (Karemera et consorts), Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procès avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments, (Chambre d'appel), 28 septembre 2004; *Karemera et consorts*, Motifs de la décision de la Chambre d'appel intitulée «*Decision on Interlocutoly Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material*», (Chambre d'appel), 22 octobre 2004.

having jurisdiction to adjudicate it. Consequent upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that the Prosecution Motion was still pending[2]. Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera, the Chamber may now address the said Motion.

2. The Chamber notes that the request is based on outdated information. Additional elements are necessary to assist the Chamber in its assessment of the Prosecution Motion, pursuant to Rule 90 *bis* of the Rules. Details should be provided on whether the personal appearance of Omar Serushago as witness is still required and for which case. The Prosecution should establish that the conditions prescribed by Sub-Rule 90 *bis* of the Rules are still met.

3. Considering the particular circumstances of the case, the Chamber is however of the view that the renewal and extension of the transfer of Omar Serushago should be temporarily granted until a decision on the Prosecution Motion is delivered on the basis of the further information to be provided.

FOR THE ABOVE REASONS, THE CHAMBER

DIRECTS the Prosecution to file by Monday, 7 March 2005, additional information on the grounds to renew and extend the transfer of the detained witness Omar Serushago pursuant to Rule 90 *bis* of the Rules;

GRANTS renewal and extension of the transfer of the detained witness Omar Serushago temporarily, until a decision on the Prosecution Motion is delivered on the basis of the further information to be provided;

INSTRUCTS the Registrar to extend the transfer of Omar Serushago temporarily until a decision on the Prosecution Motion is delivered on the basis of the additional information to be provided.

Arusha, 3 March 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[2] See Transcripts of 26 November 2004, pp. 1-2.

l'ordre de transfert du témoin à charge détenu Omar Serushago. Pendant cette période aucune formation de juges n'était compétente pour statuer. Après la nomination du Président de Chambre, une conférence de mise en état s'est tenue le 26 novembre 2004 au cours de laquelle il a été pris acte du fait que la requête du Procureur était toujours pendante[2]. Ayant autorisé le 14 février 2005 le dépôt d'un acte d'accusation modifié distinct contre Rwamakuba et d'un autre acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera, la Chambre peut à présent statuer sur ladite requête.

2. La Chambre relève que la demande est fondée sur des éléments d'information dépassés. Elle a besoin d'éléments complémentaires pour l'aider à apprécier la requête du Procureur conformément à l'article 90 *bis* du Règlement. Le Procureur devrait préciser si la comparution d'Omar Serushago en personne en qualité de témoin est toujours nécessaire et indiquer l'affaire dont il s'agit. Il devrait également établir que les conditions fixées à l'article 90 *bis* du Règlement sont encore réunies.

3. Au regard des circonstances particulières de l'affaire, la Chambre estime cependant que le renouvellement et la prorogation de l'ordre de transfert d'Omar Serushago devraient être temporairement autorisés jusqu'à ce qu'une décision soit rendue relativement à la requête du Procureur sur la base des informations complémentaires à fournir.

PAR CES MOTIFS,

ENJOINT au Procureur de déposer le lundi 7 mars 2005 au plus tard, des informations complémentaires sur les raisons justifiant le renouvellement et la prorogation de l'ordre de transfert du témoin détenu Omar Serushago conformément à l'article 90 *bis* du Règlement

AUTORISE temporairement le renouvellement et la prorogation de l'ordre de transfert du témoin détenu Omar Serushago jusqu'à ce qu'une décision soit rendue relativement à la requête du Procureur sur la base des informations complémentaires à fournir,

INVITE le Greffier à prolonger temporairement la durée du transfert d'Omar Serushago jusqu'à ce qu'une décision soit rendue relativement à la requête du Procureur sur la base des informations complémentaires à fournir.

Fait à Arusha, le 3 mars 2005, en langue anglaise.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[2] Voir compte rendu de l'audience du 26 novembre 2004, p. 1 et 2.

## *Décision relative à la requête de Joseph Nzirorera aux fins de rejeter l'acte d'accusation pour poursuites discriminatoires Articles 15, 17 (1) et 20 (1) du Statut 22 mars 2005 (ICTR-98-44-PT)*

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Joseph Nzirorera – Fonction du Procureur, Instruction des dossiers, Poursuite des personnes présumées responsables, Indépendance du Procureur – Allégation de poursuites discriminatoires, Actori Incumbit Probatio – Requête rejetée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 73 (A) ; Statut, art. 15, 15 (1), 15 (2), 17 (1) et 20 (1)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana, *Jugement et sentence, 21 février 2003 (ICTR-96-10 et ICTR-96-17) ; Chambre de première instance,* Le Procureur c. Augustin Ndindiliyimana et consorts, *Décision relative à la requête formée par le Procureur en vertu de l'article 50 du Règlement de procédure el 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)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Zejnil Delalić et consorts, *Arrêt, 20 février 2001 (IT-96-21)*

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

SIEGEANT en la Chambre de première instance III («Chambre»), composée des Juges Dennis C. M. Byron, Président, Emile Francis Short et Gberdao Gustave Kam ;

SAISI d'une requête de la Défense de Joseph Nzirorera («Défense») intitulée «Motion to Dismiss for Selective Prosecution», déposée le 24 mars 2004 ;

CONSIDÉRANT la réponse du Procureur, déposée le 29 mars 2004, et la réplique de la Défense à cette réponse, déposée le 2 avril 2004 ;

CONSIDÉRANT aussi le mémoire additionnel de la Défense intitulé «*Supplemental Exhibit to Motion to Dismiss for Selective Prosecution*», déposé le 12 janvier 2005, et la réponse du Procureur à ce mémoire, déposée le 24 janvier 2005 ;

CONSIDÉRANT le Statut du Tribunal («Statut») et, en particulier, les articles 15, 17 (1) et 20 (1) ainsi que le Règlement de procédure et de preuve du Tribunal («Règlement») ;

STATUE comme suit, sur la base des soumissions écrites des parties, conformément à l'article 73 (A) du Règlement.

## Introduction

1. Alors que l'appel sur la continuation du procès était toujours pendant[1], les parties en la présente affaire ont continué de déposer des requêtes. Ces requêtes sont restées pendantes. Après la désignation du Président de l'affaire en novembre 2004, une Conférence de mise en état a eu lieu le 26 novembre 2004, au cours de laquelle la Défense a admis que parmi les requêtes qu'elle avait déposées et qui étaient encore pendantes, six seulement, dont la présente, nécessitaient que la Chambre en dispose[2]. Après avoir autorisé, le 14 février 2005, le dépôt par le Procureur d'un acte d'accusation amendé séparé contre Rwamakuba et d'un acte d'accusation amendé pour Karemera, Ngirumpatse et Nzirorera[3], la Chambre considère qu'elle peut à présent traiter de cette requête.

## Arguments des parties

*Requête de la Défense*

2. La Défense allègue que le Procureur a adopté une politique discriminatoire de poursuites à l'encontre des Hutu et que, par conséquent, les poursuites renées à l'encontre de Joseph Nzirorera viole le principe d'égalité visé à l'article 20 (1) du Statut. Selon la Défense, alors que des Tutsi auraient également commis des crimes au cours de l'année 1994 relevant de la juridiction du Tribunal, le Procureur aurait délibérément choisi de ne pas les poursuivre. A l'appui de sa requête, la Défense annexe des documents qui, selon elle, prouvent que des crimes de guerre ont été commis par des Tutsis[4].

3. La Défense sollicite en outre la tenue d'une audience en vue de débattre des preuves qu'elle apporterait à l'appui de ses allégations, en particulier par les témoi-

[1] *Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba,* Affaire n° ICTR-98-44-AR15bis.2 *(Karemera et al.),* Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procés avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments (Ch. A), 28 septembre 2004; *Karemera et al.,* Motifs de la Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procés avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments (Ch. A), 22 octobre 2004.

[2] Décision orale, T. 26 novembre 2004, pp. 1-2.

[3] *Karemera et al.,* Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié (Ch.), 14 février 2005.

[4] Pour appuyer ses allégations, la Défense se réfère à des documents portant sur les crimes commis par des membres du Front Patriotique Rwandais, rédigés par deux témoins experts du Procureur, Mme Alison Des Forges et M. Filip Reyntjens, ainsi qu'au témoignage d'un ancien Chef des Enquêtes du Bureau du Procureur, M. James Lyons. La Défense estime que l'enquête menée par le juge d'instruction français Jean-Louis Bruguiére sur l'assassinat du Président Habyarimana semble confirmer que le Procureur du Tribunal savait, des l'origine, que le Président Kagame avait ordonné cet assassinat. La Défense annexe en outre des articles du quotidien *Le Monde* (Paris, France) et de *The Monitor* (Kampala, Ouganda), qui soutiendraient ces allégations.

gnages des experts Alison Des Forges, Filip Reyntjens et Jean-Louis Bruguière. Ces preuves pourraient fonder le rejet de l'acte d'accusation pour cause de poursuites illégitimes.

*Réponse du Procureur*

4. Le Procureur conteste la requête de la Défense. Il se réfère à l'arrêt de la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie («TPIY») dans l'affaire *Delalic et consorts*, selon lequel le Procureur est présumé exercer ses fonctions en matière de poursuites en conformité avec le Statut. Sur la base de ce même arrêt, le Procureur rappelle qu'afin de réfuter cette présomption, l'accusé doit prouver l'existence d'un motif illégal ou illégitime de poursuites, et que d'autres personnes placées dans une situation similaire n'ont pas fait l'objet de poursuites[5]. Selon le Procureur, la Défense n'aurait pas démontré que la décision du Procureur de le poursuivre était basée sur des motifs inacceptables. Le fait que, jusqu'à ce jour, des membres du groupe ethnique Tutsi n'auraient pas été poursuivis ne constitue pas la preuve d'une décision du Procureur de ne poursuivre que les Hutus. Le Procureur soutient que Joseph Nzirorera n'est pas poursuivi en raison de son appartenance au groupe ethnique Hutu mais parce qu'il est présumé avoir joué un rôle central dans la perpétration des crimes au Rwanda.

5. Le Procureur constate d'ailleurs que la Défense n'a pas établi que d'autres personnes placées dans une situation similaire n'ont pas fait l'objet de poursuites. D'autres individus qui avaient occupé des positions de pouvoir similaires sont ou ont étés poursuivis. Le fait qu'aucun de ces individus n'appartient au groupe ethnique Tutsi ne constitue qu'une preuve de l'intention discriminatoire du Gouvernement intérimaire rwandais en 1994, et non du caractère sélectif des poursuites initiées par le Procureur.

*Réplique de la Défense*

6. La Défense réitére que le fait que sur les 78 personnes poursuivies devant le Tribunal, 77 sont des Hutus prouve l'existence d'une discrimination ethnique. Selon la Défense, il appartient au Procureur de prouver que les poursuites ne sont pas engagées pour des motifs discriminatoires. La Défense annexe à sa réplique une lettre en date du 29 mars 2004, signée par 47 accusés, qui démontrerait l'existence d'une conviction générde de ceux-ci que les poursuites engagées par le Procureur se basent sur des motifs inacceptables et discriminatoires.

*Mémoire additionnel de la Défense*

7. Dans son mémoire additionnel, la Défense introduit un élément de preuve supplémentaire constitué par une lettre de M. Filip Reyntjens adressée au Procureur. De l'avis de la Défense, ce courrier établirait qu'il existe effectivement des éléments de preuve de crimes commis par des Tutsis, membres du Front Patriotique Rwandais, et que le Procureur n'a toujours pas mis un seul d'entre eux en cause. La Défense rap-

[5] *Le Procureur c. Delalic et al.,* Affaire n° IT-96-21-A, Arrêt (Ch. A.), 20 février 2001, para. 611.

pelle que le Procureur seul connaît ses motivations, et qu'une audition est nécessaire pour que la Chambre se détermine sur cette question.

*Réponse du Procureur au Mémoire additionnel de la Défense*

8. En réponse au mémoire additionnel de la Défense, le Procureur rappelle ses arguments et indique que ledit mémoire n'y a rien changé. Bien au contraire, selon le Procureur, la lettre de M. Filip Reyntjens prouverait que le Procureur conduit des enquêtes sur les éventuels crimes commis par le FPR. La Défense n'apporte donc pas de commencement de preuve de poursuites discriminatoires illégitimes, et sa requête pour une audition doit dès lors être rejetée.

**Délibérations**

9. La Chambre rappelle que, conformément au Statut, le Procureur est

> «responsable de l'instruction des dossiers et de l'exercice de la poursuite contre les personnes présumées responsables»

des crimes relevant de la compétence du Tribunal[6]. Il «évalue les renseignements reçus ou obtenus et décide s'il y a lieu de poursuivre»[7], et «agit en toute indépendance»[8]. Ainsi, la Chambre d'appel a constaté dans l'affaire *Delalic* qu'il résulte des compétences et de l'indépendance du Procureur une

> «présomption qu'il a exercé comme il convient les fonctions que le Statut lui assigne en matière de poursuites»[9].

Selon la Chambre d'appel, il appartient donc à l'accusé d'établir que le Procureur n'a pas exercé son pouvoir discrétionnaire en conformité avec le statut[10] et non pas au Procureur de prouver que les poursuites n'étaient pas engagées pour des motifs discriminatoires. Dans ce but, l'accusé doit démontrer, premièrement, «l'existence d'un motif illégal ou illégitime (notamment discriminatoire) de poursuites» et, deuxièmement, «que d'autres personnes placées dans une situation similaire n'ont pas fait l'objet de poursuites»[11].

10. La Chambre va d'abord examiner si la Défense a fourni des éléments de preuve qui établissent que le mobile du Procureur en l'occurrence était discriminatoire. Quant à l'allégation de la Défense selon laquelle des crimes ont été commis par des Tutsis,

---

[6] Article 15 (1) du Statut.
[7] Article 17 (1) du Statut.
[8] Article 15 (2) du Statut.
[9] *Le Procureur c. Delalic et al.,* Arrêt (Ch.A.), para. 611.
[10] *Le Procureur c. Delalic et al.,* Arrêt (Ch.A.), para. 611. Voir également *Le Procureur c. Ndindiliyimana,* Affaire n° ICTR-2000-56-I, 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*» (Ch.), 26 mars 2004, paras. 25 et 26
[11] *Le Procureur c. Delalic et al.*, Arrêt (Ch. A.), para. 611. Voir également *Le Procureur c. Ndindiliyimana*, 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*» (Ch.), para. 25; *Le Procureur c. Ntakirutimana*, Affaire n° ICTR-96-10-T, Jugement (Ch.), 21 février 2003, para. 871.

la Chambre observe qu'en l'espèce, la question n'est pas de savoir si des crimes ont été commis par des personnes autres que des Hutus. Il incombe à la Défense de prouver que le motif du Procureur de poursuivre l'accusé est discriminatoire. Il ne suffit pas de simplement démontrer que d'autres crimes n'ont pas donné lieu à des poursuites pour établir qu'il y a eu discrimination.

11. La Chambre constate que la Défense n'a pas démontré que le Procureur a adopté une politique de poursuites discriminatoires des Hutu ni que la poursuite de l'accusé viole l'article 20 (1) du Statut. Par conséquent, il n'est pas nécessaire d'examiner, en outre, si des personnes placées dans une situation similaire ont fait l'objet de poursuites. La Chambre relève cependant que même si d'autres personnes placées dans urc situation similaire n'avaient pas fait l'objet de poursuites,

> «l'idée qu'"il ne saurait être question de juger une personne qui a été mise en accusation et traduite en justice, à moins que ne le soient aussi toutes les personnes susceptibles de l'être" est inacceptable»[12].

12. La Chambre considère que l'allégation selon laquelle des crimes ont été commis par des Tutsis et à propos desquelles une audience de présentation des moyens de preuve est demandée par la Défense n'a aucun rapport avec la poursuite des accusés en l'espèce. Il n'y a, dès lors, aucune base juridique pour admettre une telle audience.

PAR CES MOTIFS,

LA CHAMBRE

REJETTE la requête.

Arusha, fait en français le 22 mars 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[12] *Le Procureur c. Delalic et al.,* Jugement (Ch. A.), para. 618, citant le jugement de la Chambre de première instance dans la même affaire.

## *Scheduling order*
## *Rule 54 of the Rules of Procedure and Evidence*
## *24 March 2005 (ICTR-98-44-T)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Schedule – Right of the accused to be informed in a language that he understands of the nature and the cause of the charges against him*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 54, 66 (A) (i), 72 (A), 73* bis *(B) (i), 73* bis *(B) (iv), 73* bis *(B) (v) and 73 bis (F); Statute, art. 20*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, sitting pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules");

CONSIDERING that, pursuant to Rule 66 (A) (i) of the Rules, the Prosecution has disclosed the supporting material to the Amended Indictment filed on 23 February 2005;

NOTING however that some Witness Statements filed as Supporting Material on 20 December 2004 were only disclosed or in French or in English;

CONSCIOUS of the importance to guarantee that each Accused person is informed in a language that he understands of the nature and the cause of the charges against him, as prescribed under Article 20 of the Statute of the Tribunal;

CONSIDERING the views expressed by both parties during the Status Conference held on 24 March 2005;

The Chamber ORDERS that

I. The Prosecution shall disclose the French versions of ADA, GBC, GGX, GJF, Witness Statements and the English version of XBM Witness Statement, annexed to the Prosecution Motion filed on 20 December 2004, no later than Friday 8th April 2005;

II. Any Preliminary Motion under Rule 72 (A) of the Rules shall be filed no later than 13th May 2005;

III. Any Prosecution's Reply thereto shall be filed no later than 19th May 2005;

IV. The Prosecution shall file a Pre-Trial Brief, a Final Witness List and a List of Exhibits, as prescribed under Rule 73 *bis* (B) (i), (iv) and (v) of the Rules, no later than 20th June 2005;

V. The Defence shall file any Pre-Trial Brief, as prescribed under Rule 73 *bis* (F) of the Rules, no later than 27th June 2005;

VI. Both parties shall file any statement of admitted facts and law and any statement of contested matters of fact and law, as prescribed under Rule 73 *bis* of the Rules, no later than 30th June 2005;

VII. A Pre-Trial Conference, pursuant to Rule 73 *bis* of the Rules, shall take place on 29th August 2005;

VIII. The first Trial Session shall start on 5th September 2005 until 28th October 2005 included.

Arusha, 24 March 2005, done in English.

[Signed] : Dennis C. M. Byron

***

## *Decision on Joseph Nzirorera's application for certification to appeal the decision denying his request for cooperation to government of France Rule 73 (B) of the Rules of Procedure and Evidence 31 March 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Cooperation of States, France, – Certification to appeal, Conditions to grant certification to appeal, Specific demonstration of the conditions, Fair and expeditious conduct of the proceedings or the outcome of the trial, – Supervisory power of the Presiding Judge of Trial Chamber, Judicial independence of the judges, Impartiality of the judges – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 73, 73 (B) and 73 (E)*

*International Case cited :*

*I.C.T.R. : Office of the President,* The Prosecutor v. Edouard Karemera et al., *Decision on Motion to Reassign Case to Different Trial Chamber (Pres.), 22 March 2005 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Joseph Nzirorera's Application for Certification to Appeal Denial of Request for Cooperation to Government of France " ("Motion"), filed by the Defence for Nzirorera ("Defence") on 1st March 2005;

CONSIDERING that the Prosecution has not filed its Reply within the time-limit prescribed by Rule 73 (E) of the Rules of Procedure and Evidence ("Rules");

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules.

## DEFENCE'S SUBMISSION

1. The Defence applies for certification to appeal the Decision on Nzirorera's Request for Cooperation to Government of France dated 23 February 2005 ("Decision of 23 February 2005")[1]. To justify its application, the Defence alleges that the four grounds of appeal it intends to raise meet the criteria set out by Rule 73 (B) of the Rules for certification and that the impugned Decision involves issues that would significantly affect the fair conduct of the proceedings or the outcome of the trial and for which an immediate resolution is needed. The Defence relies upon arguments already presented in its previous Motion seeking certification to appeal the Decision denying motion to vacate sanctions[2]. It contends that the Presiding Judge of Trial Chamber III exercises supervisory authority over the Chamber and a reasonable observer would conclude that the appearance of bias found by the Appeals Chamber Decision of 22 October 2004[3] extends to Decisions delivered by the new Bench in the present case. It argues that the Chamber erred in giving effect to Decision of 29 September 2003, issued by the former Bench[4], in light of the findings of the Appeals Chamber Decision of 22 October 2004[5], and in light of its own Decision not to give effect to the prior Bench's Decision on leave to amend the Indictment.

2. The impugned Decision would also affect the right of the Accused to a fair trial by denying him the necessary assistance for the preparation of his case. The Defence claims that Article 28 of the Statute of the Tribunal ("Statute") only requires as show-

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera,* Case n° ICTR-98-44 (*Karemera et al.*), *Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français*, 23 February 2005.

[2] Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to vacate Sanctions, filed on 1st March 2005.

[3] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case n° ICTR-98-44, Reasons for Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material (AC), 22 October 2004, para. 67.

[4] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case n° ICTR-98-44, Decision on the Defence Motion for Disclosure of Items deemed Material to the Defence of the Accused (TC).

[5] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case n° ICTR-98-44, Reasons for Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material (AC), 22 October 2004.

ing that the material sought from the requested State involves the same events as those included in the Indictment. The Chamber would not have to adjudicate on the admissibility of the evidence as such but on its relevance for investigatory purposes. The Defence relies upon previous Decisions issued by both *ad hoc* Tribunals[6]. It reiterates that the requested document contains important information surrounding the same events that will be the subject of the Accused's trial and relevant for the preparation of the Defence case.

3. Finally, the Defence submits that the Chamber erred in denying its Motion by applying the wrong standard for determining whether a conflict was international or internal. The denial of access to the requested document would impact upon the outcome of the war crimes charges stated in Count 7 of the Indictment. Immediate resolution of the issue of the criteria to be applied to determine whether the conflict is international or internal would be necessary to guide the Chamber in numerous Decisions concerning admissibility of evidence. The Defence relies on a previous Decision of the Tribunal where certification was granted considering that the issue of relevance of evidence was likely to recur throughout the trial[7].

**Deliberations**

4. The Chamber recalls Rule 73 (B) of the Rules, which stipulates :

> 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.

5. The Chamber notes that Decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in the above-mentioned Rule. The Chamber may grant certification to appeal if both conditions of the said Rule are satisfied : the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not determined on the merits of the appeal against the impugned Decision.

6. Based on the facts related to the case, the Chamber is of the view that the Defence has failed to show how the Decision involves an issue that that would sig-

[6] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (AC), 15 July 1999; *Prosecutor v. Bagosora et al*, Case n° ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004; *Prosecutor v. Bagosora et al*., Case No. ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance (TC), 7 February 2005.

[7] *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.

nificantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial. As the Chamber stated in the impugned Decision, the charges against the Accused are not based on any alleged responsibility of the Accused in the assassination of President Habyarimana. The potential involvement of the RPF in the said assassination cannot relieve a person who is alleged to have committed international crimes in 1994 in Rwanda of his/her own criminal responsibility. It has not been shown that there is any Defence to the Indictment which could be supported by the requested document.

7. The other arguments raised by the Defence do not add any more support to its Motion. The Chamber notes that, contrary to Defence's contentions, the impugned Decision did not apply the Decision of 29 September 2003 on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused. It expressly stated that the said Decision was not relevant to the current Motion filed by the Defence[8]. As regards the supervisory power of the Presiding Judge of Trial Chamber III over the Chamber and the alleged appearance of bias related to, the Chamber notes that the issue has been solved by a Decision delivered by the President, finding that

8. Nothing in the memorandum of Judge Vaz, nor in any rule or practice of the Tribunal concerning the position of a Presiding Judge of a Trial Chamber, could reasonably be construed as interfering with the judicial independence and impartiality of the judges in Karemera et al. It is significant, in this regard, that the Defence does not suggest that Judge Vaz had any role to play in the appointment of these judges and, furthermore, requests that they continue to sit on the case[9].

9. The Chamber considers therefore that the requirements set out by Rule 73 (B) of the Rules are not met.

For the above mentioned reasons, the Chamber

DENIES the Motion.

Arusha, 31 March 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[8] See para. 8 of the impugned Decision.

[9] *Karemera et al.*, Decision on Motion to Reassign Case to Different Trial Chamber (Pres.), 22 March 2005, para. 2.

## *Decision on Prosecution's Motion to Renew and Extend the Transfer of Detained Prosecution Witness Omar Serushago Rule 90* bis *of the Rules of Procedure and Evidence 31 March 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Omar Serushago – Witness detained at the UNDF, Transfer of the detained sentenced witness, Conditions for an order of transfer, Presence required for any criminal proceedings in progress in the territory of the requested State, Extension of the period of detention – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73 and 90* bis

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Omar Serushago, *Sentence, 5 February 1999 (ICTR-98-39); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Order for the Transfer of Detained Prosecution Witness Omar Serushago, 2 October 2002 (ICTR-98-41); Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Order, 11 February 2003 (ICTR-98-41); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004 (ICTR-98-44); Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 (ICTR-98-44); Trial Chamber,* The Prosecutor v. André Rwamakuba, *Order, 3 March 2005 (ICTR-98-44C)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Prosecutor's Motion to Renew and Extend the Transfer Order of 2 October 2002 for Detained Prosecution Witness Omar Serushago" ("Motion"), filed *ex parte* on 5 August 2004;

## *Decision relative à la requête du Procureur intitulée Prosecutor's Motion to renew and extend the Transfer of detained Prosecution Witness Omar Serushago Article 90* bis *du Règlement de procédure et de preuve 31 mars 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngriumpatse et Joseph Nzirorera – Omar Serushago – Témoin détenu à l'UNDF, Transfert de témoin détenu condamné, Conditions pour la délivrance d'un ordre de transfert, Présence du témoin détenu non nécessaire pour une procédure pénale en cours dans l'Etat requis, Absence de prolongement de la durée de détention du témoin – Requête acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73 et 90* bis

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Omar Serushago, *Sentence, 5 février 1999 (ICTR-98-39); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Ordonnance de transfert du témoin à charge détenu Omar Serushago, 2 octobre 2002 (ICTR-98-41); Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Ordonnance, 11 février 2003 (ICTR-98-41); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procès avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments, 28 septembre 2004 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Motifs de la décision de la Chambre d'appel intitulée Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 octobre 2004 (ICTR-98-44); Chambre de première instance,* Le Procureur c. André Rwamakuba, *Ordonnance, 3 mars 2005 (ICTR-98-44C)*

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

SIÉGEANT en la Chambre de première instance III composée des juges Dennis C. M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»),

SAISI de la Requête du Procureur intitulée *Prosecutor's Motion to Renew and Extend the Transfer Order of 2 October 2002 for Detained Prosecution Witness Omar Serushago* («la Requête»), déposée unilatéralement le 5 août 2004,

CONSIDERING the additional information to the Motion, filed by the Prosecution on 8 March 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

## INTRODUCTION

1. While the appeal on continuation of the trial was pending before the Appeals Chamber[1], the Prosecution filed a motion seeking renewal and extension of the transfer of the detained witness Omar Serushago. During that period, there was no bench having jurisdiction to adjudicate it. Consequent upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that the Prosecution Motion was still pending[2]. Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera, the Chamber was ready to address the Motion. However, considering that the said request was based on outdated information, the Chamber ordered the Prosecution to provide additional information[3]. On 8 March 2005, the Prosecution filed a supplemental filing in support of its Motion.

### *Prosecution's Submission*

2. The Prosecution requests that the Chamber renews and extends the transfer of Omar Serushago until such a time that this witness has finished testifying in the *Karemera et al.* trial. It recalls that Omar Serushago was sentenced by the Tribunal to 15 years of imprisonment and was transferred to Mali to serve his sentence. It notes that the witness is still detained at UNDF, but that the transfer period ordered pursuant to a Transfer Order delivered on 11 February 2003[4] has expired. The Prosecution declares that it still intends to call Omar Serushago as a witness in the *Karemera et al.* Case. It submits that the presence of the witness is not required for any criminal proceedings in Mali during the period the witness is required by the Tribunal nor will the renewal and extension of his transfer extend the period of his detention as foreseen by the requested State. In addition, the Prosecution emphasises

[1] *Prosecutor v. Edouard Karemera. Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba.* Case n° ICTR-98-44-AR15*bis*.2 *(Karemera et al.),* Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.,* Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[2] See Transcripts of 26 November 2004, pp. 1-2.

[3] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case n° ICTR-98-44-PT, and *Prosecutor v. André Rwamakuba*, Case n° ICTR-98-44C-PT, Order, 3 March 2005.

[4] *Prosecutor v. Bagosora el al.,* Case n° ICTR-98-41-T *(Bagosora et al.* Case), Order (TC), 11 February 2003.

VU les observations complémentaires à la requête, déposées par le Procureur le 8 mars 2005,

STATUE sur ladite requête conformément à l'article 73 du Règlement de procédure et de preuve (le «Règlement»).

## INTRODUCTION

1. Le recours contre la continuation du procès était encore pendant devant la Chambre d'appel[1] quand le Procureur a déposé une requête tendant à renouveler et à proroger l'ordre de transfert du témoin détenu Omar Serushago. Pendant cette période, aucune formation de juges n'était compétente pour statuer sur ladite requête. Après la nomination du Président de Chambre, une conférence de mise en état s'est tenue le 26 novembre 2004, au cours de laquelle il a été pris acte du fait que la requête du Procureur était toujours pendante[2]. Ayant autorisé le 14 février 2005 le dépôt d'un acte d'accusation modifié distinct contre Rwamakuba, et d'un autre acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera, la Chambre était en mesure de trancher la requête. Néanmoins, estimant que ladite requête était fondée sur des éléments d'information dépassés, la Chambre a ordonné au Procureur de déposer des éléments complémentaires[3]. Le 8 mars 2005, le Procureur a déposé ces éléments à l'appui de sa requête.

### *Observations du Procureur*

2. Le Procureur demande à la Chambre de première instance de renouveler et de proroger l'ordre de transfert d'Omar Serushago jusqu'à la fin de la déposition de ce témoin dans le procés *Karemera et consorts.* Il rappelle qu'Omar Serushago a été condamné par le Tribunal à 15 ans d'emprisonnement et transféré au Mali pour y purger sa peine. Il ajoute que ce témoin est toujours détenu au centre de détention du Tribunal, mais que le délai fixé dans l'ordre de transfert délivré le 11 février 2003[4] a expiré. Le Procureur affirme qu'il a toujours l'intention d'appeler Omar Serushago à comparaître en qualité de témoin en l'affaire *Karemera et consorts.* Selon lui, d'une part, la présence de ce témoin n'est pas nécessaire dans une procédure pénale en cours au Mali pour la période durant laquelle elle est sollicitée par le Tribunal, et, d'autre part, le renouvellement et la prorogation de l'ordre de transfert ne prolongeront pas

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-AR15bis.2 (Karemera et consorts), Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (Chambre d'appel), 28 septembre 2004; *Karemera et consorts*, Motifs de la décision de la Chambre d'appel intitutée «Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material» (Chambre d'appel), 22 octobre 2004.

[2] Voir compte rendu de la réunion du 26 novembre 2004, p. 1 et 3.

[3] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, affaire n° ICTR-98-44-PT, et *Le Procureur c. André Rwamakuba*, affaire n° ICTR-98-44C-PT, Ordonnance, 3 mars 2005.

[4] *Le Procureur c. Bagosora et consorts,* affaire n° ICTR-98-41-T (affaire *Bagosora et consorts*), Ordonnance, (Chambre de première instance), 11 février 2003.

the security risks to the witness if he should be returned to Mali prior to completing his testimony as a Prosecution witness and even thereafter.

**Deliberations**

3. Pursuant to Rule 90 *bis* of the Rules, a Trial Chamber shall issue a transfer order only after prior verification that the following conditions are 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.

4. In the present case, Omar Serushago was detained in Mali for the sole reason of the Government of Mali's acceptance to detain him on behalf of the Tribunal, which sentenced him to 15 years of imprisonment with credit for the time served in detention prior to the Judgement, since 9 June 1998[5]. The Chamber notes that Omar Serushago was transferred to Arusha on 9 November 2002, pursuant to a Trial Chamber 111 Order of 2 October 2002[6]. On 11 February 2003, the Trial Chamber III extended the transfer for a period not exceeding 12 months[7].

5. The Chamber notes that the beginning of the trial has been scheduled on 5th September 2005. It seems that the requested witness could be called to testify before the end of the year, during the first trial sessions. If that does not materialized, any request for extension of time should be filed before the expiration of the present Decision.

6. The Chamber has not been provided with any reasons to believe, either that the witness may be required for any criminal proceedings in progress in the territory of Mali during the period he is required by the Tribunal; or that the extension of his transfer to the Tribunal for the need of his testimony could extend the period of his detention in Mali.

7. The Chamber recalls that, pursuant to Rule 90 *bis* of the Rules, the Registry has to inform the Chamber of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the UNDPF. No information of such a kind has been transmitted to the Chamber. While the presence of the witness is still requested for the present case, his temporary detention at UNDPF for the purposes of the next trial session will not cause him any prejudice.

8. The Chamber is therefore satisfied that the requirements set out by Rule 90 *bis* of the Rules are met.

[5] *Prosecutor v. Omar Serushago,* Case n° ICTR-98-39-S, Sentence (TC), 5 February 1999.

[6] *Bagosora et al.* Case, Order for the Transfer of Detained Prosecution Witness Omar Serushago (TC), 2 October 2002.

[7] *Bagosora el al.* Case, Order (TC), 11 February 2003.

la durée de sa détention telle que prévue par l'État requis. En outre, le Procureur attire l'attention sur les risques que court le témoin pour sa sécurité s'il devait retourner au Mali avant la fin de sa déposition comme témoin à charge, voire par la suite.

**Délibéré**

3. Aux termes de l'article 90 *bis* du Règlement, l'ordre de transfert ne peut être délivré par une Chambre qu'après vérification préalable de la réunion des conditions suivantes :

i) La présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'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 1'Etat requis.

4. En l'espèce, Omar Serushago a été détenu au Mali pour la seule raison que le Gouvernement de ce pays a accepté de le détenir au nom du Tribunal, qui l'a condamné à 15 ans d'emprisonnement, déduction faite de la période qu'il a passée en détention, avant le jugement, depuis le 9 juin 1998[5]. La Chambre fait observer qu'Omar Serushago a été transféré à Arusha le 9 novembre 2002 en application d'une ordonnance qu'elle a rendue le 2 octobre 2002[6]. Le 11 février 2003, elle a prolongé la période de son transfert pour une durée maximale de 12 mois[7].

5. La Chambre relève que l'ouverture du procès est prévue pour le 5 septembre 2005. Il semble que le témoin pourrait être appelé à comparaître avant la fin de l'année, au cours de la première session du procès. Si ce n'était pas le cas, une nouvelle demande de prorogation de délai devrait être déposée avant que la présente décision cesse de produire ses effets.

6. Rien n'autorise la Chambre à croire que la présence du témoin pourra être nécessaire dans une procédure pénale en cours au Mali pour la période durant laquelle elle est sollicitée par le Tribunal, ou que la prorogation de 1a période de son transfert au Tribunal pour les besoins de sa déposition pourrait prolonger la durée de sa détention au Mali.

7**.** La Chambre rappelle que l'article 90 *bis* du Règlement fait obligation au Greffier de lui faire part de toutes modifications pouvant intervenir dans les modalités de la détention telles que prévues par l'État requis et pouvant affecter la durée de détention du témoin au centre de détention du Tribunal. Aucune information de ce type n'a été transmise à la Chambre. Si la présence du témoin est toujours nécessaire en l'espèce, sa détention temporaire au centre de détention du Tribunal en vue de la prochaine session du procès ne lui portera pas préjudice.

8. La Chambre est par conséquent convaincue que les conditions énoncées à l'article 90 *bis* du Règlement sont remplies.

---

[5] *Le Procureur c. Omar Serushago,* affaire n° ICTR-98-39-S, Sentence (Chambre de première instance), *5 février* 1999.

[6] *Bagosora et consorts,* Ordonnance de transfert du témoin à charge détenu Omar Serushago (Chambre de première instance), 2 octobre 2002.

[7] *Bagosora et consorts,* Ordonnance (Chambre de première instance), 11 février 2003.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the renewal and extension of the transfer of the detained witness Omar Serushago temporarily to the UNDF in Arusha until 31 December 2005.

II. INSTRUCTS the Registrar to :

A) Transmit this Order to the Governments of Mali;

B) 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, with the shortest delay, inform the Trial Chamber of any such change.

III. GRANTS the Prosecution leave to request any further extension of transfer of Omar Serushago no later than 15 December 2005.

Arusha, 31 March 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

PAR CES MOTIFS, LA CHAMBRE

I. AUTORISE le renouvellement et la prorogation de l'ordre de transfert temporaire du témoin détenu Omar Serushago au centre de détention du Tribunal à Arusha jusqu'au 31 décembre 2005.

II. CHARGE le Greffier de :

A) Transmettre le présent ordre de transfert au Gouvernement malien ;

B) S'informer de toutes modifications pouvant intervenir dans les modalités de la détention telles que prévues par l'État requis et pouvant affecter la durée de détention temporaire du témoin, et d'en faire part à la Chambre dans les plus brefs délais.

III. AUTORISE le Procureur à solliciter de nouveau 1a prorogation du transfert d'Omar Serushago au plus tard le 15 décembre 2005.

Fait à Arusha, le 31 mars 2005.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

***

## *Decision on Motion to Dismiss Amended Indictment for Violation of Article 12* quarter *of the Statute Article 12* quater *of the Statute 12 April 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Amended Indictment, Function of the indictment –* Ad Litem *Judge Power – Interests of Justice – Frivolous Motion, Abuse of process – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 47 (E), 47 (F), 50, 50 (A) (ii) and 73; Statute, art. 12* quarter*, 12* quarter *(2) (b) (ii), 14 and 18*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of a "Motion to Dismiss Amended Indictment for Violation of Article 12 *quater* of the Statute" ("Motion"), filed by the Defence for Nzirorera ("Defence") on 24 March 2005;

CONSIDERING the Prosecution's Response thereto filed on 29 March 2005 and the Defence's Reply thereto filed on 4 April 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

### ARGUMENTS OF THE PARTIES

*Defence's Motion*

1. The Defence alleges that the Amended Indictment must be dismissed because it has not been reviewed and confirmed in conformity with the Statute. It contends that Rule 50 (A) of the Rules, as amended in 2004, requires the Chamber to review supporting material and determine whether a *prima facie* case exists. The said Rule would require that the Chamber applies Rule 47 (E) of the Rules which explicitly refer to Article 18 of the Statute of the Tribunal ("Statute"). In the Defence's view, when deciding whether to grant leave to amend an Indictment, the Chamber would exercise a reviewing power of the Amended Indictment, from which, according to Article 12 *quater* of the Statute, *ad litem* Judges are prohibited to participate. The

Defence submits that the present Chamber exercised a reviewing power in its Decision of 14 February 2005 granting leave to amend the Indictment, contrary to the provisions of the Statute[1].

2. The Defence argues that the Appeals Chamber Decision of 11 June 2004[2], dismissing its previous appeal on this issue, did not dispose of the matter. It interprets it to mean that the Decision whether to grant leave to amend the Indictment is independent from the Decision whether a *prima facie* case has been made out after review of supporting material. The Defence contends that the said Appeals Chamber Decision did interpret the action of the Trial Chamber as simply granting leave to amend the Indictment. It asserts that if the Security Council wanted *ad litem* Judges to review Amended Indictments, it could have said so in Article 12 *quater* of the Statute.

*Prosecution's Response*

3. The Prosecution opposes the Motion considering that the arguments brought by the Defence are the same as those previously raised and rejected by the Appeals Chamber in its Decision of 11 June 2004[3]. In the Prosecution's view, the Appeals Chamber's statement could not be clearer that the power of *ad litem* Judges to adjudicate on a Motion to amend the Indictment is independent of the question of what standards they should apply when deciding, whether those standards are imposed by the amendments to Rule 50 of the Rules or otherwise.

*Defence's Reply*

4. The Defence contends that the position of the Prosecution is ambiguous. It recalls that the Prosecution's original position was that the Defence interpretation of Rule 50 of the Rules was a possible reading[4]. It reiterates its previous arguments and submits that there is no rational distinction between reviewing an original Indictment and reviewing an Amended Indictment. It moves for the Chamber to grant the Motion and ask the President to assign a Bench of permanent Judges to review the Amended Indictment. Alternatively, it requests that the Chamber grants certification to appeal so to allow the Appeals Chamber to interpret its own Decision. Finally, it submits that a denial of the Motion, without granting certification for appeal, could cause reversal of a Judgment on final appeal.

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba* (*Karemera et al.*), Case n° ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005 (*Trial Chamber Decision* of 14 February 2005).

[2] *Prosecutor v. Edouard Karemera and Joseph Nzirorera*, Case n° ICTR-98-44-AR73.4, Decision on Interlocutory Appeals Regarding Participation of *Ad Litem* Judges (AC), 11 June 2004 (*Appeals Chamber Decision* of 11 June 2004).

[3] Appeals Chamber Decision of 11 June 2004.

[4] The Defence cites the Prosecutor's Reply to the Defence Submissions on the Consolidated Motion to Sever Rwamakuba from the Joint Indictment and for Leave to Amend the Indictment, filed on 10 February 2005, para. 11.

**Deliberations**

5. The Chamber considers that all the questions raised by the instant Motion have already been decided. In its previous Decision of 14 February 2005, the Chamber also found that the Appeals Chamber's Decision had disposed of the matter[5]. In addition, the Chamber stated that

> "[w]hen adjudicating on a Motion seeking leave to file an Amended Indictment after the initial appearance, the Trial Chamber does not act as a confirming Judge under Article 18 of the Statute because it applies the procedure and standards set out in Rule 47 (E) and (F)"[6].

The Chamber will nonetheless reiterate its *ratio decidendi*.

6. Review of the Indictment under Article 18 of the Statute and leave to amend the Indictment under Rule 50 of the Rules are different steps in the proceedings. When reviewing and confirming the Indictment, the Judge of the Trial Chamber exercises the primary step to determine whether a suspect can be prosecuted before the Tribunal. He or she reviews in whole what will constitute the basis of the case against the Accused and determines whether the Indictment will be confirmed or dismissed. That fundamental function is enshrined in Article 18 of the Statute. It is precisely that exclusive function which Article 12 *quarter* (2) (b) (ii) of the Statute addresses by prescribing that *ad litem* Judges shall not have power "to review an Indictment pursuant to Article 18 of the present Statute".

7. Conversely, Article 14 of the Statute prescribes that Rules of Procedure and Evidence shall be adopted for the conduct of the pre-trial phase of the proceedings, trials and appeals. In the instant case, we have long passed the preliminary Article 18 of the Statute stage of the proceedings and are within the phase governed by the Rules of Procedure and Evidence. Rule 50 of the Rules provides that leave to amend the Indictment can be granted after the initial appearance by a Trial Chamber pursuant to Rule 73 of the Rules. Thus it is clear that it is a Trial chamber or a Judge designated by it, and not a confirming Judge, that can decide the matter[7]. Its function relates to examine the requested amendments in the light of the further supporting material provided by the Prosecution and to determine whether sufficient grounds are established to prosecute the Accused on the basis of these amendments. Article 18 of the Statute and Rule 50 of the Rules imply the exercise of functions which are not identical.

8. The Appeals Chamber did not decide otherwise when finding that

> "*ad litem* Judges, sitting as members of a Trial Chamber, are […] empowered *to participate in the consideration* and decision of a motion for leave to amend an indictment pursuant to Rule 50 of the Rules and, that it is independent of the question whether, in deciding to grant leave to amend an indictment, the Trial Chamber shall apply the standards set out in Sub-Rules 47 (E) and (F) of the Rules"[8].

[5] Trial Chamber Decision of 14 February 2005.
[6] *Ibid.*, para. 24.
[7] See Rule 50 (A) (i) of the Rules.
[8] *Appeals Chamber Decision* of 11 June 2004, p. 4 (emphasis added).

In conformity with Rule 50 (A) (ii) of the Rules, the

> "participation in the consideration and decision of a Motion for leave to amend an Indictment"

necessarily implies that the Judges will apply the standards of Rules 47 (E) and (F). Contrary to the Defence's contention, the Appeals Chamber's ruling is unambiguous.

9. In order to avoid a multiplicity of Motions, the Chamber will now adjudicate on the Defence application for certification of appeal. The submission that that certification should be granted to allow the Appeals Chamber to interpret its prior Decision must inevitably fail. For reasons expressed above, the Chamber cannot see any basis for a certification which will only invite the Appeals Chamber to reconsider its previous Decision on arguments it has already rejected.

10. The present matter has already been brought before the Chamber and the Appeals Chamber on the basis of the same arguments which have been systematically rejected[9]. The Chamber recalls the Defence's obligation to act in the interests of justice and to avoid repetitive filing of the same Motion which could be considered frivolous or an abuse of process[10].

For the above mentioned reasons, the Chamber

DENIES the Motion in all aspects.

Arusha, 12 April 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[9] *Trial Chamber Decision* of 14 February 2005; *Appeals Chamber Decision* of 11 June 2004.
[10] See Rules 46 (A) and 73 (F) of the Rules.

## *Décision relative à la requête du procureur en prolongation de délai pour le dépôt de traductions de déclarations de témoins Article 73 du Règlement de procédure et de preuve 15 avril 2005 (ICTR-98-44-R73)*

(Original : Français)

Chambre de première instance III

Juge : Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Droit de déposer des requêtes préliminaires, Prolongation de délai, Traduction, Section des langues du Tribunal – Requête acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 72, 73 et 73 (A)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, *Ordonnance portant calendrier, 24 mars 2005 (ICTR-98-44)*

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

SIÉGEANT en la Chambre de première instance III («Chambre»), composée du juge Gberdao Gustave Kam conformément à l'article 73 (A) du Règlement de procédure et de preuve («Règlement»);

SAISIE de la requête du Procureur intitulée «*Prosecutor's Request for Additional Time to Comply with the Trial Chamber's Order of 24 March 2005 to disclose Translations of Witness Statements*» datée du 11 avril 2005 («requête»);

CONSIDÉRANT que, dans son ordonnance portant calendrier datée du 24 mars 2005 («Ordonnance»), la Chambre a ordonné que les versions françaises de la déclaration des témoins à charge ADA, GBC, GGX, GJF ainsi que la version anglaise de la déclaration du témoin à charge XBM soient communiquées aux accusés et à leurs conseils («Défense») au plus tard le 8 avril 2005;

NOTANT que dans sa requête, le Procureur prie la Chambre de bien vouloir l'excuser pour la communication tardive des documents susmentionnés due à leur indisponibilité auprès de la Section des langues du Tribunal, et sollicite un délai additionnel nécessaire pour que cette dernière puisse les produire;

NOTANT que les versions françaises de la déclaration des témoins ADA et GBC ont été déposées le 11 avril 2005, que la version française de la déclaration du témoin GGX et celle du témoin GJF ont été respectivement déposées les 12 et 15 avril 2005;

NOTANT qu'en outre, le Procureur a précisé que la déclaration du témoin XBM avait déjà été communiquée en français et anglais le 20 décembre 2004, mais qu'il

avait constaté que les déclarations du témoin UB n'avaient pas été communiquées en anglais et qu'en vue de se conformer à ses obligations, il a communiqué à la Défense les documents relatifs au témoin UB le 13 avril 2005[1];

CONSTATANT que, bien que tardivement, le Procureur s'est conformé à l'ordonnance susmentionnée;

CONSTATANT que le dépôt tardif par le Procureur affecte le délai dans lequel les parties ont le droit de déposer des requêtes préliminaires en vertu de l'article 72 du Règlement, délai initialement fixé à la date du 13 mai 2005[2];

LA CHAMBRE

DECLARE la requête sans objet;

AUTORISE la Défense des Accusés à déposer leurs requêtes préliminaires en vertu de l'article 72 du Règlement au plus tard le 17 mai 2005;

AUTORISE le Procureur à déposer la réponse à ces requêtes au plus tard le 23 mai 2005.

Fait en français à Arusha, le 15 avril 2005.

[Signé] : Gberdao Gustave Kam

***

[1] Voir la requête du Procureur datée du 11 avril 2005 et le Mémorandum intérieur du 13 avril 2005 communiqué à la Défense.

[2] *Procureur c. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, Aff. n° ICTR-98-44-PT, Ordonnance portant calendrier (Ch.), 24 mars 2005.

## *Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation Article 28 of the Stature 19 April 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding judge; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Cooperation of States, Criteria to obtain an Order for providing Documents, Relevance of the document, Assessment of the credibility of the witness, Amount spent on witness protection by the Host Country, Nature and their duration of the protection measures provided by the witness protection program – Late Response of the Prosecutor, Response examined in the interests of justice – Motion denied*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 69, 73 (A), 73 (E) and 75; Rules of Procedure and Evidence of the ICTY, Rule 54; Statute, art. 19 (1), 21, 28 and 28 (2) (c)*

*International Cases cited :*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Tihomir Blaskic, *Decision 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)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Einile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED "Motion for Request for Cooperation to Government X" ("Motion"), filed by the Defence for Joseph Nzirorera ("Defence") on 20 September 2004;

CONSIDERING the Prosecution's Response filed on 27 September 2004 and the Defence Reply thereto, filed on 29 September 2004;

HEREBY DECIDES the Motion, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence ("Rules").

## *Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement Article 28 du Statut 19 avril 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Joseph Nzirorera – Coopération des Etats, Conditions pour obtenir une ordonnance de production de documents, Pertinence du document, Evaluation de la crédibilité du témoin, Coût de la protection du témoin par l'Etat de résidence, Nature et durée des moyens prévus pour la protection du témoin – Réponse tardive du Procureur, Réponse examinée dans l'intérêt de la justice – Requête rejetée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 69, 73 (A), 73 (E) et 75 ; Règlement de procédure et de preuve du TPIY, art. 54 ; Statut, art. 19 (1), 21, 28 et 28 (2) (c)*

*Jurisprudence internationale citée :*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Tihomir Blaskić, *Arrêt relatif à la Requête de la République de Croatie aux fins d'examen de la Décision de la Chambre de première instance II du 18 juillet 1997, 29 octobre 1997 (IT-95-14)*

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

SIÉGEANT en la Chambre de première instance III, composée des juges Dennis C.M. Byron, Président, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»),

SAISI de la requête de la Défense de Joseph Nzirorera (la «Défense») intitulée «*Motion for Request for Cooperation to Government* » (requête demandant à la Chambre de solliciter la coopération du Gouvernement X) (la «Requête»), déposée le 20 septembre 2004,

VU la réponse du Procureur à ladite requête, déposée le 27 septembre 2004, et la réplique de la Défense, déposée le 29 septembre 2004,

STATUE sur ladite requête, conformément à l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement»).

## Introduction

1. White the appeal on continuation of the trial was pending before the Appeals chamber[1], the parties case continued to file motions. Those motions remained pending. Upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that six of those motions filed by the Accused Nzirorera, including the current Motion, were still pending[2]. Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera[3], the Chamber may now address these Motions.

## Arguments of the Parties

*Defence*

2. The Defence moves the Chamber to issue a request for cooperation to the government of a certain state[4] to obtain documents that show the total amount of money expended for the benefit of a certain witnesss[5] and his family while in the witness protection program of this State. The Defence submits that the documents sought

– are limited in scope and precisely specified;
– are relevant to a matter in issue before the Cliamber and necessary for a fair determination of that matter since they are relevant in order to assess the credibility of the respective Witness; and
– could not be obtained tlirough prior efforts deployed by the Defence since it did not receive an answer to the letter it had sent to the respective government.

[1] *Prosecutor* v *Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44-AR15*bis*.2 *(Karemera et al.),* Decision on Interlocutory Appeal Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera et al.,* Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[2] See Oral Decision, Transcripts of 26 November 2004, pp. 1-2.

[3] *Karemera et al.,* Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

[4] The Defence defines the State by reference to a document on file with the Registry. The State is specified in a strictly confidential annex to this Decision which has been put under seal.

[5] The Defence specifies the Witness by reference to his pseudonym. The pseudonym is indicated in a strictly confidential annex to this Decision which has been put under seal.

## Introduction

1. Tandis que le recours contre la continuation du procès était pendant devant la Chambre d'appel[1], les parties en l'espèce ont continué à déposer des requêtes. Celles-ci étaient toujours pendantes. Après nomination du Président de la Chambre, une conférence de mise en état s'est tenue le 26 novembre 2004, au cours de laquelle il a été relevé que six des requêtes déposées par Nzirorera, y compris celle en cause, étaient toujours pendantes[2]. Ayant autorisé le Procureur le 14 février 2005 à déposer un acte d'accusation modifié distinct contre Rwamakuba et un acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera[3], la Chambre peut à présent examiner lesdites requêtes.

## Arguments des parties

*Requête de la Défense*

2. La Défense prie la Chambre de bien vouloir ordonner qu'une demande de coopération soit adressée au Gouvernement d'un certain État[4] afin d'obtenir des documents indiquant le montant total dépensé au bénéfice d'un certain témoin[5] et de sa famille dans le cadre des dispositions prises pour assurer sa protection dans cet État. La Défense fait valoir que les documents recherchés ont les caractéristiques suivantes :

– Ils sont de portée limitée et définis de façon précise ;
– Ils sont en rapport avec une question dont la Chambre est saisie et sont nécessaires à la Chambre pour statuer équitablement sur cette question puisqu'ils sont de nature à permettre d'évaluer la crédibilité du témoin ;
– Ils n'avaient pu être obtenus précédemment malgré les efforts déployés par la Défense qui n'a pas reçu de réponse à la lettre qu'elle avait adressée au Gouvernement intéressé.

---

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba,* Affaire n° ICTR-98-44-AR 15 *bis*.2 *(Karemera et consorts)*, Décision de la Chambre d'appel relative aux appels interlocutoires interjetés contre la décision de continuer le procès avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments, 28 septembre 2004 ; *Karemera et consorts,* Motifs de la décision de la Chambre d'appel intitulée «*Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material*», 22 octobre 2004.

[2] Voir Décision orale, compte rendu de l'audience du 26 novembre 2004, p. 1 et 2 de la version anglaise.

[3] *Karemera et consorts,* Décision de la Chambre de première instance relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005.

[4] La Défense nomme cet État en faisant référence à un document déposé au Greffe. Le nom de cet État est précisé dans un document annexe strictement confidentiel joint à la présente décision et gardé sous scellés

[5] La Défense désigne le témoin par son pseudonyme. Ledit pseudonyme est indiqué dans un document annexe strictement confidentiel joint à la présente décision et gardé sous scellés.

*Prosecution*

3. The Prosecution opposes the Motion. It argues that, since the letter by the Defence to the respective State violated a witness protection order[6], it could not qualify as a prior effort deployed by the Defence. It further submits that the information sought must be relevant and cites jurisprudence of the International Criminal Tribunal for Former Yugoslavia ("ICTY") to support its claim that the applicant must demonstrate

> "a reasonable basis for his belief [...] that the information will inaterially assist him in his case, in relation to clearly identified issues relevant to the trial"[7].

In the Prosecution's view, the money value of the benefits that the Witness received would be irrelevant. It indicates that it is willing to describe the benefits of tlie witness protection program, without a statement of the actual monies spent by the national authorities to provide such services.

**Deliberations**

4. The Chamber notes that the Prosecution's Response has been filed beyond the time-limit prescribed by Rule 73 (E) of the Rules. In the interest of justice and since the delay had no impact on the progress of the proceedings, the Chamber nevertheless takes cognizance of the Prosecution's submissions.

5. The present Motion is linked to the "Prosecutor's Urgent Motion for Sanctions against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction against Further Violations", filed on 8 September 2004. The Chamber is of the view that the merits of the Prosecution Motion for sanctions have no bearing on the question whether the legal requireinents for a request for governmental cooperatioii are satisfied. The two Motions will therefore be separately decided.

6. Article 28 (2) (c) of the Statute of the Tribunal ("Statute") prescribes that States shall comply without undue delay with any request for cooperation issued by a Trial Chamber with respect to the service of documents. According to the jurisprudence of the Tribunal Appeals Chamber, any request for production of documents, under Article 28 of the Statute, must (i) identify as far as possible the documents or information to which the application relates; (ii) set out succinctly the reasons why such documents are deemed relevant to the trial; and (iii) explain the steps taken by tlie applicaiit to secure the State's assistance[8].

[6] *Karemera et al.,* Decision on the Prosecutor's Motion for Special Protective Measures (TC), 20 October 2003.

[7] *Prosecutor v. Krstić*, Case n° IT-98-33-A, Decision on Application for *Subpoena* (AC), 1 July 2003, para. 10 (*Krstić* Decision).

[8] *Prosecutor v. Blaškić,* Case n° 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. 32 (*Blaškić* Decision).

*Réponse du Procureur*

3. Le Procureur fait objection à la requête au motif que, puisque la lettre adressée par la Défense à l'État en question constituait une violation de l'Ordonnance[6] de protection des témoins, elle ne pouvait pas être considérée comme un effort antérieurement déployé par la Défense. De surcroît, le Procureur fait valoir que l'information recherchée doit être pertinente et cite la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie («TPIY») à l'appui de l'affirmation selon laquelle le demandeur doit démontrer

> «qu'il existe des motifs raisonnables de croire que [...] des renseignements [...] apporteront une aide sensible à sa cause sur des questions précisément identifiées et qui seront débattues au procès»[7].

De l'avis du Procureur, la valeur monétaire des dispositions prises au bénéfice du témoin serait sans importance. Cela veut dire qu'il serait prêt à donner une description des dispositions prises dans le cadre de la protection d'un témoin sans faire référence au montant effectivement dépensé par les autorités nationales pour cette prestation de service.

**Délibéré**

4. La Chambre relève que la réponse du Procureur avait été déposée après le délai fixé par l'article 73 (E) du Règlement. Dans l'intérêt de la justice, et puisque ce délai n'avait aucune incidence sur l'évolution de la procédure, la Chambre prend néanmoins en compte les arguments du Procureur.

5. La présente requête a un lien avec «la requête urgente du Procureur aux fins de sanctions contre le conseil de Nzirorera pour violation de l'ordonnance portant mesures de protection de témoins et aux fins d'une injonction à lui de s'abstenir d'autres violations», déposée le 8 septembre 2004. La Chambre est d'avis que le fond de la requête du Procureur aux fins de sanctions n'a rien à voir avec la question de savoir si la requête aux fins de solliciter la coopération d'un Gouvernement remplit les conditions juridiques requises. En conséquence, la Chambre statuera séparément sur chacune de ces deux requêtes.

6. L'article 28 (2) (c) du Statut du Tribunal (le «Statut») prescrit que les États répondent sans retard a toute demande d'assistance émanant d'une Chambre de première instance et concernant l'expédition des documents. Selon la jurisprudence de la Chambre d'appel du Tribunal, toute requête de production de documents, en vertu de l'article 28 du Statut, doit : i) identifier autant que possible les informations ou les documents précis en cause; ii) énoncer succinctement les raisons pour lesquelles ces documents sont considérés comme pertinents pour le procès; iii) préciser les mesures prises par le demandeur pour s'assurer l'assistance de l'Etat en question[8].

---

[6] *Karemera et consorts,* Décision de la Chambre de première instance relative à la requête du Procureur intitulée «*Prosecutor's Motion for Special Protective Measures*», 20 octobre 2003.

[7] *Le Procureur c. Krstić*, affaire n° IT-98-33-A, Arrêt de la Chambre d'appel relatif à la demande d'injonctions, 1er juillet 2003, para. 10 (arrêt *Krstić*).

[8] *Le Procureur c. Blaškić,* affaire n° IT-95-14, Arrêt de la Chambre d'appel 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, para. 32 (arrêt *Blaškić*).

7. The Chamber finds that the documents requested by the Defence are sufficiently defined and limited in number.

8. Following the jurisprudence, the standards of relevance to be met in the context of requests for governmental cooperation are whether or not the sought information is relevant to any matter in issue before the Chamber and necessary for a fair determination of that matter[9].

9. The Chamber is of the view that the information sought by the Defence is not necessary for a fair determination of the credibility of the Witness. Contrary to the dollar amount of monies disbursed by the Prosecution, the money value, in any given currency, of the expenditures of the respective government depends on the cost of living in the respective country, on exchange rates and various other external economic factors. The indication of an absolute amount has no probative value. The protection does not necessarily compromise the credibility of the Witness. Protective measures for Witness are enshrined in the Statute and the Rules[10]. There is no mathematical relation between the amount spent on witness protection and the degree of credibility.

10. Information concerning the nature of the benefits provided by the witness protection program and their duration could be relevant to the determination of the credibility of the Witness. The Prosecution's offer to describe the said benefits, without a statement of the actual monies spent by the national autliorities to provide such services, would provide the information necessary for the fair determination of the matter.

FOR THE ABOVE REASONS,

THE CHAMBER

I. DISMISSES the Motion;

II. ORDERS the Prosecution to honour his undertaking to describe the benefits of the witness protection program.

Arusha, 19 April 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[9] *Blaškić* Decision, para. 32. See also Rule 54 *bis* ICTY Rules of Procedure and Evidence.
[10] See Articles 19 (1) and 21 of the Statute; Rules 69 and 75 of the Rules.

7. La Chambre considère que les documents demandés par la Défense sont suffisamment précis et en nombre limité.

8. Si l'on s'en tient a la jurisprudence, les critères de pertinence à respecter en matière de requêtes sollicitant la coopération d'un Gouvernement résident dans la question de savoir si l'information recherchée intéresse ou non une question quelconque dont la Chambre est saisie et s'avère nécessaire pour que la Chambre puisse statuer équitablement[9].

9. La Chambre est d'avis que l'information recherchée par la Défense n'est pas nécessaire pour décider de la crédibilité du témoin. Contrairement au montant en dollars dépensé par le Procureur, la valeur monétaire libellée, en quelque monnaie que ce soit, des dépenses effectuées par le Gouvernement intéressé, dépend du coût de la vie dans le pays en question, du taux de change et de divers autres facteurs économiques exogènes. L'indication d'un montant absolu n'a aucune valeur probante. La protection dont bénéficie un témoin ne met pas nécessairement en doute sa crédibilité. Les mesures de protection accordées au témoin sont prévues par le Statut et le Règlement[10]. En effet, il n'y a aucun rapport mathématique entre le montant dépensé aux fins de la protection d'un témoin et le degré de crédibilité de celui-ci.

10. S'agissant de l'information relative à la nature des moyens prévus pour la protection du témoin et leur durée, elle pourrait être utile à la détermination de la crédibilité du témoin. À cet effet, l'offre du Procureur de décrire lesdits moyens, sans indiquer le montant effectivement dépensé par les autorités nationales pour la prestation de ces services, permettrait de fournir les informations nécessaires à la Chambre pour statuer équitablement.

PAR CES MOTIFS,

LA CHAMBRE

REJETTE la requête;

ORDONNE au Procureur de respecter l'engagement qu'il a pris de donner une description des mesures prises en matière de protection des témoins.

Fait en langue anglaise à Arusha, le 19 avril 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[9] Arrêt *Blaškić,* para. 32. Voir également article 54 *bis* du Règlement de procédure et de preuve du TPIY.

[10] Voir les articles 19 (1) et 21 du Statut, ainsi que les articles 69 et 75 du Règlement

## *Decision on the Prosecution Motion for Sanctions against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations Rule 46 (A) of the Rules of Procedure and Evidence 19 April 2005 (ICTR-98-44-R46)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding judge; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Measures of Protection of Witnesses, Contact with the Government of the Country of Residence of the protected Witness, Transmission of the Letter by the Registrar through diplomatic Channels, Definition of "public" as "ordinary people in general", Scope of the divulgation Prohibition, Sanction against the Counsel of the Defence, Conduct contrary to the Interests of Justice, Violation of the Tribunal' Decisions, Proportionate Response to the Breach of the Decision – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 46 (A) and 73 (A)*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Reasons for Decision on interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 October 2004 (ICTR-98-44); Trial Chamber III,* The Prosecutor v. Edouard Karemera, *Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44*

*I.C.T.Y. : Appeals Chamber,* The Prosecutor v. Tihomir Blaskic, *Decision 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)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Einile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Prosecutor's Urgent Motion for Sanctions against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction against Further Violations", filed on 8 September 2004 and served on the Defence for Joseph Nzirorera ("Defence") on 14 September 2004;

## *Décision relative à la requête du Procureur intitulée «Prosecutor's urgent Motion for Sanctions against Counsel for Nzirorera for Violation of Witness Protection and for an Injunction Against Further Violations» Article 46 (A) du Règlement de procédure et de preuve 19 avril 2005(ICTR-98-44-R46)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Mesures de protection des témoins, Contact avec le gouvernement de résidence du témoin protégé, Transmission de la lettre par le Greffier par la voie diplomatique, Définition du terme «public» comme la «masse de la population», Champ d'application de l'interdiction de divulgation, Sanction contre les Conseils de la défense, Comportement contraire aux intérêts de la justice, Violation de décisions du Tribunal, Réponse proportionnée à la violation de la décision – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 46 (A) et 73 (A)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre d'appel,* Le Procureur c. Édouard Karemera et consorts, *Motifs de la décision de la Chambre d'appel intitulée Decision on Interlocutory Appeals regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for leave to consider new Material, 22 octobre 2004 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Edouard Karemera, *Order on Protective Measures for Prosecution Witnesses, 10 décembre 2004 (ICTR-98-44)*

*T.P.I.Y. : Chambre d'appel,* Le Procureur c. Tihomir Blaskić, *Arrêt relatif à la Requête de la République de Croatie aux fins d'examen de la Décision de la Chambre de première instance II du 18 juillet 1997, 29 octobre 1997 (IT-95-14)*

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

SIEGEANT en la Chambre de premiere instance III composée des juges Dennis C.M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»),

SAISI de la Requête du Procureur intitulée *Prosecutor's Urgent Motion for Sanctions against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction against Further Violations,* déposée le *8 septembre* 2004 et communiquée à la Défense de Joseph Nzirorera (la «Défense») le 14 septembre 2004,

CONSIDERING the "Response to Urgent Motion for Sanctions" filed by the Defence on 20 Septeinber 2004;

HEREBY DECIDES the Motion, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence ("Rules").

## Introduction

1. While the appeal on continuation of the trial was pending before the Appeals chamber[1], the parties continued to file Motions. Those Motions remained pending. Upon the appointment of the Presiding Judge, a Status Conference was held on 26 November 2004, where it was noted that the Prosecution Motion was still pending[2]. Having granted leave, on 14 February 2005, to file a Separate Amended Indictment against Rwamakuba and an Amended Indictment against Karemera, Ngirumpatse and Nzirorera[3], the Chamber may now address the said Motion.

## Arguments of the Parties

*Prosecution*

2. The Prosecution submits that the Defence Counsel has written a letter to the Governrnent of a State in which a protected Witness resides. In its letter, the Defence Counsel asked the said Government to provide information regarding the benefits that the protected Witness has received. The Prosecution argues that the contentious letter breaches the Decision on protective measures of 20 October 2003[4] (" Decision of 20 October 2003") by disclosing the whereabouts of a Witness to the public and by revealing information that relates to the Witness outside the Defence team. It submits that knowingly violating a court order is professional misconduct and that sanctions are warranted uiider Rule 46 (A) of the Rules. In the Prosecution's view, the said Decision on protective measures would constitute a warning within the meaning of Rule 46 (A) of tlie Rules. Accordingly, the Prosecution requests a formal withdrawal

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case No. ICTR-98-44-ARISbis.2 *(Karemera et al.),* Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004; *Karemera el al.,* Reasons for Decision on lnterlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[2] See Oral Decision, T. 26 November 2004, pp. 1-2.

[3] *Karemera et al.,* Decision on Severance of André Rwamakuba and for Leave to Fife Amended indictment (TC), 14 February 2005.

[4] *Karemera et al.,* Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for lmmediate Disclosure (TC), 20 October 2003, IV$^{th}$ and VI$^{th}$ orders.

VU la Réponse de la Défense intitulée *Response to Urgent Motion for Sanctions* déposée le 20 septembre 2004,

STATUE sur ladite requête conformément à l'article 73 (A) du *Règlement de procédure et de preuve* (le «Reglement»).

## Introduction

1. Tandis que l'appel sur la continuation du proces était pendant devant la Chambre d'appel[1], les parties en l'espèce ont continué à déposer des requêtes. Ces dernieres sont restées pendantes. Après la nomination du Président de la Chambre, une conférence de mise en état a eu lieu le 26 novembre 2004, et c'est à ce moment qu'on s'est rendu compte que la Requête déposée par le Procureur était encore pendante[2]. Apres avoir autorisé, le 14 février 2005, le dépôt d'un acte d'accusation modifié distinct contre Rwamakuba, et d'un acte d'accusation modifié contre Karemera, Ngirumpatse et Nzirorera[3], la Chambre peut à présent statuer sur ladite Requête.

## Arguments des parties

*Le Procureur*

2. Le Procureur affirme que le conseil de la Défense a écrit une lettre au gouvernement d'un Etat ou réside un témoin protégé. Dans cette lettre, le conseil demande audit gouvernement de lui fournir des renseignements sur les avantages accordés à ce témoin. Le Procureur fait valoir que la lettre litigieuse constitue une violation de la décision du 20 octobre 2003[4] portant mesures de protection («Décision du 20 octobre 2003»), en dévoilant au public l'endroit où se trouve ce témoin et en divulguant des informations le concernant à des personnes n'appartenant pas à l'équipe de la Défense. Il ajoute que le fait de violer délibérément une ordonnance de la Chambre constitue une faute professionnelle et que des sanctions s'imposent au titre de

[1] *Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-AR15bis.2 (Karemera et consorts), Décision de la Chambre d'appel intitulée *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave fo Consider New Material*, rendue le 28 septembre 2004; *Karemera ef consorts*, Motifs de la décision de la Chambre d'appel intitulée *Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material*, 22 octobre 2004.

[2] Voir décision orale, compte rendu de l'audience du 26 novembre 2004, p. 1 à 3.

[3] *Karemera et consorts*, Décision de la Chambre de premiere instance relative à la disjonction de l'insfance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, rendue le 14 fevrier 2005.

[4] Karemera et consorts, Décision de la Chambre de premiere insfance sur la Requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection en faveur des témoins G et T et aux fins d'étendre la décision portant mesures de protection de témoins à charge dans les affaires Nzirorera el Rwamakuba aux coaccusés *Ngirumpatse et Karemera et décision relative à la Requête de la Défense en communicafion immédiate de pièces,* rendues le 20 octobre 2003, paragraphes IV et VIdu dispositif.

of the letter, sanctions against the Defence Counsel and an injunction against this conduct.

*Defence*

3. The Defence contends that its letter seeking information from the respective Government did not identify the protected Witness. It argues that the location of the protected Witness was only revealed to tlie Government of a State in which the protected Witness resides, not to the public. It alleges furthermore that there is no disclosure of the actual whereabouts, but only an indication of tlie country in which the Witness resides. It contends that it did not reveal any information received from the Prosecution, since the Defence would have addressed the Government of tlie respective State on the basis of information about the Witness' location which it had previously known from its own sources.

4. Tlie Defence submits that it needed to send the contentious letter since it intended to move the Cliamber for a request for governmental cooperation. In cotnpliance with the Tribunal's jurisprudence, it first had to deploy its own efforts to receive the desired information. Counsel argues that neither does the Decision on protective measures of 20 October 2003 constitute a warning, nor are the further prerequisites that Rule 46 (A) of the Rules stipulates for sanctioning the Defence met.

**Deliberations**

5. The Chamber observes that although the present Motion is linked to the "Motion for Request for Cooperation to Government X", filed by tlie Defence on 20 September 2004, the two Motions will be separately decided.

6. The Prosecution Motion is based on the Trial Chamber's Decision of 20 October 2003 granting special protective measures for Witnesses G and T[5]. The Chamber notes that the said Decision lias been superseded by the Order of 10 December 2004 providing protective measures for Prosecution witnesses[6]. Tha t circtimstance nevertheless does not affect the Defence's obligation to compiy with the Decision of 20 October 2003 while it was in force.

7. The Chamber is also aware of the Defence's view, presented in another Motion[7], that the above mentioned Decision should be given no effect pursuant to the Appeals

[5] *Ibidem.*

[6] *Karemera et al.,* Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

[7] See Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of "No Effect", filed on 25 February 2005.

l'article 46 (A) du Règlement. Pour le Procureur, la Décision portant mesures de protection constitue un avertissement au sens de l'article 46 (A) du Règlement. Il prie donc la Chambre d'ordonner le retrait officiel de la lettre concernée, de sanctionner le conseil de la Défense et de lui enjoindre de faire en sorte que ce comportement ne se reproduise pas.

*La Défense*

3. La Défense répond que, dans sa lettre demandant des informations au gouvernement concerné, l'identité du témoin protégé n'est pas révélée. Elle affirme que l'endroit où se trouve ce témoin a été uniquement dévoilé au gouvernement du pays ou réside ce dernier, pas au public. Elle ajoute que la lettre ne révèle pas le lieu exact où se trouve ce témoin, mais uniquement le pays où il réside. La Défense soutient qu'elle n'a communiqué aucune des informations que lui a fournies le Procureur, étant donne qu'elle a contacté le gouvernement du pays concerné en se fondant sur des renseignements qu'elle avait elle-même obtenus auparavant au sujet de l'endroit oµ se trouve le témoin.

4. La Défense fait valoir qu'elle a eu à envoyer la lettre litigieuse étant donne qu'elle envisageait de saisir la Chambre de première instance en vue d'une demande de coopération gouvernementale. Pour se conformer à la jurisprudence du Tribunal, elle devait d'abord déployer ses propres efforts pour obtenir les informations recherchees. Le conseil soutient que la Décision du 20 octobre 2003 portant mesures de protection ne constitue pas un avertissement et que les conditions justifiant la prise de sanctions contre un conseil et qui sont énoncées à l'article 46 (A) du Règlement ne sont pas satisfaites.

**Delibere**

5. La Chambre relève que, bien que la presente requête soit liée à la requête intitulée *Motion for Request for Cooperation to Government X*, déposée par la Défense le 20 septembre 2004, les deux requêtes feront l'objet de décisions distinctes.

6. La requête du Procureur est fondée sur la décision de la Chambre de première instance du 20 octobre 2003 prescrivant des mesures spéciales de protection des témoins G et T[5]. La Chambre rappelle que cette decision a été remplacée par l'Ordonnance du 10 decembre 2004 qui accorde des mesures de protection des temoins à charge[6]. Néanmoins, cela ne change rien au fait que la Défense était tenue de se conformer à la Decision du 20 octobre 2003 aussi longtemps que celle-ci était en vigueur.

7. De meme, la Chambre de première instance n'ignore pas le point de vue exprimé par la Defense dans une autre requête[7], à savoir que la décision susmentionnée devrait cesser de produire ses effets en vertu de la décision de la Chambre d'appel du

[5] *Ibid*.

[6] *Karemera et consorts*, Ordonnance de la Chambre de première instance intitulée *Order on Protective Measures for Prosecution Witnesses,* rendue le 10 décembre 2004.

[7] Voir la requête de Joseph Nzirorera intitulle *Motion for Order Finding Prior Decisions to Be of «No Effect»,* déposée le 25 février 2005.

Chamber's Decision of 22 October 2004[8]. The Defence's obligation to comply with it stems from the fact that it was in force wlien the letter was written. The Appeals Chamber's finding that a Judge of the prior Bench who participated in the Decision of 20 October 2003 does not affect that conclusion. It is clear that a party could not act contrary to a Tribunal's order on the assumption that the said order could be revised or is no longer binding.

8. It is therefore necessary to assess whether the Defence has violated Orders IV and VI of the Decision of 20 October 2003 as the Motion asserts. The Chamber recalls that the Order IV declares that the whereabouts of the Witness shall never be disclosed to the public, the Defence or the Accused and that Order VI prohibits the Defence from disclosing information relating to the respective Witness "outside their teams".

9. The Chamber is satisfied that, by writing the contentious letter, Defence Counsel has not disclosed the whereabouts of the respective Witness to the public, the Defence or the Accused[9]. The meaning of the word "public" is in common usage defined as "ordinary people in general"[10]. The Chamber holds that this meaning is congruent with the meaning given to the term in the Decision of 20 October 2003. The letter sent by the Defence Counsel was addressed to officials of the Government of the State that had assumed the charge of protecting the respective Witness and was transmitted by the Registrar through diplomatic channels. The information passed through the structure set up by the Tribunal and the respective State for the purpose of protecting the Witness. The addressee of the letter and the persons transmitting it do not involve any "ordinary people in general". They do not fall within the meaning of "public". Hence, Order IV of the Decision on protective measures of 20 October 2004 was not violated.

10. Order VI prohibiting the Defence from disclosing information relating to the respective Witness "outside their teams" does not differentiate according to the professional or social function of the persons receiving the information, or their prior involvement with Witness protection measures. The only criterion that the Order establishes with respect to the person receiving information is whether or not he or she is a member of the Defence team. The Order does not make any distinction as to when the Defence first learned about the disclosed information. The prohibition of disclosure is not limited to information that the Defence gathered from prosecutorial documents or records. The corresponding arguments submitted by the Defence have to be disregarded. The contentious letter stated that the Wimess was located in the respective State. It therefore contained information relating to the protected Witness. The Defense does not dispute the Prosecution's argument that the letter was addressed to persons outside the Defence team. The Chamber conciudes that the Defence Counsel has violated protective Order VI by writing the letter which disclosed information

[8] *Karemera et al.,* Reasons for Decision on lnterlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

[9] IV$^{th}$ order of the previously cited Decision of 20 October 2003.

[10] See *The Concise Oxford Dictionary,* Oxford University Press, 10$^{th}$ edition (2001), p. 1156. Cf. also *Collins English Dictionary,* Harper Collins Publishers, 5$^{th}$ edition (2000) p. 1247.

22 octobre 2004[8]. La Defense était tenue de se conformer à cette première décision car elle était en vigueur quand la lettre litigieuse a été écrite. La conclusion de la Chambre d'appel selon laquelle un juge de la formation précédente qui a participé à la Décision du 20 octobre 2003 [*sic*] n'affecte pas cette conclusion. Il va de soi qu'une partie ne saurait enfreindre une ordonnance du Tribunal parce qu'elle assume que cette ordonnance pourrait être révisée ou n'a plus force obligatoire.

8. Il convient donc d'examiner si la Defense a violé les paragraphes IV et VI du dispositif de la Décision du 20 octobre 2003 comme il est dit dans la requête. La Chambre rappelle qu'aux termes du paragraphe IV le lieu où se trouve le témoin ne doit jamais être divulgué au public, à la Defense où à l'accusé et que le paragraphe VI interdit à la Défense de divulguer des informations concernant ledit témoin à des personnes autres que ses conseils.

9. La Chambre est convaincue qu'en écrivant la lettre litigieuse le conseil de la Défense n'a pas informé le public, la Défense ou l'accusé de l'endroit où se trouvait le témoin[9]. Selon l'usage commun, le mot «public» renvoie à la «masse de la population»[10]. La Chambre relève que cette définition est compatible avec le sens donne au terme «public» dans la Décision du 20 octobre 2003. La lettre envoyée par le conseil de la Défense était adressée aux autorités gouvernementales de l'Etat qui avait pris la responsabilité de protéger le témoin concerné et a été transmise par le Greffier par la voie diplomatique. Les renseignements sont passés par les structures mises en place par le Tribunal et l'Etat concerné en vue de la protection du témoin. Le destinataire de la lettre et les personnes qui l'ont transmise ne représentent pas la «masse de la population». Ils ne rentrent pas dans la catégorie «public». Ainsi, le paragraphe IV du dispositif de la Décision du 20 octobre 2003 portant mesures de protection n'a pas été violé.

10. Le paragraphe VI interdisant à la Défense de divulguer des informations sur le témoin concerné «à des personnes autres que ses conseils» n'etablit pas de distinction en fonction de la catégorie professionnelle ou de la fonction sociale de la personne qui reçoit les informations ni de son implication antérieure dans les mesures de protection dont jouit le témoin. Le seul critère visé, s'agissant de la personne qui reçoit les informations, réside dans son appartenance ou non à l'équipe de la Defense. Ledit paragraphe ne fait aucun cas du moment où la Défense a pris connaissance des renseignements divulgués. L'interdiction de divulgation n'est pas limitée aux informations que la Défense a tirées des documents ou des dossiers du Procureur. Les arguments correspondants déposés par la Défense n'ont pas à être pris en compte. Dans la lettre litigieuse, il est dit que le témoin se trouvait dans l'Etat concerné. Cette lettre contenait par conséquent des informations relatives à ce temoin protégé. Le conseil ne conteste pas l'argument du Procureur selon lequel la lettre etait adressée à des personnes autres que les conseils de l'intéressé. La Chambre conclut que le conseil de la Défense à violé le paragraphe VI portant mesures de protection en ecrivant la lettre

[8] *Karemera et consorts*, Motifs de la décision de la Chambre d'appel intitulée "Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Mofion for Leave fo Consider New Materiat", 22 octobre 2004.

[9] Paragraphe IV du dispositif de la Décision du 20 octobre 2003 susmentionnée.

[10] Voir *The Concise Oxford Dictionary,* Oxford University Press, 10ème édition (2001), p. 1156. Voir aussi *Collins English Dictionary,* Harper Collins Publishers, 5ème édition (2000) p. 1247.

relating to the Witness outside of its team. It would therefore be appropriate to make that declaration.

11. Pursuant to Rule 46 (A) of the Rules, the Chamber may impose sanctions against Counsel if it has previously issued a warning and his conduct remains offensive or abusive, obstructs tlie proceedings or is otherwise contrary to the interests of justice.

12. The Chamber considers that the Prosecution's contention that the Decision implied a warning, and any breach could immediately trigger sanctions contradicts the wording and spirit of the Rule. The Chamber finds that the Decision of 20 October 2003 does not contain any wording which can be construed as a warning. Although violations of Decisions delivered by the Tribunal could be contrary to the interests of justice in the sense of Rule 46 (A) of the Rules, the Chamber observes that issuing a warning at this time would not be a proportionate response to the breach of the Decision on protective measures. The degree of misconduct deployed by the Defence needs to be seen in the light of the particular circumstances of the present incident. The Defence Counsel contended that he was of the opinion that he had to write the contentious letter as a prerequisite for his "Motion for Request for Cooperation to Government X", filed on 20 September 2004. The Chamber observes that, the jurisprudence of this Tribunal[11] obliges the Defence to deploy its own efforts to obtain the desired information before it can seize the Chamber with a request for governmental cooperation. Consequently, the Defence Counsel might have acted in good faith and may have genuinely believed that he acted in the interest of justice.

13. The Chamber finds that no previous warning was issued, and that the conduct of Defence Counsel did not amount to conduct which is offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. The prerequisites of Rule 46 (A) of the Rules have not been met.

FOR THE ABOVE REASONS,

THE CHAMBER

I. DECLARES that the Defence has violated the VIth Order of the Chamber's Decision on protective measures of 20 October 2003 by writing a letter to the Government of a certain State and therein disclosing information relating to a certain protected Witness outside its team.

II. RECALLS its Order of 10 December 2004 on protective measures.

III. DISMISSES the remainder of the Motion.

Arusha, 19 April 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[11] *Prosecutor v. Blaskić,* Case n° 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. 32.

qui transmettait des informations sur le témoin concerné à des personnes n'appartenant pas à son equipe. Il conviendrait donc de constater cette violation.

11. Aux termes de l'article 46 (A) du Règlement, la Chambre peut, après un avertissement, prendre des sanctions contre un conseil, si elle considère que son comportement reste offensant ou injurieux, entrave la procédure ou va autrement à l'encontre des intérêts de la justice.

12. La Chambre estime que l'argument du Procureur selon lequel la décision laissait sous-entendre un avertissement et que tout manquement pourrait entrainer immédiatement des sanctions est en contradiction avec le libellé et l'esprit de l'article 46 (A) du Règlement. La Chambre conclut que la Décision du 20 octobre 2003 ne contient aucune formule qui puisse être interprétée comme un avertissement. S'il est vrai que des violations des décisions rendues par le Tribunal pourraient être considérées comme contraires à l'intérêt de la justice au sens de l'article 46 (A) du Règlement, la Chambre considère que lancer un avertissement à ce stade ne constituerait pas une réponse proportionnée à la violation de la décision relative aux mesures de protection. I1 convient d'examiner l'ampleur de la faute commise par la Défense en tenant compte des circonstances particulières de l'incident en question. Le conseil de la Défense à estimé qu'il devait écrire la lettre litigieuse en préalable à sa requête intitulee *Motion for Request for Cooperation to Government X,* déposée le 20 septembre 2004. La Chambre observe que la jurisprudence du Tribunal[11] oblige la Défense à faire tout son possible pour obtenir les informations voulues avant de saisir la Chambre d'une demande de cooperation gouvernementale. I1 se pourrait donc que le conseil de la Défense ait agi de bonne foi et qu'il ait vraiment cru le faire dans l'intérêt de la justice.

13. La Chambre conclut qu'aucun avertissement n'a été émis précédemment et que le comportement du conseil de la Défense n'a été ni offensant ni injurieux, n'entrave pas la procédure ou ne va pas autrement à l'encontre des intérêts de la justice. Les conditions énoncées à l'article 46 (A) ne sont pas satisfaites.

PAR CES MOTIFS,

LA CHAMBRE

I. DECLARE que la Défense a violé le paragraphe VI du dispositif de la Decision de la Chambre du 20 octobre 2003 portant mesures de protection en écrivant une lettre au gouvernement d'un certain pays, et, partant, en communiquant des informations relatives à un certain témoin protégé à des personnes autres que ses conseils;

II. RAPPELLE son Ordonnance du 10 décembre 2004 relative aux mesures de protection;

III. REJETTE le reste de la Requête.

Fait en anglais à Arusha, le 19 avril 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[11] *Le Procureur c. Blaskić*, affaire n° IT-95-14, Arrêt relatif à la Reqête 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, para. 32.

# Corrigendum *to Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction against further Violations 25 April 2005 (ICTR-98-44-R46)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Typographical Error*

*International Cases cited :*

*I.C.T.R. : Appeals Chamber,* The Prosecutor v. Edouard Karemera et al., *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

NOTING paragraph 7 of the Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and For an Injunction Against Further Violations, issued on 19 April 2005, which states that

> "[…] The Appeals Chamber's finding that a Judge of the prior Bench who participated in the Decision of 20 October 2003 does not affect that conclusion. […]";

CONSIDERING that the cited paragraph cantains a typographical error;

HEREBY ORDERS that paragraph 7 of the above mentioned Decision reads as follows :

> The Chamber is also aware of the Defence's view, presented in another Motion[1], that the above mentioned Decision should be given no effect pursuant to the Appeals Chamber's Decision of 22 October 2004[2]. The Defence's obligation to comply with it stems from the fact that it was in force when the letter

[1] See Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of "No Effect", filed on 25 February 2005.

[2] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case n° ICTR-98-44-AR15*bis*.2, Reasons for Decision on Interlocutroy Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004.

was written. The Appeals Chamber's finding that a Judge of the prior Bench who participated in the Decision of 20 October 2003 was affected by an appearance of bias does not affect that conclusion. It is clear that a party could not act contrary to a Tribunal's order on the assumption that the said order could be revised or is no longer binding.

Arusha, 25 April 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Decision on Motion to unseal* Ex Parte *Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment Rule 66 (A) (i) of the Rules of Procedure and Evidence 3 May 2005 (ICTR-98-44-R66)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Pauline Nyiramasuhuko – Communication of supporting material, Supporting material, unseal* ex parte *Submissions,* Ex parte *Procedure, Interest of Justice, Fair trial – Defects of the Indictment* – Audi alteram partem *Principle – Motion partially granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, rules 50, 66 (A) (i), 72 (A) and 73*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, *Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment, 14 February 2005 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, *Decision on Prosecution Motion for Leave to File Amended Indictment and Filing of Further Supporting Material, 18 February 2005 (ICTR-98-44)*

*I.C.T.Y. : Trial Chamber,* The Prosecutor v. Dario Kordić and Mario Cerkez, *Order on Motion to compel Compliance by the Prosecutor with Rules 66 (A) and 68, 26 February 1999 (IT-95-14/2); Trial Chamber,* The Prosecutor v. Blagoje Simić et al., *Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000 (IT-95-9); Trial Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000 (IT-99-36); Trial Chamber,* The Prosecutor v. Dragoljub Ojdanić and Nikola Šainović, *Decision on Defence Motion to Require Full Compliance with Rule 66 (a) (i) and for Unsealing of* Ex Parte *Materials, 18 October 2002 (IT-99-37)*

## *Décision relative à la requête demandant la levée de la confidentialité de certains écrits unilatéraux et la suppression des paragraphes 32.4 et 49 de l'acte d'accusation modifié Article 66 (A) (i) du Règlement de procédure et de preuve 3 mai 2005 (ICTR-98-44-R66)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Pauline Nyiramasuhuko – Communication de pièces, Pièces justificatives, Levée de la confidentialité de certains écrits unilatéraux, Procédure* ex parte, *Intérêt de la justice, Equité du procès – Vices de l'acte d'accusation –* Audi alteram partem *– Requête partiellement acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 50, 66 (A) (i), 72 (A) et 73*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba, *Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba, *Décision relative à la requête du Procureur tendant à obtenir l'autorisation de déposer un acte d'accusation modifié et des pièces justificatives supplémentaires, 18 février 2005 (ICTR-98-44)*

*T.P.I.Y. : Chambre de première instance,* Le Procureur c. Dario Kordić et Mario Cerkez, *Ordonnance relative à la requête aux fins de contraindre le Procureur à respecter les articles 66 (A) et 68 de Règlement de procédure et de preuve, 26 février 1999 (IT-95-14/2); Chambre de première instance,* Le Procureur c. Blagoje Simić et consorts, *Décision relative 1) à la requête de Stevan Todorovic aux fins de réexaminer la décision du 27 juillet 1999, 2) à la requête du CICR aux fins de réexaminer l'ordonnance portant calendrier du 18 novembre 1999 et 3) aux conditions d'accès aux pièces, 28 février 2000 (IT-95-9); Chambre de première instance,* Le Procureur c. Radoslav Brđanin, *Décision relative à la deuxième requête de l'accusation aux fins de mesures de protection, 27 octobre 2000 (IT-99-36/1); Chambre de première instance,* Le Procureur c. Dragoljub Ojdanić et Nikola Šainović, *Décision relative à la requête de la Défense aux fins de respect de l'article 66 (A) (i) du Règlement et aux fins de rendre publiques des pièces déposées* ex parte*, 18 octobre 2002 (IT-99-37)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chambre");

BEING SEIZED of a "Motion to Unseal *Ex Parte* Submission and to Strike Paragraphs 32.4 and 49 from the Amended Indictment" ("Motion"), filed by the Defence for Nzirorera ("Defence") on 29 March 2005;

CONSIDERING the Prosecution's Response filed on 4 April 2005 and the Defence Reply thereto filed on 11 April2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

## ARGUMENTS OF THE PARTIES

*Defence Motion*

1. The Defence complains that, on 16 February 2005, in addition to the further supporting material filed following the Chamber's Decision of 14 February 2005 with respect to Paragraphs 32.4 and 49 of the proposed Amended Indictment[1], the Prosecution filed *ex parte* a Memorandum containing submission in response to the cited Decision. That document would have been the basis of the Chamber's Decision of 18 February 2005 that a *prima facie* case for the mentioned Paragraphs of the Amended Indictment was established[2]. The Defence observes that, on 23 February 2005, the Prosecution filed additional supporting material as well as a second *ex parte* Memorandum for the attention of the Chamber. The Defence raises queries about that subsequent filing of supporting material, while the Decision granting leave to amend the Indictment was already delivered. It also claims .that the Prosecution refused to disclose both *ex parte* Memoranda of 16 and 23 February 2005 ("Memoranda") and requests their disclosure since it would enable : to address preliminary motions, challenge the Amended Indictment and facilitate the understanding of the Chamber's Decision of 18 February 2005, making the proceedings more fair and transparent. It contends that its application for disclosure is supported by two decisions delivered in cases before the International Tribunal for Former Yugoslavia ("ICTY")[3] and an oral ruling in the instant case[4].

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

[2] *Prosecutor* v. *Edouard Karemera Mathieu Ngirumpatse and Joseph Nzirorera*, Case n° ICTR-98-44-PT (*Karemera et al.*), Decision on Prosecution Motion for Leave to File Amended Indictment and Filing of Further Supporting Material (TC), 18 February 2005

[3] *Prosecutor* v. *Milutinovic et al.,* Case n° IT-99-37-I, Decision on Application by Dragoljub Ojdanic for Disclosure of *Ex Parte* Submissions, 8 November 2002 (*Milutinovic* Decision); *Prosecutor v Dusko Sikirica and Others,* Case n° IT-95-8-PT, Order Granting in Part Prosecutor's Motion to Vacate Order of Non-Disclosure Issued on 30 August 1999 (TC), 20 July 2000.

[4] See Transcripts of 26 November 2004, p. 2.

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

SIÉGEANT en la Chambre de première instance III composée des juges Denis C. M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»),

SAISI de la requête intitulée *Joseph Nzirorera's Motion to Unseal Ex Parte Submission and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (la «requête»), déposée par la Défense de Nzirorera (la «Défense») le 29 mars 2005,

VU la réponse du Procureur et la réplique de la Défense respectivement déposées les 4 et 11 avril 2005,

STATUANT sur la requête en application de l'article 73 du Règlement de procédure et de preuve (le «Règlement»),

## ARGUMENTS DES PARTIES

*Requête de la Défense*

1. La Défense se plaint de ce que le 16 février 2005, outre les pièces justificatives supplémentaires demandées par la Chambre dans sa décision du 14 février 2005[1] à l'effet d'étayer les paragraphes 32.4 et 49 du projet d'acte d'accusation modifié, le Procureur a déposé unilatéralement un mémorandum contenant des éléments relatifs à la même décision. Ce document aurait servi de base à la décision du 18 février 2005 dans laquelle la Chambre a conclu à l'existence de présomptions suffisantes au soutien desdits paragraphes[2]. La Défense relève que le 23 février 2005, le Procureur a déposé à l'intention de la Chambre de nouvelles pièces justificatives et un second mémorandum unilatéral, et s'interroge sur ces nouveaux éléments déposés alors que la Chambre avait déjà rendu sa décision, autorisant la modification de l'acte d'accusation. Elle fait également valoir que le Procureur a refusé de communiquer ses mémorandums unilatéraux des 16 et 23 février 2005 (les «mémorandums») et demande qu'il soit procédé à leur communication pour lui permettre de soulever des exceptions, de contester l'acte d'accusation modifié et de mieux comprendre la décision du 18 février 2005, et ce, dans l'intérêt d'une procédure plus équitable et plus transparente. Elle invoque à l'appui de sa prétention deux précédents du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY»)[3] et une décision orale rendue en l'espèce[4].

---

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-PT, Chambre de première instance, Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005.

[2] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera,* affaire n° ICTR-98-44-PT (l'affaire «Karemera et consorts»), Chambre de première instance, Décision relative à la requête du Procureur tendant à obtenir l'autorisation de déposer un acte d'accusation modifié et des pièces justificatives supplémentaires, 18 février 2005.

[3] *Le Procureur c. Milutinovic et consorts*, affaire n° IT-99-37-1, Chambre de première instance, Décision relative à la requête de Dragoljub Ojdanic aux fins de communication de conclusions *ex parte*, 8 novembre 2002 (la «décision Milutinovic»); *Le Procureur c. Dusko Sikirica et consorts*, affaire n° IT-95-8-PT, Chambre de première instance, Ordonnance faisant partiellement droit à la requête du *Procureur aux fins de l'annulation d'une ordonnance de non-divulgation rendue le 30 août* 1999, 20 juillet 2000.

[4] Voir compte rendu de l'audience du 26 novembre 2004, p. 2.

2. Finally, the Defence submits that the dismissal of Paragraphs 32.4 and 49 of the Amended Indictment is warranted because the additional supporting material filed by the Prosecution on 16 February 2005 fails to establish a prima facie case against the Accused, unless there is further support in the ex parte Memoranda not disclosed to the Defence.

*Prosecution's Response*

3. The Prosecution alleges that neither the Statute of the Tribunal ("Statute") nor the Rules prescribe that Memoranda transmitted by the Prosecution to the Chamber in the course of providing supporting material should be disclosed. The phrase "supporting material" under Rule 66 (A) (i) would apply solely to the material upon which the charges are based and not to Interna1 Memoranda[5]. The Prosecution recognizes that a Judge could order disclosure of documents in the interest of justice, but concludes that it would not be applicable in the instant case since the Defence has no justifiable purpose in obtaining the requested documents. The Prosecution submits indeed that, contrary to the Defence's contention, a Preliminary Motion under Rule 72 of the Rules would not be a which to challenge the Chamber's determination that a *prima facie* case exists against the Accused[6]. The Prosecution also alleges that the oral Decision regarding disclosure of an email from a protected witness, quoted in the Defence Motion, is distinguishable since, contrary to the present request, the said email was disclosed in open court which waived any expectation that it would remain confidential.

4. Finally, the Prosecution recalls Judge Hunt's Decision in *Odjanovic* case[7] that disclosure of *ex parte* filings should only be entertained where it is necessary in the interests of justice to "everyone" concerned. It alleges that since the *ex parte* Memoranda we written in a manner that id not anticipate disclosure, it would unfairly prejudice the Prosecution if the Motion was granted.

*Defence Reply*

5. In the Defence's view, principles of fairness and transparency require that the Accused be allowed to understand the basis of the Chamber's Decision of 18 February 2005 which would not be apparent from the disclosure of supporting material made

[5] The Prosecution refers to *Prosecutor v. Ojdanic and Sainovic,* Case n° IT-99-37-PT, Decision on Defence Motion to Require Full Compliance with Rule 66 (a) (i) and for Unsealing of *Ex Parte* Materials (TC), 18 October 2002 *(Ojdanic and Sainovic* Decision).

[6] The Prosecution refers to *Prosecutor v. Nyiramasuhuko et al.,* Case n° ICTR.97-21-1, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment (TC), 4 September 1998, paras. 19-20; *Prosecutor v. Bagambiki et al.,* Case n° ICTR-97-36-I, Decision on the Defence Motion on Defects in the Form of the Indictment (TC), 24 September 1998, para. 5; *Prosecutor v. Krnojelac,* Case n° IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999. para. 20.

[7] *Milutinovic* Decision.

2. Enfin, la Défense sollicite le rejet des paragraphes 32.4 et 49 de l'acte d'accusation modifié au motif que les pièces justificatives supplémentaires fournies par le Procureur le 16 février 2005 n'établissent pas l'existence de présomptions suffisantes contre l'accusé, à moins que d'autres éléments n'aient été apportés dans les mémorandums unilatéraux qui ne lui ont pas été communiqués.

*Réponse du Procureur*

3. Le Procureur avance qu'il n'est astreint ni par le Statut du Tribunal (le «Statut») ni par son Règlement à la communication des mémorandums qu'il adresse à la Chambre dans le cadre de la fourniture des pièces justificatives. L'expression «pièces justificatives» au sens de l'article 66 (A)(i) du Règlement désigne selon lui les seules pièces qui servent à étayer les accusations, et non les mémorandums intérieurs[5]. Reconnaissant qu'un juge peut ordonner la communication de documents lorsque l'intérêt de la justice le commande, il conclut toutefois qu'une telle mesure ne saurait se justifier dans le cas d'espèce dès lors que la Défense n'a pas de motif valable pour réclamer les écrits concernés. Le Procureur fait en effet valoir que, contrairement à ce qu'affirme la Défense, les exceptions prévues à l'article 72 du Règlement ne permettent pas de contester la conclusion de la Chambre selon laquelle des présomptions suffisantes ont été établies contre l'accusé[6]. Le Procureur estime par ailleurs que la décision orale portant communication d'un message électronique de témoin protégé, invoquée par la Défense à l'appui de sa requête, n'est pas pertinente en l'occurrence; à la différence des pièces visées dans le cas d'espèce, ledit message avait été présenté en audience publique et il n'y avait donc pas lieu d'escompter qu'il resterait confidentiel.

4. Pour finir, ayant rappelé que dans sa décision sur la requête en communication d'*Ojanic*[7], le juge Hunt avait déclaré qu'il ne devrait avoir lieu à communication de pièces déposées unilatéralement que si l'intérêt de la justice «envers toutes les parties concernées» le requérait, le Procureur soutient que, comme les mémorandums ont été rédigés d'une façon qui ne prévoyait pas leur communication, le fait d'accueillir la requête lui causerait un préjudice injustifié.

*Réplique de la Défense*

5. Selon la Défense, les principes d'équité et de transparence veulent que l'accusé soit à même de comprendre sur quelles bases la Chambre a rendu sa décision du

[5] Le Procureur invoque la décision suivante : *Le Procureur c. Ojdanic et Sainovic*, affaire n° IT-99-37-PT, Chambre de première instance, Décision relative à la requête de la Défense aux fins de respect de l'article 66 (A)(i) du Règlement et aux fins de rendre publiques des pièces déposées *ex parte*, 18 octobre 2002 (la «décision Ojdanic et Sainovic»).

[6] Le Procureur invoque les décisions suivantes : *Le Procureur c. Nyiramasuhuko et consorts*, affaire n° ICTR-97-21-I, Chambre de première instance, *Decision on the Preliminary Motion by Defence Counsel on effects in the Form of the Indictment*, 4 septembre 1998, paras. 19 et 20; *Le Procureur c. Bagambiki et consorts*, affaire n° ICTR-97-36-(1), Chambre de première instance, Decision on the Defence Motion on Defects in the Form of the Indictment, 24 septembre 1998, para. 5; *Le Procureur c. Krnojelac*, affaire n° IT-97-25-PT, Chambre de première instance, Décision relative à l'exception préjudicielle de la Défense pour vices de forme de l'acte d'accusation, 24 février 1999, para. 20.

[7] Décision *Milutinovic*.

by the Prosecution. *Ex parte* communications between the Prosecution and the Chamber, such as the requested Memoranda, would destroy any trust the Accused and the public have in the fairness of the proceedings before the Tribunal. The Defence reiterates that the principle stated by the Presiding Judge in the current case about the disclosure of an email from protected witness should apply to the present request. In the Defence's view, disclosure would be a matter to be decided by the Chamber, not a Party. The Prosecution's argument that it did not anticipate disclosure of the said Memoranda should be rejected. The Defence submits that, contrary to the Prosecution's contention, it is entitled to challenge the Chamber's finding that a *prima facie* case exists against the Accused. In its Decision of 14 February 2005[8], the Chamber would have indicated that the Defence would have an opportunity to challenge the supporting material, by way of preliminary motions, after leave to amend the Indictment was granted.

**Deliberations**

*On the Request to Unseal* Ex Parte *Submissions*

6. Pursuant to Rule 66 (A) (i) of the Rules, the Prosecution shall disclose to the Defence :

> "i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused"

*7.* The Chamber concludes, following the jurisprudence, that the supporting material includes

> "the materia1 upon which the charges are based and does not include other material that may be submitted [...], such as a brief of argument or statement of facts"[9].

Documents filed with the goal of assisting the Chamber when adjudicating on a Motion for leave to amend the Indictment under Rule 50 of the Rules do not fall within the category of supporting material to be disclosed under Rule 66 (A) (i) of the Rules[10].

[8] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

[9] *Prosecutor v. Kordic and Cerkez,* Case n° IT-95-14/2-1, Order on Motion to compel Compliance by the Prosecutor with Rules 66 (A) and 68 (TC), 26 February 1999, p. 2 (*Kordic and Cerkez* Decision); *Ojdanic and Sainovic* Decision.

[10] See, by analogy, *Kordic and Cerkez* Decision; *Ojdanic and Sainovic* Decision.

18 février 2005. Or, ces bases ne ressortent pas des pièces justificatives communiquées par le Procureur. Les communications unilatérales entre le Procureur et la Chambre, dont les mémorandums demandés sont des exemples, sont de nature à détruire la confiance que l'accusé et le public ont dans les procès devant le Tribunal. La Défense répète que le principe énoncé en l'espèce par le Président de la Chambre relativement à la communication d'un message électronique de témoin protégé doit également s'appliquer à la présente demande. Elle estime que c'est à la Chambre et non à une partie de décider des questions de communication. Le fait que le Procureur n'ait pas prévu que ses mémorandums pussent être communiqués ne constitue pas, de l'avis de la Défense, un argument valable. Elle affirme être en droit, contrairement à ce que soutient la partie adverse, de contester la conclusion de la Chambre selon laquelle il existe des présomptions suffisantes à l'encontre de l'accusé. Dans sa décision du 14 février 2005[8], la Chambre aurait indiqué, selon la Défense, que celle-ci aurait l'occasion de contester les pièces justificatives par voie d'exception une fois accordée l'autorisation de modifier l'acte d''acusation.

**Délibérations**

*De la levée de la confidentialité de certains écrits unilatéraux*

6. Selon l'article 66 (A) (i) du Règlement, le Procureur communique à la Défense :

> «Dans les trente jours suivant la comparution initiale de l'accusé, copie de toutes les pièces justificatives jointes à l'acte d'accusation lors de la demande de confirmation ainsi que de toutes les déclarations antérieures de l'accusé recueillies par le Procureur».

7. Conformément à la jurisprudence, la Chambre conclut

> «qu'on entend par 'pièces [justificatives] jointes à l'acte d'accusation les documents sur lesquels se fondent les chefs d'accusation, à l'exclusion d'autres documents qui peuvent être présentés [...], tel qu'un exposé des faits ou des conclusions»[9].

Les documents déposés dans le but d'assister la Chambre dans l'examen d'une requête en modification de l'acte d'accusation formée selon l'article 50 du Règlement ne relèvent pas de la catégorie des pièces justificatives dont l'article 66 (A)(i) prescrit la communication[10].

---

[8] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-PT, Chambre de première instance, Décision relative à la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié 14 février 2005.

[9] *Le Procureur c. Kordic et Cerkez*, affaire n° IT-95-14/2-I, Chambre de première instance, Ordonnance relative à la requête aux fins de contraindre le Procureur à respecter les articles 66 (A) et 68 de Règlement de procédure et de preuve, 26 février 1999, p. 2 (l'«ordonnance Kordic and Cerkez»); décision *Ojdanic et Sainovic*.

[10] Voir, par analogie, ordonnance *Kordic et cerkez* et décision *Ojdanic et Sainovic*.

8. In the present case, the Chamber finds that the requested documents are briefs of arguments or statements of facts. The first one, dated 16 February 2005, indexes the further supporting material provided for Paragraph 49 of the Amended Indictment which involved two witness statements that have been disclosed to the Defence since then, suggests an amendment of Paragraph 32.4 and, as support to these last allegations, invites the Chamber to rely on material previously disclosed to the parties[11]. The second Memorandum, dated 23 February 2005, provides explanations on how the Prosecution complied with the Chamber's Decision of 14 February 2005. None of these documents can be qualified as "supporting material" within the meaning of Rule 66 (A) (i) of the Rules. The material upon which the charges against the Accused are based has been disclosed to the parties. The non-disclosure of the requested documents did not amount in any deficiency or late filing of supporting material.

9. The fact that neither the Statute nor the Rules obliges explicitly the Prosecution to disclose the requested documents does not imply that these documents are not subject to disclosure. Access to material from the Prosecution can be granted where it appears necessary in the interest of justice[12].

10. The Chamber notes that the requested Memoranda were filed with the notation "not for distribution for the parties". That notation and the subsequent submissions of the Prosecution indicate that these documents were intended to be *ex parte* filings so that the Defence could not have access to them.

11. As a general rule, applications must be filed *inter partes.* Such a rule finds its expression in the general principle of *audi alteram partem. Ex parte* applications are nevertheless appropriate, and even required, in certain circumstances[13]. They are not necessarily contrary to the fairness of the proceedings. The fundamental principle is that

> "*ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated : where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application"[14].

[11] Namely, the Diary of Pauline Nyiramasuhuko, the Expert Report of André Guichaoua entitled "Butare: The Rebellious Prefecture" and statements of GBU and ANP witnesses.

[12] *Milutinovic* Decision, para. 18.

[13] For instance, Prosecution's application to submit an Indictment for review and confirmation, under Article 18 of the Statute; submissions pursuant to Rule 66 (C) of the Rules or seeking protective orders under Rule 69 of the Rules, see *Prosecutor v. Simic et al.,* Case n° IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material (TC), 28 February 2000, para. 40 *(Simic et al* Decision).

[14] *Simic et al.* Decision, par. 41; *Prosecutor v. Brdanin and Talic,* Case No. IT-99-36/1, Decision on Second Motion by Prosecution for Protective Measures (TC), 27 October 2000, para. 11; *Miluttnovic* Decision, para. 23.

8. En l'espèce, la Chambre estime que les documents visés sont des exposés des faits ou des conclusions. Le premier mémorandum, daté du 16 février 2005, répertorie les pièces justificatives supplémentaires fournies à l'appui du paragraphe 49 de l'acte d'accusation modifié – ce paragraphe implique deux déclarations de témoins qui ont été communiquées à la Défense depuis lors –, il suggère une modification du paragraphe 32.4 de l'acte d'accusation et il invite la Chambre à se reporter, à l'appui des allégations contenues dans ce second paragraphe, à certaines pièces préalablement fournies aux parties[11]. Le second mémorandum, daté du 23 février 2005, explique la façon dont le Procureur s'est conformé à la décision de la Chambre du 14 février 2005. Ni l'un ni l'autre de ces documents ne constituent des «pièces justificatives» au sens de l'article 66 (A) (i) du Règlement. Les pièces sur lesquelles se fondent les chefs d'accusation retenus contre l'accusé ont été communiquées aux parties. La non-communication des documents demandés n'a donc entraîné aucun vice ni retard quant au dépôt des pièces justificatives.

9. Cela étant, le fait que ni le Statut ni le Règlement ne fassent expressément obligation au Procureur de procéder à la communication des documents visés ne signifie pas nécessairement que ceux-ci ne doivent pas être communiqués. L'accès aux pièces dont dispose le Procureur peut être accordé lorsque l'intérêt de la justice semble le commander[12].

10. La Chambre constate que les mémorandums ont été déposés avec la mention «*not for distribution for the parties*» [à ne pas transmettre aux parties]. Il ressort de cette mention et des arguments subséquents du Procureur que celui-ci avait conçu ces écrits pour être déposés unilatéralement, de sorte que la Défense ne puisse pas en prendre connaissance.

11. Si les prétentions des parties doivent généralement être annulées sous l'empire du contradictoire, conformément à l'adage *audi alteram partem,* il est des cas où le dépôt de requêtes unilatérales peut se justifier, voire s'imposer[13]. Le dépôt unilatéral ne va pas nécessairement à rebours de l'équité du procès, pour autant que soit respecté le principe fondamental selon lequel

> «les procédures *ex parte* ne devraient être autorisées que lorsqu'elles sont jugées nécessaires dans l'intérêt de la justice – c'est-à-dire de la justice pour *tous* les intéressés – et ce, dans les circonstances exposées ci-dessus, à savoir lorsqu'il est probable que la communication à l'autre partie ou [aux] autres parties au litige des informations contenues dans la requête, ou le simple fait que la requête soit déposée, nuirait injustement à la partie requérante ou à toute personne impliquée dans la requête ou s'y rattachant»[14] .

---

[11] En l'occurrence, l'agenda de Pauline Nyiramasuhuko, le rapport d'expert soumis par André Guichaoua sous le titre «Butare, la préfecture rebelle» et les déclarations des témoins GBU et ANP.

[12] Décision *Milutinovic*, para. 18.

[13] C'est notamment le cas lorsque le Procureur soumet un acte d'accusation à l'examen et à la confirmation de la Chambre de première instance en application de l'article 18 du Statut, lorsqu'il invoque l'article 66 C) du Règlement pour obtenir que certaines pièces ou informations ne soient pas communiquées, ou lorsqu'il demande des mesures de protection en application de l'article 69 du Règlement. Voir *Le Procureur c. Simic et consorts,* Chambre de première instance, affaire n° IT-95-9, *Décision relative 1) à la requête de Stevan Todorovic aux fins de réexaminer la décision du 27 juillet 1999, 2)* à *la requête du CICR aux fins de réexaminer l'ordonnance portant calendrier du 18 novembre 1999 et 3) aux conditions d'accès aux pièces,* 28 février 2000*,* para. 40 (la «décision *Simic et consorts*»).

[14] Décision *Simic* et consorts, para. 41; *Le Procureur c. Brdanin et Talic*, affaire n° IT-99-36/1, Chambre de première instance, Décision relative à la deuxième requête de l'accusation aux fins de mesures de protection, 27 octobre 2000, para. 11; Décision *Milutinovic*, para. 23.

12. In view of the previous elements, the Chamber concludes that when filing the requested Memoranda *ex parte,* the Prosecution did not intend to take advantage of the Defence nor try to misrepresent the facts to the Chamber.

13. The Chamber however is of the view that the interest of justice and the *audi alteram partem* principle require disclosure of the said documents. Even if the Memorandum of 16 February 2005 does not add, as such, any information not already in possession of the Defence, it assisted the Chamber in its Decision granting leave to maintain Paragraphs 32.4 and 49 of the proposed Amended Indictment[15]. The second Memorandum explains how the Prosecution provided further details concerning certain charges AS requested by the Chamber's Decision of 14 February 2005[16]. This explanation could avoid further requests seeking additional details about these charges. The suggestion that the Prosecution may suffer unfair prejudice because it did not anticipate the documents to be disclosed is not persuasive. Disclosure of the requested documents is therefore warranted.

14. Finally, the Chamber considers that there is no basis for the Defence queries about the filing of additional statements made by the Prosecution and attached to the second Memorandum, while the Decision granting leave to amend the 1n :liçtment was already delivered. The Chamber notes that additional material was provided to allow the Prosecution to comply with the Chamber's order to include supplementary details in the Amended Indictment filed. The supplementary filing did not affect the Chamber's Decision granting leave to amend the Indictment. The rights of the Accused were enhanced due to the details and material added, allowing him to know better the charges against him.

*On the Request to Strike Paragraphs 32.4 and 49 from the Amended Indictment*

15. The Chamber recalls that Motions filed under Rule 72 (A) of the Rules consist solely in (i) challenging jurisdiction of the Tribunal, or (ii) alleging defects in the form of the Indictment, or (iii) seeking severance of counts or separate trials, or (iv) raising objection based on the refusa1 of a request for assignment of Counsel. Through a Preliminary Motion alleging defects in the form of the Indictment, the Accused can challenge a lack of sufficient notice of the charges against him, but not the veracity of the allegations contained in the Indictment. The purpose of reviewing supporting material provided to obtain leave to amend the Indictment is to ensure that the Prosecution has shown sufficient grounds to indict the Accused with the charges as amended, without going into any specific evaluation of the culpability of the Accused. The Chamber's statement that a *prima facie* case exists against the Accused cannot

[15] *Karernera et al.,* Decision on Prosecution Motion for Leave to File Amended Indict-lent and Filing of Further Supporting Material (TC), 18 February 2005.

[16] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

12. Au vu des considérations ci-dessus, la Chambre conclut que le Procureur n'entendait pas, en déposant ses mémorandums unilatéralement, duper la Défense ou abuser la Chambre sur les faits de la cause

13. La Chambre est toutefois convaincue que la communication des documents réclamés par la Défense se justifie au regard de l'intérêt de la justice et du principe du contradictoire. Même si le mémorandum du 16 février 2005 ne contenait, en tant que tel, aucune information dont la Défense ne disposait déjà, la Chambre s'en est aidée pour statuer en faveur du maintien des paragraphes 32.4 et 49 du projet d'acte d'accusation[15]. Le second mémorandum expliquait la façon dont le Procureur avait précisé certaines accusations comme le lui enjoignait la décision du 14 février 2005[16]. Les explications ainsi fournies sont de nature à prévenir d'autres demandes de précisions sur ces accusations. La Chambre n'est pas convaincue par l'argument selon lequel le Procureur subirait un préjudice injustifié du fait que les mémorandums n'eussent pas été conçus pour être communiqués. La communication des documents visés est donc justifiée,

14. Enfin, la Chambre juge non fondées les préoccupations de la Défense quant aux déclarations supplémentaires que le Procureur a jointes à son second mémorandum, après que la modification de l'acte d'accusation avait été autorisée. Le Procureur a fourni ces pièces supplémentaires pour se conformer à la décision de la Chambre lui enjoignant d'apporter certaines précisions à l'acte d'accusation modifié tel qu'il aurait été déposé. Ce dépôt supplémentaire n'a pas eu d'incidence sur l'autorisation de modifier l'acte d'accusation. Les précisions et les pièces ajoutées vont dans le sens des droits de l'accusé en ce qu'elles lui permettent de mieux cerner les accusations portées contre lui.

*De la suppression des paragraphes 32.4 et 49 de l'acte d'accusation modifié*

15. La Chambre rappelle que les seules exceptions prévues par l'article 72 (A) du Règlement sont i) l'exception d'incompétence, ii) l'exception fondée sur un vice de forme de l'acte d'accusation, iii) l'exception aux fins de disjonction de chefs d'accusation ou d'instances et iv) l'exception fondée sur le rejet d'une demande de commission d'office d'un conseil. S'il peut ainsi soulever des vices de l'acte d'accusation et faire valoir qu'il n'a pas été suffisamment averti des accusations portées contre lui, l'accusé ne saurait mettre en cause, par cette voie, la véracité des allégations contenues dans l'acte d'accusation. L'examen des pièces justificatives fournies à l'appui d'une demande de modification de l'acte d'accusation doit permettre à la Chambre de s'assurer que le Procureur a fait état d'éléments suffisants pour retenir contre l'accusé les chefs d'accusation modifiés. Il ne s'agit pas d'entreprendre une appréciation spécifique de la culpabilité de l'intéressé. La confirmation de l'existence de présomptions suffisantes contre l'accusé ne peut donc donner prise à une exception au

[15] *Karemera et consorts*, Chambre de première instance, Décision relative à la requête du Procureur tendant à obtenir l'autorisation de déposer un acte d'accusation modifié et des pièces justificatives supplémentaires, 18 février 2005.

[16] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba*, affaire n° ICTR-98-44-PT, Chambre de première instance, Décision relative a la disjonction de l'instance d'André Rwamakuba et à l'autorisation de déposer un acte d'accusation modifié, 14 février 2005.

therefore be challenged by filing Preliminary Motions under Rule 72 (A) of the Rules. In its Decision of 14 February 2005, the Chamber has not decided otherwise[17].

16. The allegations contained at Paragraph 32.4 are supported by the Diary of Pauline Niyiramasuhuko and Statements of Witnesses GBU and ANP. These materials were previously disclosed to the Defence and explicitly pinpointed in the *Index of Documents contained in Binders*, annexed to the Prosecution Motion of 17 December 2004[18].

17. The Witness statement that

> "Minister Mugenzi told the new preièct that his mission as prefect of Gisenyi was to kill al1 the Tutsis"

supports fully the allegation that

> "Justin Mugenzi ordered or instigated attacks against the Tutsi population, emphasizing the new *préfet*'s mission as the elimination of the Tutsis",

whether the meeting took place in Kibungo prefecture or in Gisenyi[19]. Nothing in the wording of the second sentence allows the supposition that it applies only to a speech held in Kibungo prefecture.

18. Contrary to the Defence's contention, a *prima facie* case has been sufficiently established concerning Paragraphs 32.4 and 49 of the Amended Indictment. The second Defence's contention falls therefore to be rejected.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

I. GRANTS in part the Motion.

II. ORDERS the Prosecution to disclose immediately to all parties in the present case the Memoranda of 16 February 2005 and 23 February 2005, respectively entitled "Further Supporting Material in Compliance with Decision of 11 February 2005" and "Amended Indictment of 23 February 2005/Further Supporting Material".

III. DISMISSES the remainder of the Motion.

Arusha, 3 May 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[17] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005, para. 36

[18] Prosecution Motion that Index has been disclosed to the Defence a second time on 24 March 2005.

[19] Second sentence of Paragraph 49 of the Amended Indictment.

sens de l'article 72 (A) du Règlement. Et la décision du 14 février 2005 ne faisait rien d'autre que d'apporter une telle confirmation[17].

16. Les allégations portées au paragraphe 32.4 de l'acte d'accusation sont fondées sur l'agenda de Pauline Nyiramasuhuko et sur les déclarations des témoins GBU et ANP. Ces pièces ont déjà été communiquées à la Défense et ont été expressément indiquées dans le répertoire *(Index of Documents contained in Binders)* annexé à la requête du Procureur du 17 décembre 2004[18].

17. La déclaration de témoin selon laquelle

> «[l]e Ministre Mugenzi a dit au nouveau préfet que sa mission en tant que préfet de Gisenyi consistait à tuer tous les Tutsis»

étaye tout à fait l'allégation selon laquelle

> «Justin Mugenzi a ordonné des attaques contre la population tutsie ou incité à perpétrer de telles attaques en soulignant que la mission du nouveau préfet était d'éliminer les Tutsis»,

et ce, que la réunion en question ait eu lieu dans la préfecture de Kibungo ou à Gisenyi[19]. Rien dans la seconde phrase du paragraphe concerné ne permet de supposer qu'il s'agisse exclusivement d'un discours prononcé dans la préfecture de Kibungo.

18. Contrairement à ce qu'affirme la Défense, des présomptions suffisantes ont été établies en ce qui concerne les paragraphes 32.4 et 49 de l'acte d'accusation modifié. Il convient donc de rejeter la seconde prétention de la Défense.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT en partie à la requête;

II. ORDONNE au Procureur de communiquer immédiatement à toutes les parties à l'instance les mémorandums des 16 et 23 février 2005 respectivement intitulés «*Further Supporting Material in Compliance with Decision of 14 February 2005*» et «*Amended Indictment of 23 February 2005 Further Supporting Material*»;

III. REJETTE, pour le surplus, la requête.

Fait à Arusha, en anglais, le 3 mai 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[17] *Ibid*., para. 36.

[18] Ce répertoire a été communiqué à la Défense une seconde fois le 24 mars 2005.

[19] Seconde phrase du paragraphe 49 de l'acte d'accusation modifié.

## *Order for Filing Documents Rule 54 of the Rules of Procedure and Evidence 5 May 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of un-redacted witness statements to the Chamber*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 54*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge ("Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules");

NOTING "Joseph Nzirorera's Motion to Compel Inspection and Disclosure", filed by the Defence for the Accused Joseph Nzirorera ("Defence") on 4 April 2005;

CONSIDERING that in its Motion the Defence requests disclosure of 14 un-redacted witness statements concerning Witness T;

CONSIDERING that to assess the said Motion, the Chamber needs to be in possession of all relevant information;

ACCORDINGLY DIRECTS the Prosecution to file no later than 6 May 2005 and only to the attention of the Chamber, the following documents in their un-redacted form :

> The 14 witness statements previously disclosed by OTP Attorney Stephen Rapp concerning Witness T and requested by the Defence in its Motion to compel Inspection and Disclosure.

Arusha, 5 May 2005, done in English.

[Signed] : Dennis C. M. Byron

***

## *Ordonnance aux fins de dépôt de documents Article 54 du Règlement de procédure et de preuve 5 mai 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juge : Dennis C. M. Byron, Président de Chambre

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Communication de declarations de témoins non caviardées à la Chambre

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 54*

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

SIÉGEANT en la Chambre de première instance III, composée du jugc Dennis C. M. Byron, Président de Chambre (la «Chambre»), conformément à l'article 54 du Règlement de procédure et de preuve (le «Règlement»),

VU la requête intitulée, «*Joseph Nzirorera's Motion to Compel Inspection and Disclosure*», déposée le 4 avril 2005 par la Défense de l'accusé, (la «Défense»),

ATTENDU que dans sa requête la Défense demande que lui soit communiquées 14 déclarations de témoin non caviardées concernant le témoin T,

ATTENDU que pour apprécier cette requête, la Chambre a besoin d'être en possession de toutes les informations pertinentes,

EN CONSÉQUENCE, ORDONNE au Procureur de déposer au plus tard le 6 mai 2005 et à la seule attention de la Chambre, les documents suivants dans leur version non caviardée :

> Les quatorze déclarations de témoin antérieurement communiquées par M. Stephen Rapp du Bureau du Procureur, relativement au témoin T et demandées par la Défense dans sa requête tendant à obtenir de la Chambre qu'elle ordonne l'inspection et la communication des documents.

Arusha, le 5 mai 2005.

[Signé] : Dennis C. M. Byron

***

## *Order for filing Documents Rule 54 of the Rules of Procedure and Evidmce 11 May 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of un-redacted witness statements to the Chamber*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 54*

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

SITTING as Trial Chamber III, composed of Judge Denis C. Byron, Presiding, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules");

NOTING "Joseph Nzirorera's Motion to Compel Inspection and Disclosure", filed by the Defence for the Accused Joseph Nzirorera ("Defence") on 4 April 2005;

CONSIDERING that in its Motion the Defence requests disclosure of 14 un-redacted witness statements concerning Witness T;

CONSIDERING that to assess the said Motion, the Chamber needs to be in possession of all relevant information;

ACCORDINGLY DIRECTS the Prosecution to identify and describe for the attention of the Chamber and the parties in the present case what, if any, protective measures have been ordered by the Tribunal and are still in force regarding the 14 witnesses for which disclosure of above-mentioned un-redacted statements are requested by the Defence; and, to file along with its submissions any such protective Orders, no later than 13 May 2005.

Arusha, 11 May 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Ordonnance aux fins de dépôt de documents Article 54 du Règlement de procédure et de preuve 11 mai 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Communication des déclarations non caviardées de témoins*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 54*

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

SIÉGEANT en la Chambre de première instance III, composée, des juges Dennis C. M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam, (la «Chambre»), conformément à l'article 54 du *Règlement de procédure et de preuve* (le «Règlement»),

VU la requête intitulée, «*Joseph Nzirorera*'s *Motion to Compel Inspection and Disclosure*», déposée le 4 avril 2005 par la Défense de l'accusé, (la «Défense») :

ATTENDU que dans sa requête la Défense demande que lui soit communiquées 14 déclarations de témoin non caviardées relatives au témoin T,

ATTENDU que pour apprécier cette requête, la Chambre a besoin d'être en possession de toutes les informations pertinentes,

EN CONSEQUENCE, ORDONNE au Procureur d'identifier et de préciser à l'attention de la Chambre et des parties de la présente cause, les mesures de protection qui ont été ordonnées par le Tribunal et toujours en vigueur en ce qui concerne les 14 témoins pour lesquels la Défense demande la communication des déclarations non caviardées ci-dessus et de déposer ses conclusions avec toute ordonnance de protection ainsi rendue, au plus tard le 13 mai 2005.

Arusha, le 11 mai 2005.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

***

## *Decision on Joseph Nzirorera's Motion to hold Trial Sessions in Rwanda 13 May 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Withdrawal of the Motion to hold Sessions in Rwanda – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 33 (B)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Joseph Nzirorera's Motion to Hold Trial Sessions in Rwanda" ("Motion"), filed by the Defence of the Accused ("Defence") on 4 April 2005;

NOTING that the Accused, Mathieu Ngirumpatse, has opposed the Motion in his Response entitled "Mémoire en réponse de M. Ngirumpatse sur la *Joseph Nzirorera's Motion to hold Trial Sessions in Rwanda*" filed on 12 April 2005; that the Accused, Édouard Karemera, has also opposed the Motion in his "*Requête en opposition à la requête de Joseph Nzirorera*" filed on 27 April 2005; that the Prosecutor has contested the Motion in his Response filed on 11 April2005; and that the Registrar has made his submissions under Rule 33 (B) of the Rules of Procedure and Evidence on 3 May 2005;

CONSIDERING that in the li ht of the oppositions of the Co-Accused, the Defence has decided to withdraw its Motion[1];

ACCORDINGLY, THE CHAMBER

ACCEPTS the withdrawal of the Motion and DIRECTS the Registrar to strike it out from the pending motions list.

Arusha, 13 May 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[1] *Withdrawal of Joseph Nzirorera's Motion to Hold Trial Sessions in Rwanda,* filed on 2 May 2005.

## *Order Granting Time to Reply to Additional Prosecution's Submission Rule 54 of the Rules of Procedure and Evidence 16 May 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of un-redacted witness statements to the Chamber, Protective measures of the witness, Interests of justice, Fairness of the proceedings, Additional Defence's Response*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 54*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules");

NOTING "Joseph Nzirorera's Motion to Compel Inspection and Disclosure", filed by the Defence for the Accused Joseph Nzirorera ("Defence") on 4 April 2005;

NOTING the "Prosecutor's Submission in Compliance with Order for filing Documents of 11 May 2005" ("Submission"), filed on 13 May 2005;

CONSIDERING that in its Order of 11 May, the Chamber

> "directs the Prosecution to *identify and describe* to the attention of the Chamber and the parties in the present case what, if any, protective measures have been ordered by the Tribunal and are still in force regarding the 14 witnesses for which disclosure of above-mentioned un-redwted statements are requested by the Defence; and, to file along with its submissions any such protective Orders, no later than 13 May 2005" (emphasis added).

NOTING that in its Submission, in addition to identifying and describing the protective measures that would still be in force regarding certain witnesses, the Prosecution submits new arguments to oppose the above-mentioned Defence's request to obtain disclosure of 14 unredacted statements;

CONSIDERING that in the interests of justice and the fairness of the proceedings, the Defence should be allowed to respond to this additional Prosecution Submission, if it considers it necessary;

## *Ordonnance accordant un délai pour répondre aux observations supplémentaires du Procureur Article 54 du Règlement de procédure et de preuve 16 mai 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Communication des déclarations non caviardées de témoins, Mesures de protection des témoins, Intérêts de la justice, Equité de la procédure, Réponse supplémentaire de la Défense*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 54*

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

SIÉGEANT en la Chambre de première instance III, composée des juges Dennis C. M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»), conformément à l'article 54 du Règlement de procédure et de preuve (le «Règlement»),

VU la requête de Nzirorera intitulée, «*Joseph Nzirorera's Motion to Compel Inspection and Disclosure*», déposée le 4 avril 2005 par la Défense de l'accusé Joseph Nzirorera (la «Défense»),

VU les observations du Procureur intitulées «*Prosecutor's Submissions in Compliance with Order for Filing Documents of I I May 2005*», (les «Observations»), déposées le 13 mai 2005,

ATTENDU que dans son ordonnance du 11 mai, la Chambre

> «demande au Procureur *d'identifier* et de *préciser* à l'attention de la Chambre et des parties de la présente cause, les mesures de protection qui ont été ordonnées par le tribunal et toujours en vigueur en ce qui concerne les quatorze témoins pour lesquels la Défense demande la communication des déclarations non caviardées ci-dessus et de déposer ses conclusions avec toute ordonnance de protection ainsi rendue, au plus tard le 13 mai 2005».[Traduction] (Non souligné dans le texte original).

VU que dans ses observations, outre le fait d'identifier et de préciser les mesures de protection qui seraient toujours en vigueur pour certain témoins, le Procureur avance de nouveaux arguments pour s'opposer à la demande ci-dessus de la Défense de se faire communiquer les quatorze déclarations non caviardées,

ATTENDU que dans l'intérêt de la justice et de l'équité de la procédure, la Défense devrait être autorisée a répondre aux observations supplémentaires déposée; par le Procureur, si elle le juge utile,

ACCORDINGLY, AUTHORIZES the Defence for Nzirorera to file a Reply to the Prosecution Submission no later than 20 May 2005.

Arusha, 16 May 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

EN CONSÉQUENCE, AUTORISE la Défense de Nzirorera à déposer une Réponse aux observations du Procureur au plus tard le 20 mai 2005.

Arusha, le 16 mai 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Decision on Joseph Nzirorera's Motion for Deadline for filing of Reports of experts Rule 94* bis *(A) of the Rules of Procedure and Evidence 16 May 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Expert Witness, Delay to file expert witness report – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73 and 94* bis *(A)*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Pauline Nyiramasuhuko et al., *Decision on the Defence Motions for an Extension of Time Limit for Filing the Notice in respect of Expert Witness Statements (Rules 73 and 94* bis *of the Rules), 25 May 2001 (ICTR-97-21 and ICTR-97-29); Trial Chamber,* 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); Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Mugenzi's Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements (Rule 94* bis*), 10 November 2004 (ICTR-99-50)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts", filed by the Defence of the Accused ("Defence") on 29 March 2005;

CONSIDERING the Prosecutor's Response thereto filed on 30 March 2005 and the Defence's Reply thereto filed on 4 April 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

### INTRODUCTION

1. The commencement of the trial in the instant proceedings is scheduled on 6 September 2005. The Prosecutor intends to call expert witnesses to testify during its case.

None of the Defence Counsel has received disclosure of their reports from the Prosecutor.

2. The Chamber has now to determine whether a deadline for disclosure of such reports should be imposed on the Prosecutor.

ARGUMENTS OF THE PARTIES

3. The Defence argues that the Prosecutor should disclose all reports of expert witnesses 60 days before trial to avoid delays during proceedings and allow the parties to prepare their case properly. Consequently, the Defence seeks an Order requiring the Prosecutor to disclose all reports of expert witnesses that he intends to call in its case no later than 5 July 2005.

4. The Prosecutor affirms that Rule 94 *bis* (A) of the Rules requires him to disclose the expert reports more than 21 days before their testimonies if he is able to do so. In the instant case, the expert witnesses would be expected not to testify before the end of 2006. The Prosecutor argues that reports prepared since 2002 are no longer suitable. He also intends to replace an expert who stated that he is no longer willing to testify. These reasons would explain why the requested reports have not yet been disclosed yet.

**Deliberations**

5. The Chamber recalls that Rule 94 *bis* (A) states that 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 day prior to the date on which the expert is expected to testify. The Rule distinguishes *filing* with the Trial Chamber from *disclosure* to the opposing party. The mandate to disclose the statements as early as possible has been applied in other cases[1] The Rule does not require the parties to wait until twenty-one days before testimony to disclose the witness' expert report nor does it prohibit disclosure before the trial commences[2].

6. The Prosecutor's explanation for the current non-availability of the statements suggests that the requested deadline of 5th July 2005 may be premature. The trial is scheduled to commence on 6 September 2005. The Chamber considers Monday, 15 August 2005 is a date by which it could reasonably expected that the statements would have been obtained. If they have not been disclosed by that date, a further explanation should be provided to the Chamber and the parties on the causes for the default, with an indication of the date by which the disclosure will occur.

[1] *Bizimungu et al.*, Case n° ICTR-99-50-T Decision on Mugenzi's Confidential Motion for the Filing, Service or Disclosure of Expert Reports and/or Statements (Rule 94 *bis*) (TC), 10 November 2004, para. 19 ; *Nyiramasuhuko et al.*, Case n° ICTR-97-21-T and ICTR-97-29-T, Decision on the Defence Motions for an Extension of Time Limit for Filing the Notice in respect of Expert Witness Statements (Rules 73 and 94 *bis* of the Rules) (TC), 25 May 2001, para. 12.

[2] *Bagosora et al.*, Case n° ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 23.

For the above mentioned reasons, the Chamber

I. DENIES the Motion;

II. ORDERS the Prosecutor to disclose to the Chamber and the Defence of all the Accused in the instant proceedings, by Monday, 15 August 2005, the statements of all the expert witnesses he intends to call to testify. In case of default of disclosure, the Prosecutor should provide the Chamber and the Defence of all the Accused with the reasons and indicate the date by which the disclosure will occur.

Arusha, 16 May 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Décision relative à la requête d'Edouard Karemera en prolongation de délai Article 20 du Statut, Articles 54 et 72 du Règlement de procédure et de preuve 18 mai 2005 (ICTR-98-44-PT)*

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Incidence des délais de traduction sur les délais pour déposer ses requêtes préliminaires, Absence de prolongation, Délai supplémentaire, Intérêt de la justice – Requête rejetée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 54, 72, 72 (A) et 73 (A); Statut, art. 20*

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

SIÉGEANT en la Chambre de première instance III composée des luges Dennis C. M. Byron, Président, Emile Francis Short et Gberdao Gustave Kam («Chambre»);

SAISIE de la «Requête aux fins de prolongation de délais dans l'attente d'obtenir la version française de la requête de la Défense de J. Nzirorera relative à l'entreprise criminelle commune» déposée par la Défense d'Édouard Karemera («Défense») le 13 mai 2005 («requête»);

CONSIDÉRANT la réponse du Procureur à cette requête, déposée le 16 mai 2005;

STATUE comme suit, sur la base des soumissions écrites des parties, conformément à l'article 73 (A) du Règlement de procédure et de preuve («Règlement»).

1. Le procès en la présente affaire est inscrit au rôle pour commencer le 5 septembre 2005. Par une ordonnance portant calendrier, la Chambre a arrêté la date limite du dépôt des requêtes préliminaires en vertu de l'article 72 (A) du Règlement au 17 mai 2005, le Procureur devant déposer, au plus tard, ses réponses auxdites requêtes le 23 mai 2005[1]. La Chambre est à présent saisie d'une demande en extension de délai pour le dépôt de requêtes préliminaires.

2. La Défense soutient qu'en vue de pouvoir déposer ses requêtes préliminaires, il lui est nécessaire de disposer de la version française des requêtes déposées par l'accusé Nzirorera et des réponses du Procureur à ces requêtes en la présente affaire. Elle sollicite, en conséquence, une prolongation du délai fixé par la Chambre pour le dépôt des requêtes préliminaires jusqu'à la communication des documents précités en version française.

3. Le Procureur considère que les délais de traduction des requêtes déposées par l'accusé Nzirorera ne peuvent avoir aucun impact sur l'obligation de la Défense de Karemera de déposer ses requêtes préliminaires dans le délai fixé par la Chambre. S'il admet qu'une prolongation de délai pourrait être éventuellement accordée à la Défense en vue de répondre aux requêtes déposées par Nzirorera, il soutient qu'en pareille hypothèse, le délai dans lequel le Procureur doit répondre à l'ensemble des requêtes préliminaires devrait, par conséquent, être également prorogé.

4. De l'avis de la Chambre, le fait que la Défense ne dispose pas de la version traduite de requêtes déposées par une autre partie en la présente affaire n'affecte en rien son obligation de déposer ses requêtes préliminaires fondées sur l'article 72 (A) du Règlement dans le délai imparti par la Chambre. Aucune prolongation de ce délai sur cette base ne pourrait dès lors être accordée.

5. La Chambre note cependant qu'un délai supplémentaire peut être nécessaire à la Défense pour faire valoir ses arguments quant aux requêtes déposées en anglais par la Défense de Nzirorera. Dans l'intérêt de la justice et considérant que le début du procès n'en sera pas affecté, la Chambre estime pouvoir accorder à la Défense un tel délai supplémentaire.

PAR CES MOTIFS,

LA CHAMBRE

REJETTE la requête en prolongation de délai en vue du dépôt de requêtes préliminaires sur la base de l'article 72 (A) du Règlement;

RAPPELLE que le délai pour le dépôt de telles requêtes expirait au 17 mai 2005 et que le délai pour le dépôt de la réponse du Procureur à ces requêtes expire le 23 mai 2005;

AUTORISE la Défense de Karemera à déposer toute réponse aux requêtes préliminaires présentées par la Défense de Nzirorera au plus tard le 6 juin 2005;

[1] Ordonnance portant calendrier (Ch.), 24 mars 2005, telle que modifiée par la Décision relative à la requête du Procureur en prolongation de délai pour le dépôt de la traduction de déclarations de témoins (Ch.), 15 avril 2005.

AUTORISE le Procureur à déposer la réplique aux réponses de la Défense de Karemera au plus tard le 13 juin 2005.

Fait en français à Arusha, le 18 mai 2005.

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Decision on Joseph Nzirorera's Motion for Order finding Decisions to be of "No Effect" Rules 46 (A) and 73 of the Rules of Procedure and Evi~!ence 24 May 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Ratione temporis scope of the Decisions of the Tribunal, Permanent effect of the Trial decisions through the pre-Appeal period, Agreement of the Parties – Proper administration of justice, Absence of a right to respond to a Reply to a Motion, Late Response of the Prosecutor, Response examined in the interests of justice – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 5* bis *(D), 46 (A) and 73*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision on the Defence Motion for Modification of a Decision of 12 July 2000 on Protective Measures for Prosecution Witnesses, 7 October 2003 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Joseph Nzirorera*, Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence Motion for Immediate Disclosure, 20 October 2003 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Edouard Karemera et al.*, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of "No Effect"" ("First Motion"), filed by the Defence of the Accused Nzirorera ("Defence") on 25 February 2005;

## *Décision relative à la requête de Joseph Nzirorera tendant à faire déclarer «nulles et de nul effet» des décisions antérieures Articles 46 (A) et 73 du Règlement de procédure et de preuve 24 mai 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Joseph Nzirorera – Application ratione temporis des décisions du Tribunal, Continuité de l'effet des décisions entre les périodes de procès et d'appel, Identité de vue entre les parties – Bonne administration de la justice, Absence d'un droit de produire une réplique à la suite de la réponse à une requête, Réponse tardive du Procureur, Réponse examinée dans l'intérêt de la justice –Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 5* bis *(D), 46 (A) et 73*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts, *Decision on the Defence Motion for Modification of a Decision of 12 July 2000 on Protective Measures for Prosecution Witnesses, 7 octobre 2003 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Joseph Nzirorera*, Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection en faveur des témoins G et T et aux fins d'étendre les mesures de protection des témoins à charge dans les affaires Nzirorera et Rwamakuba aux co-accusés Ngirumpatse et Karemera, et décision relative à la requête de la défense en communication immédiate de pièces, 20 octobre 2003 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts*, Décision relative à la disjonction de l'instance de Rwamakuba et à la modification de l'acte d'accusation (Chambre de première instance), 7 décembre 2004 (ICTR-98-44)*

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

SIÉGEANT en la Chambre de première instance III, composée des juges Dennis C. M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»),

SAISI d'une requête intitulée *Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of «No Effect»* (la «Première requête») que le conseil de l'accusé Nzirorera (la «Défense») a déposée le 25 février 2005 pour faire déclarer «nulles et de nul effet» des décisions antérieures,

CONSIDERING the Prosecution's Response, filed on 16 March 2005;

BEING SEIZED further of the Defence "Motion to Strike Prosecutor's Response To Nzirorera's Motion for Order Finding Prior Decisions to Be of No Effect and Motion for Warning pursuant to Rule 46 (A)" ("Second Motion"), filed on 17 Match 2005;

CONSIDERING the Prosecution's Response thereto, filed on 18 March 2005;

HEREBY DECIDES the Motions pursuant to Rules 73 of the Rules of Procedure and Evidence ("Rules").

## Introduction

1. The trial against the Accused commenced on 27 November 2003. During the course of the proceedings, one of the Judges withdrew from the case[1], and the remaining Judges decided to continue the trial with a substitute Judge pursuant to Rule 5 *bis* (D) of the Rules[2].

2. This Decision to proceed was successfully challenged by the Accused before the Appeals Chamber which granted the Appeals on the points of assessrrient of credibility in the absence of an opportunity to observe the demeanour of witnesses and apprehension of bias[3]. It should be stressed at the outset that the Appeals Chamber found that there was "no actual bias". Its ruling was based purely on an abundance of caution to ensuie that interest ofjustice was guaranteed[4].

3. As a result of this ruling, the current Chamber, in preparing to hear the case anew, has determined that Decisions regarding evidentiary matters no longer have any bearing on the current proceedings and the previous Decision of 13 February 2004; granting leave to amend the Indictment should be disregarded[5]. The question now before the Chamber is whether certain Decisions rendered by the previous Bench should also be disregarded.

[1] See *Prosecutor* v. *Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-94-44-PT *(Karemera et al.),* Decision on Motions by Nzirorera and Rwiirnakuba for Disqualification of Judge Vaz (*Bureau*), 17 May 2004, para. 6.

[2] *Karemera et al.,* Decision on Continuation of Trial (TC), 16 July 2004.

[3] *Karemera et al.,* Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera''s Motion for Leave to Consider New Material (AC), 22 October 2004 (*Appeals Chamber Reasons* of 22 October 2004).

[4] *Ibid.,* para. 67.

[5] *Karemera et al.,* Decision on Severance of André Rwamakuba and Amendment; of the Indictment (TC), 7 December 2004.

VU la réponse du Procureur, déposée le 16 mars 2005,

SAISI en outre de la requête de la Défense intitulée *Motion to Strike Prosecutor's Response to Nzirorera's Motion for Order Finding Prior Decisions to Be of No Effect and Motion for Warning Pursuant to Rule 46 (A)* (la «Seconde requête»), déposée le 17 mars 2005 pour faire déclarer la réponse du Procureur irrecevable et donner à celui-ci un avertissement en vertu de l'article 46 (A) du Règlement,

VU la réponse du Procureur à la Seconde requête, déposée le 18 mars 2005,

STATUE sur ces requêtes conformément aux dispositions de l'article 73 du Règlement de procédure et de preuve (le «Règlement»).

## Introduction

1. Le procès des accusés s'est ouvert le 27 novembre 2003. Au cours des débats, l'un des juges s'est déporté[1] et les juges restants ont décidé de continuer à entendre l'affaire avec un juge suppléant en vertu de l'article 5 *bis* (D) du Règlement[2].

2. La décision prescrivant la continuation du procès a été attaquée avec succès par les accusés devant la Chambre d'appel qui a fait droit à leurs recours en ce qui concerne le moyen pris de l'appréciation de la crédibilité des témoins sans avoir la possibilité d'observer le comportement de ceux-ci et le moyen pris du soupçon de partialité[3]. Il convient de souligner d'entrée de jeu que la Chambre d'appel a conclu à l'inexistence d'un «véritable parti pris» en l'espèce, sa décision ne procédant que d'une extrême précaution destinée à assurer l'intérêt de la justice[4].

3. La Chambre d'appel ayant ainsi statué, la Chambre telle qu'elle est actuellement composée a dit, dans le cadre des dispositions nécessaires pour entendre à nouveau l'affaire, que les décisions antérieures touchant à l'administration de la preuve ne s'appliqueraient plus en l'espèce et qu'il convenait de ne pas tenir compte de celle du 13 février 2004 autorisant la modification de l'acte d'accusation[5]. A présent, la Chambre est invitée à dire si certaines des décisions rendues par le collège de juges précédent doivent aussi être jetées aux oubliettes.

---

[1] Voir *Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba,* affaire n° ICTR-94-44-PT (affaire *Karemera et consorts),* Décision relative aux requêtes de Nzirorera et de Rwamakuba en récusation de la juge Vaz (Bureau), 17 mai 2004, para. 6.

[2] Affaire *Karemera et consorts,* Décision relative à la continuation du procès (Chambre de première instance), 16 juillet 2004

[3] Karemera et consorts, Motifs de la décision de la Chambre d'appel intitulée «Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera S Motion for Leave to Consider New Material» (Chambre d'appel), 22 octobre 2004 (Motifs de la Chambre d'appel du 22 octobre 2004).

[4] *Ibid*., para. 67.

[5] Affaire *Karemera et consorts,* Décision relative à la disjonction de l'instance d'André Rwamakuba et à la modification de l'acte d'accusation (Chambre de premiere instance), 7 décembre 2004.

**Arguments of the Parties**

4. In the First Motion, the Defence requests the Chamber to declare that certain Decisions issued by the previous Bench are of "no effect". The Motion refers to 26 written Decisions, and all oral Decisions rendered during trial and written Decisions denying certification to appeal oral Decisions, in which the Judge in respect of -whom the Appeals Chamber has found an appearance of bias participated and which coniainetl rulings adverse to the Accused. The Defence contends that its request ought to logically follow from the rulings made by the Appeals Chamber and by this Trial Chamber in its Decision of 7 December 2004[6].

5. The Prosecution does not oppose a finding that written Decisions on evidence issues[7] and all oral decisions must be disregarded. It concedes that the Decision on the Amended Indictment of 18 February 2004[8] is disregarded since the said Indictment is no longer valid. It submits that since numerous Decisions on disclosure were complied with, a finding that these decisions should be disregarded would be meaningless.

6. The Prosecution only objects that three categories of Decisions should be disregarded :

It contends that since the reasonable apprehension of bias did not occur until 5 September 2005 and the Decisions on State Cooperation[9] were delivered before that date, they should still have effect.

It objects to any statement nullifying prior Decisions on Witness Protective Measures as it could leave Witnesses G and T without critical protections.

[6] See Appeals Chamber Reasons of 22 October 2004; *Karemera et al.,* Decision on Severance of André Rwamakuba and Amendments of the Indictment (TC), 7 December 2004

[7] Namely, *Karemera et al.,* Decision on Defence Motion for an Order to Prosecution Witnesses to Produce, At Their Appearance, Their Diaries and Other Written Materials from 1992 to 1994 and their Statements Made Before Rwandan Judicial Authorities (TC), 24 November 2003; *Karemera et al.,* Decision on the Defence Motion to Strike Testimony of Witnesses GBG and GBV, 30 April 2004; Decision on Prosecutor's Motion for Judicial Notice (TC), 30 April 2004.

[8] *Karemera et al.,* Decision on the Preliminary Defence Motion to Dismiss the Ammded indictment for Defects in Form (TC), 7 April 2004.

[9] Namely, *Karemera et al.,* Decision on the Defence Motion to Order the Government of Rwanda to Show Cause (TC), 4 September 2003; *Karemera et al.,* Decision on the Requests to the Governrnents of the United States of America, Belgium, France, and Germany for Cooperation (TC), 4 September 2003.

**Arguments des parties**

4. Dans la Première requête, la Défense demande à la Chambre de déclarer «nulles et de nul effet» certaines décisions rendues par le collège précédent. La requête vise 26 décisions prononcées par écrit ainsi que toutes les décisions orales rendues lors du procès et les décisions écrites rejetant des demandes d'autorisation d'interjeter appel de ces décisions orales. Défavorables à l'accusé, les décisions en question ont été rendues avec la participation du juge chez qui la Chambre d'appel a trouvé une apparence de partialité. Selon la Défense, la logique voulait qu'elle forme sa demande à la suite des déclarations de la Chambre d'appel et de celles faites par la présente Chambre de première instance dans sa décision du 7 décembre 2004[6].

5. Le Procureur ne s'oppose pas à ce que la Chambre prescrive de mettre au placard les décisions écrites touchant à l'administration de la preuve[7] et toutes les décisions orales. Il reconnaît que la décision relative à l'acte d'accusation du 18 février 2004[8] est devenue lettre morte, puisque cet acte d'accusation n'est plus valable. Par contre, il estime que de nombreuses décisions relatives à la communication de pièces ayant déjà été exécutées, dire et juger que ces décisions doivent devenir lettre morte serait une aberration.

6. Le Procureur s'oppose uniquement à ce que trois catégories de décisions soient enterrées :

Il soutient que le soupçon légitime de partialité ne s'étant manifesté que le 5 septembre [2003] et les décisions relatives à la coopération des États[9] ayant été rendues avant cette date, celles-ci doivent continuer à produire leurs effets.

Il s'oppose à toute déclaration visant à annuler des décisions antérieures prescrivant des mesures de protection des témoins, car elle pourrait priver les témoins G et T de dispositifs de protection essentiels.

[6] Voir Motifs de la Chambre d'appel du 22 octobre 2004; affaire *Karemera et consorts,* Décision relative à la disjonction de l'instance d'André Rwamakuba et à la modification de l'acte d'accusation (Chambre de première instance), 7 décembre 2004

[7] Il s'agit des décisions suivantes : Décision relative à la requête de la Défense aux fins de la délivrance d'une ordonnance enjoignant aux témoins à charge de produire, lors de leur comparution, leurs agendas ou autres écrits datant de 1992 à 1994 et leurs déclarations faites devant des autorités judiciaires rwandaises (Chambre de premiere instance), 24 novembre 2003; *Decision on the Defence Motion to Strike Testimony of Witnesses GBG and GBV,* 30 avril 2004; Décision relative a la requête du Procureur aux fins de constat judiciaire (Chambre de première instance), 30 avril 2004.

[8] Affaire *Karemera et consorts,* Décision relative aux exceptions préjudicielles de la Défense fondées sur les vices de forme de l'acte d'accusation modifié (Chambre de première instance), 7 avril 2004.

[9] Il s'agit des décisions suivantes : Décision relative à la requête de la Défense aux fins d'une ordonnance prescrivant au Gouvernement rwandais de s'expliquer (Chambre de première instance), 4 septembre 2003; Décision relative a la requête aux fins d'obtenir la coopération des Gouvernements des États-unis d'Amérique, de la Belgique, de la France et de l'Allemagne (Chambre de première instance), 4 septembre 2003.

It argues that Decisions ordering sanctions against the Lead Counsel for the Accused[10] should not be nullified because such a finding would render meaningless the Chamber's Decision rejecting Nzirorera's Motion to vacate the same sanctions[11].

7. In the Second Motion, the Defence requests the Chamber to strike the Prosecution's Response because it was filed out of time, and to issue a warning to the Prosecution pursuant to Rule 46 (A) of the Rules, or alternatively, to grant it time to reply tc the Prosecution's Response.

**Deliberations**

8. As a preliminary matter, the Chamber observes that the Prosecution's Response, though late, was filed before it was ready to be considered. In these circumstances, the Prosecution did not retard the progress of the proceedings nor cause any prejudice to the Accused. In the interest of justice, the Charnber has taken cognizance of the Prosecution's submissions. The Chamber recalls its Oral Decision delivered on 24 March 2005 on timelimits to file Replies[12] and reminds the parties to contribute to the proper administration of justice and file their pleadings within the prescribed time-limit. The Rules do not prescribe any right to respond to a Reply to a Motion. It is a liberty which may be allowed by the Chamber. In this case, the submissions filed by the parties are sufficient to rule on the merits and it is not necessary to make the requested provision for the Defence to reply to the Prosecution's Response. In all these circumstances, the Chamber does not consider that any warning under Rule 46 (A) of the Rules is warranted. Accordingly, the Second Motion falls to be rejected.

9. On the merits, the Chamber notes that the Defence and the Prosecution agree, although on different grounds, that the Decisions delivered by the previous Bench and relating to evidentiary matters, disclosure and the amendment of the Indictment have no further effect. That agreement appropriately reflects the Chamber's Decision of 7 December 2004[13] and does not require repetition.

[10] Namely, *Karemera et al.,* Decision on the Defence Motion to Order the Goveinment of Rwanda to Show Cause (TC), 4 September 2003; *Karemera et al.,* Decision on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu, and Omar Serushago (TC), 29 September 2003; *Karemera et al.,* Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003; *Karemera et al.,* Decision on the Motion of Nzirorera to Dismiss the Indictment for Lack of Jurisdiction: Chapter VII of the United Nations Charter (TC), 29 March 2004; *Karemera et al.,* Decision on the Motions by Karemera and Nzirorera for Invalidation of the Indictment for Defects in Procedure and Form (TC), 29 March 2004.

[11] *Prosecutor* v. *Édouard Karemera, Mathieu Ngirumpatse and Joseph Nrirorera,* Case n° ICTR-94-44-PT, Decision on Motion to Vacate Sanctions (TC), 23 February 2005.

[12] See Transcripts, 24 March 2005, p. 6.

[13] *Karemera et al.,* Decision on Severance of André Rwamakuba and Amendments of the Indictment (TC), 7 Decernber 2004; *Karemera et al.,* Dissenting Opinion of Judge Short on Severance of André Rwamakuba and Amendments of the Indictment (TC), 8 December 2004.

Il fait valoir que les décisions infligeant des sanctions au conseil principal de l'accusé[10] ne doivent pas être annulées, car une telle mesure invaliderait la décision de la Chambre rejetant la requête formée par Nzirorera aux fins d'obtenir l'annulation de ces sanctions[11].

7. Dans la Seconde requête, la Défense demande à la Chambre de déclarer irrecevable la réponse du Procureur pour avoir été déposée hors délai et de donner un avertissement à celuici en application de l'article 46 (A) du Règlement ou de lui accorder un délai pour produire une réplique à ladite réponse.

**Délibération**

8. Avant d'entrer dans le vif du sujet, la Chambre relève que même si la réponse du Procureur est tardive, elle a été déposée avant le moment où elle devait être examinée. Dans ces circonstances, le Procureur n'a ni ralenti l'évolution de la procédure ni porté préjudice à l'accusé. Dans l'intérêt de la justice, la Chambre a pris connaissance des arguments du Procureur. Rappelant sa décision orale du 24 mars 2005 relative aux délais de dépôt des réponses et des répliques[12], elle invite de nouveau les parties à contribuer à la bonne administration de la justice en déposant leurs écritures dans le délai prescrit. Le Règlement ne prévoit pas le droit de produire une réplique à la suite de la réponse à une requête. C'est une simple faculté d'agir dont l'exercice est laissé à l'appréciation de la Chambre. En l'espèce, les conclusions déposées par les parties suffisent pour statuer sur le fond et il n'est pas nécessaire de prendre les dispositions sollicitées pour que la Défense produise une réplique à la réponse du Procureur. Compte tenu de toutes ces circonstances, la Chambre ne trouve aucune raison de donner un avertissement au Procureur en application de l'article 46 (A) du Règlement. D'où il suit que la seconde requête doit être rejetée.

9. Sur le fond, la Chambre relève que la Défense et le Procureur s'accordent à reconnaître, même si leurs raisons sont différentes, que les décisions du collège de juges précédent relatives à l'administration de la preuve, à la communication de pièces et à la modification de l'acte d'accusation n'ont plus aucun effet. Cette identité de vue répond bien à la décision rendue par la Chambre le 7 décembre 2004[13] et il n'est pas nécessaire de s'y appesantir.

---

[10] Il s'agit des décisions suivantes : Décision relative a la requête de la Défense aux fins d'une ordonnance prescrivant au Gouvernement rwandais de s'expliquer (Chambre de première instance), 4 septembre 2003; Décision sur la requête de la Défense aux fins d'obtenir l'autorisation d'interroger les témoins à charge potentiels Jean Kambanda, Georges Ruggiu et Omar Serushago (Chambre de première instance), 29 septembre 2003; Décision sur la requête de la Défense en communication de moyens de preuve à décharge (Chambre de première instance), 7 octobre 2003; Décision relative a la requête en exception préjudicielle de Nzirorera aux fins de rejet de l'acte d'accusation pour défaut de compétence : Chapitre VI1 de la Charte des Nations Unies (Chambre de première instance), 29 mars 2004; *Decision on the Motions by Karemera and Nzirorera for Invalidation of the Indictment for Defects in Procedure and Form* (Chambre de première instance), 29 mars 2004.

[11] *Le Procureur c. Edouard Karemera, Mathieu Ngurumpatse et Joseph Nzirorera,* affaire n° ICTR-94-44-PT, Décision relative à la requête intitulée *Motion to Vacate Sanctions* (Chambre de première instance), 23 février 2005.

[12] Voir le compte rendu de l'audience du 24 mars 2005, p. 6.

[13] Affaire *Karemera et consorts,* Décision relative à la disjonction de l'instance d'André Rwamakuba et à la modification de l'acte d'accusation (Chambre de première instance),

10. The Chamber considers that the same principle should apply to the Decisions on State Cooperation. They also related to evidentiary matters. In addition they had a temporary effect, and would not necessarily prevent renewing the request if such is required as a result of changed circumstances in the approximately eighteen months that have elapsed. With respect to the current effectiveness of Decisions on protective measures[14], the Chamber recalls furthemore that its *proprio motu* Order of 10 December 2004 superseded the prior Decisions granting protective measures for Prosecution witnesses. It is therefore pointless for the Chamber to declare that these Decisions should be disregarded. If the Prosecution is not satisfied that the said Order provides appropriate protective measures to some specific witnesses, it can bring a Motion requesting amendment of these measures.

11. The Decisions in which sanctions were ordered by the Prior Bench, related to applications which fall within the categories already discussed and which would have no continuing effect on the trial. Following the rulings made above or the other categories, it would be pointless to make a declaration that these Decisions should be disregarded.

12. The Defence contends that the orders for sanctions have a continuing effect by permanently depriving Counsel for the Accused of fees relating to those motions and should be declared to be of no effect. The sanctions orders are not substantive. They are merely ancillary or consequential to the substantive motions. They reflect the conclusion by the Trial Chamber that bringing those motions was frivolous or was an abuse of process. This is a new trial starting on the principle of a clean slate. Those orders for sanctions do not prevent the Defence from making fresh applications, during the rehearing, containing substantive requests similar to those which led to the said sanctions, if it has an appropriate basis to do so. The Chamber wishes to emphasize that it will consider each motion or its merits so that nothing in this Decision must be construed as a license to bring motions that are frivolous or are an abuse of process. In these circumstances, the orders for sanctions have no bearing on or relevance to the rehearing. The Chamber considers that the same principle should therefore be applied.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the First and the Second Motions.

Arusha, 24 May 2005, done in English.

[Signed] : Dennis C. Byron; Emile Francis Short; Gberdao Gustave Kam

***

[14] *Karemera et al.,* Decision on the Defence Motion for Modification of a Decision of 12 July 2000 on Protective Measures for Prosecution Witnesses (TC), 7 October 2003; *Karemera et al.,* Decision on the Prosecutor's Request for Special Protective Measures for Witnesses G and T (TC), 20 October 2003.

10. La Chambre estime que le même principe doit s'appliquer aux décisions relatives à la coopération des États. Non seulement, elles se rapportaient aussi à l'administration de la preuve, mais leur effet était limité dans le temps et elles n'empêcheraient pas nécessairement que la Défense forme à nouveau sa demande si un éventuel changement de circonstances survenu dans les quelque 18 mois qui se sont écoulés depuis lors l'exigeait. En ce qui concerne la question de savoir si les décisions prescrivant des mesures de protection[14] demeurent en vigueur, la Chambre rappelle en outre que l'ordonnance qu'elle a rendue de sa propre initiative le 10 décembre 2004 annulait et remplaçait les décisions antérieures accordant des mesures de protection aux témoins à charge. Il est donc inutile que la Chambre déclare que ces décisions doivent rester lettre morte. Si le Procureur n'est pas convaincu que cette ordonnance protège bien tel ou tel témoin, il lui est loisible de former une requête en modification des mesures de protection qu'elle contient.

11. Les décisions dans lesquelles des sanctions ont été ordonnées par le collège précédent se rapportent à des requêtes relevant des catégories déjà traitées qui n'auraient plus d'effet sur le procès. Dans le droit fil de ce qui a été arrêté plus haut au sujet des autres catégories, il ne servirait à rien de déclarer que ces décisions doivent rester lettre morte.

12. La Défense fait valoir que les décisions répressives en question ont un effet continu en ce qu'elles privent indéfiniment le conseil de l'accusé d'honoraires relatifs aux requêtes susvisées et doivent être déclarées nulles et de nul effet. Loin de toucher au fond de la cause, ces décisions n'ont qu'un lien secondaire ou indirect avec les requêtes de fond. Elles indiquent que selon la Chambre de première instance, les requêtes visées étaient fantaisistes ou constituaient un abus de procédure. C'est un nouveau procès qui s'ouvre sur des bases nouvelles comme le veut la règle. Les décisions antérieures prescrivant des sanctions n'empêchent pas que pendant le réexamen de l'affaire, la Défense forme des requêtes nouvelles contenant des demandes de fond semblables à celles qui ont donné lieu à ces sanctions si elle a des motifs valables pour le faire. La Chambre tient à souligner qu'elle examinera chaque requête au fond et qu'aucune des énonciations de la présente décision ne doit dès lors être interprétée comme une autorisation de former des requêtes fantaisistes ou constitutives d'abus de procédure. Dans ces circonstances, les décisions prescrivant des sanctions n'ont aucun rapport avec les nouveaux débats ni ne présentent d'intérêt à cet égard. Par conséquent, la Chambre considère que le même principe doit s'appliquer en l'occurrence.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la Première et la Seconde requêtes.

Fait à Arusha, le 24 mai 2005

[Signé] : Dennis C. Byron; Emile Francis Short; Gberdao Gustave Kam

***

7 décembre 2004; Opinion dissidente du juge Short relative à la disjonction de l'instance de Rwamakuba et à la modification de l'acte d'accusation (Chambre de première instance), 8 décembre 2004.

[14] Affaire *Karemera et consorts*, *Decision on the Defence Motion for Modification of a Decision of 12 July 2000 on Protective Measures for Prosecution Witnesses* (Chambre de première instance), 7 octobre 2003; Décision sur la requête du Procureur, aux fins d'obtenir des mesures exceptionnelles de protection en faveur des témoins G et T (Chambre de première instance), 20 octobre 2003.

## *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying His Motion to Vacate Sanctions Rul 73 (B) of the Rules of Procedure and Evidence 26 May 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Joseph Nzirorera – Motion for certification of appeal, Issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, No hearing of the orders for sanctions to the rehearing – Motion denied*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73, 73 (B) and 73 (E)*

*International Cases cited :*

*I.C.T.R. : Office of the President,* The Prosecutor v. Edouard Karemera et al.*, Decision on Motion to Reassign Case to Different Trial Chamber, 22 March 2005 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera, *Decision on Joseph Nzirorera's Motion for Order finding prior Decisions to be of "no effect", 24 May 2005 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Vacate Sanctions" ("Motion"), filed by the Defence for Nzirorera ("Defence") on 1 March 2005;

CONSIDERING that the Prosecution has not filed its Response within the time-limit prescribed by Rule 73 (E) of the Rules of Procedure and Evidence ("Rules");

CONSIDERING the Application to intervene in Joseph Nzirorera's Motion, filed by the Defence for Ngirumpatse ("Defence") on 14 March 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules.

## *Décision relative à la requête intitulée «Joseph Nzirorera's Application for Certification to Appeal the Decision denying his Motion to vacate Sanctions» Article 73 (B) du Règlement de procédure et de preuve 26 mai 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Karin Hökborg ; Gberdao Gustave Kam

*Joseph Nzirorera – Requête en certification d'appel, Question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, Ordonnances aux fins de sanctions sans influence sur la reprise du procès – Requête rejetée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73, 73 (B) et 73 (E)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Bureau du Président, Le Procureur c. Edouard Karemera et al., Decision on Motion to Reassign Case to Different Trial Chamber, 22 mars 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Édouard Karemera, Mathieu Ngirumpaste et Joseph Nzirorera, Décision intitulée «Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions tu Be of «No Effect», 24 mai 2005 (ICTR-98-44)*

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

SIÉGEANT en la Chambre de première instance III, composée des juges Dennis C. M. Byron, Président de Chambre, Emile Francis Short et Gberdao Gustave Kam («la Chambre»),

SAISI de la requête de Joseph Nzirorera intitulée «*Joseph Nzirorera's Application .for Certification to Appeal Denial of Motion to Vacate Sanctions*» (la «Requête»), déposée le 1er mars 2005 par la Défense de Joseph Nzirorera (la «Défense») ;

ATTENDU que le Procureur n'a pas déposé de réponse dans le délai prescrit par l'article 73 (E) du Règlement de procédure et de preuve (le «Règlement»),

VU la requête intitulée «*Application to intervene in Joseph Nzirorera's Motion*», déposée le 14 mars 2005 par la Défense de Ngirumpatse (la «Défense») ;

STATUE CI-APRÈS sur la requête conformément à l'article 73 du Règlement.

## Introduction

1. The Appeals Chamber Decision of 28 September 2004[1] made it necessary for the rehearing of this case. The commencement of the trial is scheduled on 6 September 2005. On 23 February 2005, the Chamber denied Nzirorera's Motion to vacate sanctions ordered by the prior Bench ("Decision of 23 February 2005")[2].

2. The Chamber is now seized of a Motion seeking certification to appeal the impugned Decision pursuant to Rule 73 (B) of the Rules.

## Arguments of the Parties

3. The Defence for Nzirorera raises three arguments, which it contends meet the criteria set out by Rule 73 (B) of the Rules. First, it contends that the Presiding Judge of Trial Chamber III exercises supervisory authority over the Chamber and a reasonable observer would conclude that the appearance of bias found by the Appeals Chamber Decision of 22 October 2004[3] in respect of the Presiding Judge extends to Decisions of Judges who are answerable to, and overseen by her. It argues that this issue could affect the fair and expeditious conduct of the proceedings or the outcome of the trial within the meaning of Rule 73 (B) of the Rules, since the right to a trial by Judges free from the appearance of bias is a fundamental right guaranteed under Article 20 of the Statute of the Tribunal ("Statute"). Second, the Defence for Nzirorera submits that the Chamber erred in giving effect to the Decisions of the former Bench in light of the findings of the Appeals Chamber Decision of 22 October 2004[4] and of its own Decision not to give effect to the prior Bench's Decision on leave to amend the Indictment[5]. Finally, the Defence for Nzirorera contends that the Chamber erred in finding that Rule 73 (F) of the Rules "as written" and "as applied" does not constitute discrimination between Defence and Prosecution Counsel. It refers to a list to demonstrate that the Defence has been sanctioned many times, whereas the Prosecutor has never been. This alleged one-sided application of Rule 73 (F) at the Tribunal would put the Defence at a serious disadvantage when presenting its case since it would be penalized when bringing motions that the Chamber disapproves of, thus discouraging the Defence from asserting its rights during the trial and jeopardizing

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44 *(Karemera et al.),* Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004.

[2] *Prosecutor* v. *Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera,* Case n° ICTR-98-44-PT, Decision on Motion to Vacate Sanctions (TC), 23 February 2005.

[3] *Karemera et al.,* Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 22 October 2004, para. 67.

[4] *Ibidem.*

[5] *Karemera et al.,* Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004.

## Introduction

1. La décision de la Chambre d'Appel[1] du 28 septembre 2004 a rendu nécessaire une reprise du procès. L'ouverture du procès est prévue pour le 6 septembre 2005. Le 23 février 2005, la Chambre a rejeté la requête de Nzirorera en annulation des sanctions adoptées par les précédents juges («Décision du 23 février 2005»)[2].

2. La Chambre est à présent saisie d'une requête en certification d'appel de la décision contestée, conformément à l'article 73 (B) du Règlement de procédure et de preuve.

## Arguments des parties

3. La Défense de Nzirorera avance trois arguments, qui selon elle sont conformes aux critères énoncés à l'article 73 (B) du Règlement. Tout d'abord, la Défense allègue que la Présidente de la Chambre de première instance III exerce une autorité hiérarchique sur la Chambre et qu'un observateur raisonnable arriverait à la conclu si or que l'apparence de partialité constatée par la Chambre d'appel dans sa décision du 22 octobre 2004[3] à propos de la Présidente de la Chambre vaut également pour les juges qui sont placés sous sa responsabilité. Elle soutient que cette question pourrait compromettre l'équité et la rapidité du procès, ou son issue, au sens de l'article 73 (B) du Règlement, dans la mesure où le droit d'être jugé par des juges dénués de toute partialité apparente est un droit fondamental garanti par l'article 20 du Statut du Tribunal (le «Statut»). Ensuite, la Défense de Nzirorera affirme que la Chambre a commis une erreur en exécutant les décisions des précédents juges compte tenu des conclusions figurant dans la décision de la Chambre d'appel du 22 octobre 2004[4] et de sa propre décision de ne pas donner effet à la décision des précédents juges relative à l'autorisation de modifier l'acte d'accusation[5]. Enfin, la Défense de Nzirorera fait valoir que la Chambre a versé dans l'erreur en concluant que l'article 73 (F) du Règlement «tel que rédigé» et «tel qu'appliqué» n'a pas d'effet discriminatoire sur les conseils de la Défense vis-à-vis des membres du Bureau du Procureur. Elle se réfère à une liste pour démontrer que la Défense a été sanctionnée de nombreuses fois, tandis que le Procureur ne l'a jamais été. Cette application partiale alléguée de l'article 73 (F) du Règlement placerait la Défense dans une situation nettement désa-

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba,* affaire n° ICTR-98-44 *(Karemera et consorts),* Décision relative aux appels interlocutoires interjetés contre la décision de continuer le procès avec un juge suppléant et à la requête de Nzirorera en autorisation de l'examen de nouveaux éléments (arrêt), 28 septembre 2004.

[2] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, affaire n° ICTR-98-44-PT, Décision relative à la requête intitulée «Motion to Vacate Sanctions» (jugement), 23 février 2005.

[3] *Karemera et consorts*, Motifs de la décision de la Chambre d'appel intitulée Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorerak Motion for Leave to Consider New Material (arrêt), 22 octobre 2004, para. 67.

[4] *Id.*

[5] *Karemera et consorts,* Décision relative à la disjonction de l'instance d'André Rwamakuba et à la modification de l'acte d'accusation, 7 décembre 2004.

its ability to preserve trial issues for appellate review. It is submitted that such issues go directly to the fairness of trial.

4. The Defence for Ngirumpatse contends that the impugned Decision seems to consider as valid certain decisions made by the prior Bench. Pursuant to the Appeals Chamber's statement of apprehension of bias affecting the previous Bench, it requests that the Chamber holds that all Decisions taken by the prior panel should have no effect. It also submits that there is a need to harmonize the ruling of the Chamber that certain evidentiary Decisions by the prior panel are of no force and effect, while the impugned Decision would hold the prior rulings on imposing sanctions.

**Deliberations**

5. In accordance with Rule 73 (B) of the Rules, Decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for very limited circumstances. Certification to appeal may be granted if both conditions set by Rule 73 (B) of the Rules are satisfied : the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not determined on the merits of the appeal against the impugned Decision.

6. Having reviewed the applicant's Motion, the Chamber considers that the Defence has failed to show how the Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial. In addition, the Chamber has already found that the orders for sanctions have no bearing on or relevance to the rehearing[6]. For the same reason, an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

7. As regards the supervisory power of the Presiding Judge of Trial Chamber III over the Chamber and the alleged appearance of bias, the Chamber notes that the issue has been resolved by a Decision delivered by the President, finding that

> Nothing in the memorandum of Judge Vaz, nor in any rule or practice of the Tribunal concerning the position of a Presiding Judge of a Trial Chamber, could reasonably be constmed as interfering with the judicial independence and impartiality of the judges in *Karemera et al.* It is significant, in this regard, that the

[6] See *Prosecutor* v. *Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera,* Case n° ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for Order finding prior Decisions to Be of "no effect" (TC), 24 May 2005.

vantageuse pour présenter sa cause puisqu'elle serait pénalisée en déposant des requêtes que la Chambre désapprouve, ce qui aurait pour effet de la décourager de faire valoir ses droits au cours du procès et menacerait sa capacité de soumettre au contrôle de la juridiction d'appel des points litigieux en première instance. La Défense soutient que de telles questions sont susceptibles de nuire à l'équité du procès.

4. La Défense de Ngirumpatse affirme que la décision contestée semble juger valables certaines décisions rendues par la Chambre précédente. Or, la Chambre d'appel ayant déclaré qu'une suspicion de partialité pesait sur les juges précédents, la Défense demande à la Chambre de conclure que toutes les décisions rendues par le collège précédent sont sans effet. Elle fait valoir en outre qu'il est nécessaire de mettre en accord la décision de la Chambre selon laquelle certaines décisions des précédents juges relatives à la preuve sont nulles et sans effet, et la décision contestée, qui confirme les décisions antérieures sur l'application de sanctions.

## Délibérations

5. Conformément à l'article 73 (B) du Règlement, les décisions concernant les requêtes présentées en application de l'article 73 ne sont pas susceptibles d'appel interlocutoire, sauf décision contraire de la Chambre dans un nombre de cas très limité. L'autorisation d'interjeter appel peut être accordée si les deux conditions énoncées à l'article 73 (B) sont réunies : le requérant doit démontrer i) en quoi la décision contestée touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et ii) que le «règlement immédiat – de cette question – par la Chambre d'appel pourrait concrètement faire progresser la procédure». La réunion de ces deux conditions doit être expressément démontrée, sans qu'il y ait lieu de se prononcer sur le fond de l'appel interjeté de la décision contestée.

6. Après avoir examiné la requête du requérant, la Chambre estime que la Défense n'a pas démontré en quoi la décision touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue. En outre, la Chambre a déjà jugé que les ordonnances aux fins de sanctions n'ont aucune incidence sur la reprise du procès ou aucune pertinence à cet égard[6]. De même, un règlement immédiat de la question par la Chambre d'appel ne pourra pas concrètement faire progresser la procédure.

7. Eu égard à la responsabilité hiérarchique de la Présidente de la Chambre de première instance III sur la Chambre et à l'apparence de partialité alléguée, la Chambre note que la question a été règlée par une décision rendue par le Président, selon laquelle :

> [Aucun élément dans le mémorandum du Juge Vaz, ni aucune règle ou pratique du Tribunal concernant la position d'un Président de Chambre de première instance ne pourrait raisonnablement être interprété comme portant atteinte à l'indépendance judiciaire et à l'impartialité des juges en l'affaire *Karemera et consorts*. Il est significatif à cet égard de noter que la Défense n'insinue pas que

[6] Voir *le Procureur c. Édouard Karemera, Mathieu Ngirumpaste et Joseph Nzirorera*, affaire n° ICTR-98-44-PT, Décision intitulée «Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions tu Be of «No Effect» (TC), 24 mai 2005.

Defence does not suggest that Judge Vaz had any role to play in the appointment of these judges and, furthemore, requests that they continue to sit on the case[7].

8. The Chamber considers therefore that the requirements set out by Rule 73 (B) of the Rules are not met.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 26 May 2005, done in English.

[Signed] : Dennis C. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Decision Granting Extension of Time to File Pre-trial Brief Rule 73* bis *(B) of the Rules of Procedure and Evidence 20 June 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Delay, Extension of time, Commitment of members of the Prosecution team in another case, Interests of justice, Fair trial – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73, 73* bis*, 73* bis *(B) (i), 73* bis *(B) (iv),73* bis *(B) (v) and 73* bis *(F)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, *Scheduling Order, 24 March 2005 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge ("Chamber");

[7] *Karemera et al.,* Decision on Motion to reassign Case to different Trial Chamber (Pres.), 22 March 2005, para. 2.

le Juge Vaz ait joué un rôle quelconque dans la nomination de ces juges, et qu'en outre, elle demande qu'ils continuent à siéger en l'affaire][7].

8. La Chambre estime donc que les conditions visées à l'article 73 (B) du Règlement ne sont pas réunies.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, le 26 mai 2005 (document original en Anglais).

[Signé] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Décision prorogeant le délai prescrit pour le dépôt du mémoire préalable au procès Article 73* bis *(B) du Règlement de procédure et de preuve 20 juin 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juge : Dennis C. M. Byron, Président de Chambre

*Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Délais, Délai supplémentaire, Occupation de membres du Bureau du Procureur dans une autre affaire, Intérêts de la justice, Procès équitable – Requête acceptée*

*Instrument international cité :*

*Règlement de Procédure et de preuve, art. 73, 73* bis*, 73* bis *(B) (i), 73* bis *(B) (iv), 73* bis *(B) (v) et 73* bis *(F)*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, *Ordonnance portant calendrier, 24 mars 2005 (ICTR-98-44)*

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

SIÉGEANT en la Chambre de première instance III, composée du juge Denis C. M. Byron, juge désigné par la Chambre,

[7] *Karemera et consorts*, Décision intitulée «Decision on Motion to Reassign Case to Different Trial Chamber» (Pres.), 22 mars 2005, para. 2.

BEING SEIZED of the "Prosecutor's Motion to Extend Time to File Pre-Trial Brief" filed on 20 June 2005 ("Motion");

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of the Rules of Procedure and Evidence ("Rules").

1. The commencement of the trial in the current proceedings is scheduled on 6 September 2005. On 24 March 2005, the Chamber ordered that the Prosecution files a Pre-Trial Brief, a Final Witness List and a List of Exhibits, as prescribed under Rule 73 *bis* (B) (i), (iv) and (v) of the Rules, no later than 20 June 2005[1].

2. The Prosecution requests now additional time to file these documents. It submits that two members of the Prosecution team have had commitments in another case to which they have been required to give more time than previously anticipated. It contends that more clarity and precision in the Pre-Trial Brief will greatly assist the Chamber and the Accused persons and that the extension will not delay the start date for the trial.

3. The Chamber considers that the commitment of two members of the Prosecution team in another case is not a circumstance that can justify an extension of time.

4. However, having considered the circumstances of the case, the extension requested shall not affect the schedule of the trial's beginning. The Chamber is therefore of the view that both in the interests of justice and fair trial, the motion should be granted.

For the above mentioned reasons, the Chamber

I. GRANTS the Motion;

II. AUTHORIZES the Prosecution to file a Pre-Trial Brief, a final Witness List and a List of Exhibits, as prescribed under Rule 73 *bis* (B) (i), (iv) and (v) of the Rules, no later than 27 June 2005;

III. AUTHORIZES the Defence to file any Pre-Trial Brief, as prr scribed under Rule 73 bis (F) of the Rules, no later than 4 July 2005;

IV. AND AUTHORIZES both parties to file any statement of adiiiitteci facts and law and any statement of contested matters of fact and law, as prescribed under Rule 73 *bis* of the Rules, no later than 7 July 2005.

Arusha, 20 June 2005, done in English.

[Signed] : Dennis C. M. Byron

***

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera*, Case n° ICTR-98-44-PT, Scheduling Order (TC), 24 March 2005.

SAISI de la requête du Procureur intitulée «*Prosecutor's Motion to Extend Time tu File Pre-Trial Brief*» déposée le 20 juin 2005 (la «Requête»),

STATUE comme suit sur la requête en vertu de l'article 73 du Règlement de procédure et de preuve (le «Règlement»).

1. L'ouverture du procès est fixée au 6 septembre 2005. Le 24 mars 2005, la Chambre a invité le Procureur à déposer un mémoire préalable au procès, une liste définitive des témoins et une liste des pièces à conviction, conformément à l'article 73 *bis* (B) (i), (iv) et (v) du Règlement, d'ici au 20 juin 2005[1].

2. Le Procureur demande un délai supplémentaire pour déposer ces documents. Il fait valoir que deux membres de son Bureau ont été occupés dans un autre procès auquel ils ont consacré plus de temps que prévu. Il affirme que la Chambre et les accusés auront tout à gagner si le Mémoire préalable au procès est plus clair et plus précis, et qu'une prorogation de délai ne retardera pas l'ouverture du procès.

3. La Chambre estime que le fait que deux membres du Bureau du Procureur ont été occupés dans un autre procès ne justifie pas une prorogation de délai.

4. Il apparaît cependant, après examen des circonstances de la cause, que la prorogation de délai sollicitée ne retardera pas l'ouverture du procès. La Chambre estime donc que tant l'intérêt de la justice que l'équité du procès recommandent d'accorder la prorogation sollicitée.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT à la Requête;

II. AUTORISE le Procureur à déposer un Mémoire préalable au procès, une liste définitive des témoins et une liste des pièces à conviction, conformément à l'article 73 *bis* (B) (i), (iv) et (v) du Règlement, d'ici au 27 juin 2005;

III. AUTORISE la Défense à déposer un mémoire préalable au procès, comme prévu à l'article 73 *bis* (F) du Règlement, d'ici au 4 juillet 2005;

IV. AUTORISE les deux parties à déposer une déclaration des points de fait et de droit reconnus et un exposé des points de fait et de droit litigieux, conformément à l'article 73 *bis* du Règlement, d'ici au 7 juillet 2005.

Fait en anglais, Arusha, le 20 juin 2005.

[Signé] : Dennis C. M. Byron

***

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, affaire n° ICTR-98-44-PT, Ordonnance intitulée *Scheduling Order*, rendue le 24 mars 2005 par la Chambre.

## *Decision granting Extension of Time to file Defence pre-trial Brief Rule 73* **bis** *(B) of the Rules of Procedure and Evidence 1st July 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Delay, Extension of time, Interests of justice, Fair trial – Motion granted*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rules 73, 73* bis *and 73* bis *(F)*

*International Case cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, *Scheduling Order, 24 March 2005 (ICTR-98-44); Trial Chamber,* The Prosecutor v. Edouard Karemera et al., *Decision Granting Extension of Time to File Pre-Trial Brief, 20 June 2005 (ICTR-98-44)*

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

SITTING as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding ("Chamber");

BEING SEIZED of the "Joseph Nzirorera's Motion for Extension of Time to File Pre-Trial Brief" ("Motion"), filed by the Defence for the Accused Joseph Nzirorera ("Defence") on 29 June 2005;

CONSIDERING the Prosecution's Response thereto filed on 30 June 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of the Rules of Procedure and Evidence ("Rules").

1. The commencement of the trial in the current proceedings is scheduled on 6 September 2005. On 24 March 2005, the Chamber issued an Order scheduling, *inter alia*, the time-limits for filing documents prescribed under Rule 73 *bis* of the Rules[1]. On 20 June 2005, at the Prosecution's request, the Chamber authorized it to file its Pre-Trial Brief, Final Witness List and List of Exhibits on 27 June 2005, at the latest, and accordingly extended the time-limits for the filing of Defence Pre-Trial Brief and of statement of admitted or contested facts and law[2].

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpaste and Joseph Nzirorera*, Case n° ICTR-98-44-PT (*Karemera et al.*), Scheduling Order (TC), 24 March 2005.

[2] *Karemera et al.*, (TC), Decision Granting Extension of Time to File Pre-Trial Brief (TC), 20 June 2005.

2. The Chamber is now seized of a Motion seeking extension of time for filing Defence Pre-Trial Brief. The Defence submits that while the Prosecution filed its Pre-Trial Brief as scheduled, it has to be sent by express mail due to the size of the document and its annexes. This sending would normally take four to seven working days to reach the Counsel. Accordingly, the Defence requests leave to file its Pre-Trial Brief within the seven days from the receipt of the Prosecution Pre-Trial Brief.

3. Having considered the circumstances of the case, the extension requested shall not affect the schedule of the trial's beginning. In addition, the Prosecution does not oppose the Motion but requests only to be notified when the delivery is completed.

4. The Chamber is of the view that both in the interests of justice and to ensure a fair trial, the motion should be granted.

For the above mentioned reasons, the Chamber

I. GRANTS the Motion;

II. AUTHORIZES the Defence for each Accused in the present case to file a Pre-Trial Brief, as prescribed under Rule 73 *bis* (F), within seven (7) days from the receipt of the Prosecution Pre-Trial Brief and no later than 15 July 2005;

III. AUTHORIZES both parties to file any statement of admitted facts and law and any statement of contested matters of fact and law, as prescribed under Rule 73 *bis* of the Rules, no later than 18 July 2005;

IV. AND DIRECTS the Registrar to notify the Chamber and the Prosecution when the delivery of the Prosecution Pre-Trial Brief is complete with respect to Defence for each Accused.

Arusha, 1 July 2005, done in English.

[Signed] : Dennis C. M. Byron

***

## *Order for filing documents*
## *Rule 54 of the Rules of Procedure and Evidence*
## *4 July 2005 (ICTR-98-44-R54)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Emile Francis Short; Gberdao Gustave Kam

*Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Documents necessary to assess request*

*International Instrument cited :*

*Rules of Procedure and Evidence, Rule 54; Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, Rule 64*

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam ("Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules");

NOTING "Joseph Nzirorera's Motion for Order Allowing Meeting with Defence Witness" ("Motion"), filed by the Defence for the Accused Joseph Nzirorera ("Defence") on 24 March 2005;

CONSIDERING that in the Response thereto, filed on 29 March 2005, the Prosecution declares that the reasons for its request under Rule 64 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules on Detention") were expressed to the Registry;

CONSIDERING that to assess the said Motion, the Chamber needs to be in possession of all relevant information;

ACCORDINGLY DIRECTS the Prosecution to notify the Chamber and the Defence for the Accused Nzirorera of the reasons of its request under Rule 64 of the Rules on Detention, no later than 6 July 2005.

Arusha, 4 July 2005, done in English.

[Signed] : Dennis C. M. Byron; Emile Francis Short; Gberdao Gustave Kam

***

## *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure Rules 54, 66 (B) and 68 of the Rules of Procedure and Evidence 5 July 2005 (ICTR-98-44-PT)*

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge Emile Francis Short Gberdao Gustave Kam

*Joseph Nzirorera – Jean Kambanda – Disclosure of documents, Disclosure obligation of the Prosecutor, Electronic Disclosure Suite ("EDS"),* Ex parte *applications, Purpose of* ex parte *applications – Criteria to meet for inspection of documents, Identification of the specific material, Establishment of a* prima facie *of necessity – Rights of the Accused, Balance of the rights of the Accused against the need for protection of victims,* Audi alteram partem *principle – Protection of the victims – Interests of justice, Fair trial – Motion partially granted*

*International Instruments cited :*

*Rules of Procedure and Evidence, Rules 39, 54, 66 (B), 68, 68 (A), 69, 73, 75 and 75 (F); Statute, Art. 19, 20 and 21*

*International Cases cited :*

*I.C.T.R. : Trial Chamber,* The Prosecutor v. Théoneste Bagosora, *Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 31 October 1997 (ICTR-96-7) Trial Chamber,* The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, *Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, 19 May 2000 (ICTR-97-34); Trial Chamber,* The Prosecutor v. Augustin Ndindiliyimana et al., *Order for Protective Measures for Witnesses, 12 July 2001 (ICTR-2000-56) Trial Chamber,* The Prosecutor v. Elie Ndayambaje et al., *Decision on the Defence Motion for Disclosure, 25 September 2001 (ICTR-98-42) Trial Chamber,* The Prosecutor v. Athanase Seromba, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003 (ICTR-2001-66) Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41) Trial Chamber, T*he Prosecutor v. Théoneste Bagosora, *Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004 (ICTR-98-41) Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, 25 May 2004 (ICTR-99-50) Trial Chamber,* The Prosecutor v. Ferdinand Nahimana et. al., *Decision on Disclosure of Transcripts and exhibits of Witness X, 3 June 2004 (ICTR-99-52) Trial Chamber,* The Prosecutor v. Casimir Bizimungu et al., *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Relat-*

## *Décision relative à la requête intitulée Joseph Nzirorera's Motion to Compel Inspection and Disclosure Articles 54, 66 (B) et 68 du Règlement de procédure et de preuve 5 juillet 2005 (ICTR-98-44-PT)*

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

*Joseph Nzirorera – Jean Kambanda – Communication de documents, Obligation de communication du Procureur, Système électronique de communication de pièces ("EDS"), Communication ex parte, But des communications ex parte – Critères pour pouvoir examiner des documents, Identification précise des documents, Etablissement d'une présomption d'utilité des docuements – Droits de l'accusé, Equilibre entre la préservation des droits de l'accusé et la nécéssité de protéger les victimes, Audi alteram partem principle – Protection des victimes – Intérêts de la justice, Procès équitable – Requête partiellement acceptée*

*Instruments internationaux cités :*

*Règlement de Procédure et de preuve, art. 39, 54, 66 (B), 68, 68 (A), 69, 73, 75 et 75 (F) ; Statut, art. 19, 20 et 21*

*Jurisprudence internationale citée :*

*T.P.I.R. : Chambre de première instance,* Le Procureur c. Théoneste Bagosora, *Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, 31 octobre 1997 (ICTR-96-7) ; Chambre de première instance,* Le Procureur c. Gratien Kabiligi et Aloys Ntabakuze, *Décision sur la requête du Bureau du Procureur en mesures de protection des victirnes et des témoins, 19 mai 2000 (ICTR-97-34) ; Chambre de première instance,* Le Procureur c. Augustin Ndindiliyimana et consorts, *Ordonnance portant mesures de protection des témoins, 12 juillet 2001 (ICTR-2000-56) ; Chambre de première instance,* Le Procureur c. Elie Ndayambaje, *Decision on the Defence Motion for Disclosure, 25 septembre 2001 (ICTR-98-42) ; Chambre de première instance,* 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) ; Chambre de première instance,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 juillet 2003 (ICTR-98-41) ; Chambre de premiere instance,* Le Procureur c. Théoneste Bagosora et consorts, *Decision for Disclosure under Rule 68, 1 mars 2004 (ICTR-98-41) ; Chambre de premiere instance, Le Procureur c. Casimir Bizimungu et consorts, Decision on Prosper Mugiraneza's Motion pursuant to Rule 68 for Exculpatory Evidence, 25 mai 2004 (ICTR-99-50) ; Chambre de première instance,* Le Procureur c. Ferdinand Nahimana et. al., *Décision relative la communication des comptes rendus*

*ed to Witness GKI, 14 September 2004 (ICTR-99-50) Trial Chamber,* The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu, *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) Trial Chamber,* The Prosecutor v. Edouard Karemera, *Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44) Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, *Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français, 23 February 2005 (ICTR-98-44) Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France, 31 March 2005 (ICTR-98-44) Trial Chamber,* The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, *Decision on Motion to Unseal* Ex Parte *Submissions and to strike Paragraphs 32.4 and 49 from the Amended Indictment, 3 May 2005 (ICTR-98-44) Appeals Chamber,* The Prosecutor v. Juvénal Kajelijeli, *Judgement, 23 May 2005 (ICTR-98-44A)*

*I. C. T. Y.: Trial Chamber,* The Prosecutor v. Zejnil Delalić*, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996 (IT-96-21)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunalé"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam ("Chamber")

BEING SEIZED of "Joseph Nzirorera's Motion to Compel Inspection and Disclosure", filed by the Defence of the Accused ("Defence") on 4 April 2005

CONSIDERING the Prosecution's Response thereto filed on 11 April 2005, and the Defence' Reply thereto filed on 13 April 2005

CONS IDERING the "Prosecutor's Submission in Compliance with Order for Filing Documents of 11 May 2005", filed on 13 May 2005, and the Defence's Reply thereto filed on 17 May 2005

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

**Introduction**

1. The commencement of the trial in the instant proceedings is scheduled on 6 September 2005. On 4 April 2005, the Defence filed a Motion seeking disclosure and inspection of three categories of documents and material :

*d'audience et des pièces a conviction intéressant le témoin X, 3 juin 2004 (ICTR-99-52); Chambre de premiere instance,* Le Procureur c. Casimir Bizimungu et consorts, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatoty Evidence Related to Witness GKI, 14 septembre 2004 (ICTR-99-50); Chambre de première instance,* Le Procureur c. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye et Innocent Sagahutu, *"Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials", 3 novembre 2004 (ICTR-2000-56); Chambre de première instance,* Le Procureur c. Edouard Karemera, *Order on Protective Measures for Prosecution Witnesses, 10 décembre 2004 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts, *Décision relative à la requete de Joseph Nzirorera aux fins d'obtenir la cooperation du Gouvemement francais, 23 fevrier 2005 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts, *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France, 31 mars 2005 (ICTR-98-44); Chambre de première instance,* Le Procureur c. Edouard Karemera et consorts, *Décision relative à la requête demandant la levée de la confidentialité de certains écrits unilatéraux et la suppression des paragraphes 32.4 et 49 de l'acte d'accusation modifié, 3 mai 2005 (ICTR-98-44); Chambre d'appel,* Le Procureur c. Juvénal Kajelijeli, *Arrêt, 23 mai 2005 (ICTR-98-44A)*

*T.P.I.Y. : Chambre de première instance,* Le Procureur c. Zejnil Delalić, *Décision relative à la requête de l'accusé Zejnil Delalić aux fins de divulgation de moyens de preuve, 26 septembre 1996 (IT-96-21)*

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

SIEGEANT en la Chambre de premiere instance III, composee des juges Dennis C. M. Byron, President de Chambre, Emile Francis Short et Gberdao Gustave Kam (la «Chambre»),

SAISI de la requete intitulee *Joseph Nzirorera's Motion to Compel Inspection and Disclosure*, déposée par la Défense de l'accusé (la «Defense») le 4 avril 2005,

VU la reponse du Procureur à la requête susmentionnée, deposee le 11 avril 2005, et la réplique de la Défense, déposée le 13 avril 2005,

VU les observations du Procureur intitulées *Prosecutor's Submission in Compliance with Order for Filing Documents of 11 May 2005*, déposées le 13 mai 2005, et la réplique de la Défense ces observations, déposée le 17 mai 2005,

STATUE sur la requête en application de l'article 73 du Règlement de procédure et de preuve (le «Règlement»).

**Introduction**

1. L'ouverture du procès en l'espece est fixée au 6 septembre 2005. Le 4 avril 2005, la Défense a déposé une requête demandant la communication et l'examen de trois catégories de documents et de pièces, à savoir :

A. Under Rule 54 of the Rules, disclosure of two documents filed *ex parte* and confidential by the Prosecution :
   1. Statement of Witness T attached as Annex to "Prosecutor's Supplemental Response to Nzirorera's Ex Parte Motion to interview Witness T" (5 October 2004)
   2. Supporting Affidavit of Christian Baudesson filed with "Prosecutor's Motion for Special Protective Measures for Witnesses G and T" (23 September 2003).

B. Under Rule 66 (B) of the Rules, inspection of :
   1. Items seized from former Prime Minister Jean Kambanda as described in Annex "A" of the Motion
   2. E-mails and correspondence between Prosecution and any Prosecution witness
   3. Material relating to the assassination of President Habyarimana.

C. Under Rule 68, disclosure of
   1. Statements of any witness which contradict Prosecution witnesses and therefore affects their credibility
   2. Exculpatory Witness Statements for the Accused or any member of the joint criminal enterprise
   3. The identifying information for thirteen witnesses to crimes committed by Witness T whose redacted statements were previously disclosed to the Defence under Rule 68.

2. In its Response, the Prosecution consents to inspection of items seized from former Prime Minister Jean Kambanda. It furthermore notes that some of these documents have been already disclosed to the parties and that the Electronic Disclosure Suite ("EDS") contains or will contain these materials. The Defence acknowledges the Prosecution's undertaking but reserves its right to bring this matter again to the attention of the Chamber where necessary.

3. The Chamber now addresses contentious Defence requests.

## Discussion

### A. *On the Disclosure of Documents Filed* Ex Parte *and Confidential by the Prosecution*

4. The Defence submits that, in light of Articles 20 (1) and 21 of the Statute of the Tribunal ("Statute"), the Trial Chamber must balance the rights of the Accused against the need for protection of victims. Since the identities of Witnesses G and T have now been disclosed, the Defence contends that the justification for confidential filings no longer exists. It also alleges that the requested documents were submitted in support of Prosecution submissions and should therefore be disclosed in accordance with the principle *audi alteram partem* already applied by the Presiding Judge in this case. Finally, it submits that the information sought is necessary for the preparation of

A. En vertu de l'article 54 du Règlement, la communication de deux documents déposés unilatéralement et confidentiellement par le Procureur :
   1. Déclaration du temoin T, jointe en annexe au document intitulé *Prosecutor's Supplemental Response to Nzirorera's Ex Parte Motion to interview witness T* (5 octobre 2004) ;
   2. Déclaration sous serment de Christian Baudesson déposée à l'appui de la requête du Procureur intitulée *Prosecutor's Motion for Special Protective Measures for Witnesses G and T* (23 septembre 2003).

B. En vertu de l'article 66 (B) du Règlement, l'examen des éléments suivants :
   1. Eléments saisis chez l'ancien Premier Ministre Jean Kambanda, décrits dans l'annexe A de la requête ;
   2. Courriels et autre correspondance échangée entre le Procureur et tous témoins à charge ;
   3. Pièces relatives à l'assassinat du Président Habyarimana.

C. En vertu de l'article 68 du Reglement, la communication des documents suivants :
   1. Déclarations de tous témoins qui contredisent les témoins à charge, portant ainsi atteinte à leur crédibilité ;
   2. Déclarations de témoin qui sont de nature à disculper l'accusé ou tout membre de l'entreprise criminelle commune visée ;
   3. Informations permettant d'identifier 13 témoins de crimes commis par le temoin T, témoins dont les déclarations caviardées avaient été communiquées précédemment à la Défense en application de l'article 68 du Règlement.

2. Dans sa réponse, le Procureur accepte l'examen des articles saisis chez l'ancien Premier Ministre Jean Kambanda. Par ailleurs, il fait remarquer encore que certains des documents ont déjà été communiqués aux parties et figurent ou figureront sur le système électronique de communication de pièces («EDS»). La Defense reconnait l'initiative du Procureur, mais se réserve le droit de saisir de nouveau la Chambre à ce sujet, le cas échéant.

3. La Chambre va à present analyser celles des demandes de la Défense auxquelles le Procureur s'oppose.

## Discussion

### A. *Communication de documents déposés unilatéralement et confidentiellement par le Procureur*

4. La Defense fait valoir qu'en vertu des articles 20 (1) et 21 du Statut du Tribunal (le «Statut»), la Chambre de première instance doit trouver un juste équilibre entre la préservation des droits de l'accusé et la nécéssité de protéger les victimes. L'identité des témoins G et T étant à présent dévoilée, la Défense estime que le dépôt de documents confidentiels ne se justifie plus. Elle ajoute que les documents sollicités ont été soumis à l'appui des observations du Procureur et devraient donc être communiqués, conformément au principe du contradictoire (*audi alteram partem*) appliqué par le Président de Chambre en l'espèce. Enfin, elle explique que les informations

cross-examination and is also relevant to show the bias and motives of the Witnesses to testify.

5. As a general rule, the Chamber finds that applications must be filed *inter partes. Ex parte* and confidential applications can be warranted when they are in the interests of justice

> "where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application"[1].

This requires consideration on a case-by-case basis and in light of the provisions of the Statute and the Rules. Pursuant to Article 19 of the Statute and as acknowledged by the Defence, the Chamber has to ensure a fair trial with full respect of the rights of the Accused but must also have due regard for the protection of victims and witnesses.

6. The Chamber observes that the Order granting special protective measures to Witnesses G and T was indeed based on the confidential information provided in the Supporting *Affidavit* of Christian Baudesson[2]. This document contains information whereby disclosure could jeopardize the protection of these Witnesses, and the Prosecution's ongoing investigations, and therefore cause them both an unfair prejudice. After reviewing the content of this document, the Chamber does not consider that its non-disclosure will affect the Defence's cross-examination. In the interests of justice, the said *affidavit* must be kept *ex parte* and confidential.

7. The Statement of Witness T sought by the Defence contains identifying information related to his whereabouts, which in accordance with the Chamber's Order of 10 December 2004, cannot be disclosed to the Accused, the Defence or the public[3]. The disclosure of the requested Statement of Witness T could cause unfair prejudice to the Witness and impair his protection. The complete statement must be kept *ex parte* and confidential. However, the Chamber is of the view that the substance of the said statement does not contain any protected information and can be disclosed to the Defence. This substantive statement is therefore quoted in an Annex to this Decision.

### B. *On the Inspection of E-mails and Correspondence between Prosecution and any Prosecutor Witness and of Material relating to the Assassination of President Habyarimana*

8. The Defence submits that the e-mails and correspondence between Prosecution and any Prosecution Witness are material for the preparation of its case and should be made available for inspection since they do not fall within any exception. The

[1] See *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case n°* ICTR-98-44-R66 *(Karemera et al.),* Decision on Motion to unseal *Ex Parte* Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 11.

[2] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba,* Case n° ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

[3] *Ibidem.*