

ICTR-98-42-T

10/7/2001

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 10 July 2001

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI

(Case No. ICTR-97-21-T),

Sylvain NSABIMANA & Alphonse NTEZIRYAYO

(Case No. ICTR-97-29-T),

Joseph KANYABASHI

(Case No. ICTR-96-15-T)

and Élie NDAYAMBAJE

(Case No. ICTR-96-8-T)

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**DECISION ON THE PROSECUTOR'S ALLEGATIONS OF CONTEMPT, THE
HARMONISATION OF THE WITNESS PROTECTION MEASURES AND
WARNING TO THE PROSECUTOR'S COUNSEL**

*Rules 46, 54, 73 and 77 of the Rules and Article 9(3)(c)(ii) of the Code of Professional
Conduct for Defence Counsel*

The Office of the Prosecutor:

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Pierre Boulé
Isabelle Lavoie

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS
NAME / NOM: *Dr. M. N. M. K. M. Antoinette*
SIGNATURE: *[Signature]* DATE: *10.07.2001*

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10.07.2001

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

SITTING as Trial Chamber II of the Tribunal, composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramarosan (the "Chamber");

BEING SEIZED, pursuant to Rule 73 of the Rules, of:

(i) The "Prosecutor's Extremely Urgent Motion for an Investigation of Contempt of the Tribunal" filed on 14 June 2001;

(ii) The "Réponse de Élie Ndayambaje à la Requête du Procureur en extrême urgence demandant une enquête pour outrage au Tribunal" filed on 20 June 2001;

(iii) The "Réponses de Sylvain Nsabimana à la Requête en extrême urgence formulée le 14 juin 2001 par le Procureur « aux fins d'une enquête pour outrage au Tribunal »" filed on 20 June 2001 ;

(iv) The "Réponse à la Requête en extrême urgence du Procureur pour une enquête sur un outrage au Tribunal" filed on 20 June 2001 by Counsel for Nteziryayo;

(v) The "Réponse à la Requête en extrême urgence du Procureur aux fins d'une enquête pour outrage au Tribunal" filed on 20 June 2001 by Counsel for Nyiramasuhuko;

(vi) The "Response to Prosecutor's Extremely Urgent Motion for an Investigation of Contempt of the Tribunal" filed on 20 June 2001 by Counsel for Ntahobali;

(vii) The "Réponse à la Requête du Procureur en extrême urgence demandant une enquête pour outrage au Tribunal" filed on 20 June 2001 by Counsel for Kanyabashi;

(viii) The "Prosecutor's Reply to the Defence Responses to the Prosecutor's Extremely Urgent Motion for an Investigation of Contempt of the Tribunal" filed on 22 June 2001;

HAVING HEARD the Parties on 25 June 2001;

CONSIDERING the Statute, the Rules of Procedure and Evidence of the Tribunal (the "Statute" and the "Rules") as well as the Code of Professional Conduct for Defence Counsel of the Tribunal (the "Code of Conduct"); particularly Rules 46, 54, 73, 77 of the Rules and Article 9(3)(c)(ii) of the Code of Conduct;

HAVING DELIBERATED,

1. The Chamber has reviewed and decided upon the issues arising from the Parties' submissions in the following order: (a) the Prosecutor's Request for investigations on allegations of contempt; (b) the Prosecutor's request for harmonisation of the witness protection measures in force in the 'Butare' Cases; (c) the Prosecutor's allegations of a conflict of interests; (d) the Defence requests for sanctions against the Prosecution's alleged misconduct in bringing the allegations of contempt.

(a) The Prosecutor's Request for Investigations on Allegations of Contempt

2. The Prosecutor alleges that, following disclosures in respect of several of her actual or potential witnesses, on or about 1 to 6 June 2001 in the Butare *préfecture*, four members of the Defence team for Accused Kanyabashi approached four Prosecution witnesses, at least two of whom will or could be called to testify in the Butare proceedings, and



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attempted to "mak[e] them change their mind not to testify for the Prosecution". Among these four persons were "Boubou", who appeared to be the leader of the Defence team; a "white man", the alleged son-in-law of Accused Kanyabashi, who, together with the said Boubou, falsely presented himself as a Tribunal investigator; and an interpreter identified, by a witness to whom the pseudonym RO was given, as a Rwandan national, former member of the *Interahamwe* and neighbour of Kanyabashi's wife, named Joseph Biroto Nzabirinda. Furthermore, the Prosecutor contends that, on another day, on or about 1 to 6 June 2001, the said Defence representatives falsely represented themselves as Tribunal investigators to the authorities of the Ngoma Commune Office in the said *prefecture*. These individuals allegedly told the said Commune authorities that the Prefect had given them permission to verify information in a file, which was accordingly released to them. One of the Defence representatives thereupon allegedly tried to steal a document from the Commune Office referring to the particulars of a Prosecution witness. He was, however, forced to return the said document to these authorities, who had seen him take it.

3. According to the Prosecution, these acts amount to Misconduct of Counsel pursuant to Rules 46 of the Rules and Contempt of the Tribunal pursuant to Rule 77(C) of the Rules for having:
 - (i) Knowingly and falsely presented themselves to third parties as 'ICTR investigators', without specifying that they were not acting on behalf of the Office of the Prosecutor, and with the intention of using such authority and ascendancy on the said third parties;
 - (ii) Intimidated witnesses; and,
 - (iii) Attempted to tamper with evidence.
4. The Chamber agrees with the Prosecutor that investigations in respect of such conduct could fall within the ambit of Rule 54 of the Rules, according to which "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial", notably in light of the fundamental necessity to protect the safety and security of witnesses.
5. However, the Chamber bears in mind the gravity of such allegations and the fact that, should the Chamber decide to proceed with the Prosecutor's request for investigations on these issues, a trial would commence within the trial, at the conclusion of which these allegations could result, if proven, notably, in a verdict of Contempt of the Tribunal and in the imposition of "a fine (...) or a term of imprisonment (...)", pursuant to Rule 77(C) of the Rules.
6. For this reason, and bearing in mind the principle of the presumption of innocence, any allegations of contempt are to be handled with due care. Consequently, the Prosecution is to justify its request for investigations by *prima facie* satisfying the Trial Chamber that there are reasonable grounds to believe that contemptuous conduct may have taken place, which may be attributable to the alleged contemnor.
7. The Chamber notes in this regard that the requirement of *prima facie* proof of allegations of contempt is supported by Decisions and Judgements rendered in this matter by the International Criminal Tribunal for the former Yugoslavia (See notably the "Scheduling Order in the Matter of Allegations against Accused Milan Simic and his Counsel", The

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Prosecutor v. Blagoje Simic *et al.*, 7 July 1999, in which the ICTY Trial Chamber dismissed allegations of contempt made by the Prosecutor against Counsel Pantelic, prior to his being “called upon (...) to respond to the allegations” and prior to the appearance of any witnesses, on the grounds that “it does not have good reason to believe that Mr. Igor Pantelic may be in contempt of the International Tribunal”; *See also* the “Judgment on Appeal by Anto Nobile Against Finding of Contempt”, The Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1, 30 May 2001 (the “Aleksovski Appeal Judgment on Contempt”), where, at para. 56, the Appeals Chamber dwells on “the danger of a Chamber [acting *proprio motu*] being both the prosecutor and the judge in relation to a charge of contempt, and the possibility in such a case that the ordinary procedures and protections for the parties are overlooked”, thereby reaffirming the need, when allegations of contempt are raised, “to proceed by way of an indictment, with the prosecution bearing the onus of establishing the charge” (our emphasis).

8. With respect to the present allegations, the Chamber notes:

- (i) That they lack precision, notably: (1) in respect of the persons allegedly contacted by the Defence representatives and of their being witnesses or not to be called during the joint trial by the Prosecutor, save for Witness RO who is included in the Prosecutor’s list of witnesses filed on 30 April 2001; (2) in respect of how many and which of the 4 witnesses contacted were supposedly intimidated; (3) in respect of the relevant dates when such conduct allegedly took place; (4) in respect of the identity and actual status of the individuals having contacted the said persons.

The Chamber particularly notes in this regard that the Prosecutor does not “formulat[e] at [this] early stage the nature of the charge with the precision expected of an indictment”, as expected for allegations of contempt (*See*, the Aleksovski Appeal Judgment on Contempt, para. 56);

- (ii) That, further, to support her allegations, the Prosecutor adduces only hearsay evidence, in the form of an Interoffice Memorandum dated 6 June 2001 signed by an Associate Investigator of the Office of the Prosecutor (the “OTP”), and double-hearsay evidence, in the form of an affidavit from a Coordinator of the OTP, which affidavit relies upon the information contained in the above referenced Memorandum of 6 June 2001;

The Chamber particularly notes that neither have sworn statements emanating from the witnesses who were allegedly approached been produced, nor any official statement emanating from the authorities of the Ngoma Commune Office referring to the allegations of tampering with evidence held in their archives.

- (iii) That, lastly, the Prosecutor’s withdrawal, in her Reply to the Defence Responses, of the accusations against Joseph Biroto Nzabirinda, a member of the Defence for Accused Nsabimana, who was singled out, notably as being “a former member of the *Interahamwe*”, on the sole ground that “[s]ince the filing of her Extremely Urgent Motion, she has new information that there was an error [with respect to the latter]”, without elaborating on the nature of this error or its scope, casts substantial doubt on the overall reliability of the allegations made.

9. For these reasons, the Chamber is not satisfied that the contemptuous conduct alleged may have taken place, and/or may be attributed to the Defence teams concerned, so as to

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justify an order for investigations. The Prosecutor's request in this regard, at para. 30(B) of her Motion, is therefore dismissed.

10. Having reached this conclusion on the basis of the submissions and evidence thereof submitted by the Prosecutor, the Chamber has not resorted to assessing the counter-evidence produced by Counsel for Kanyabashi, which was not substantially controverted by the Prosecutor in her written and oral replies, in the form of:

- (i) Two affidavits, one from Lawrence Morgan, investigator of the Defence team for Kanyabashi, the other from his wife Marie-Josée Uwimana, attesting to the fact that the former was not in Rwanda during the period when the alleged events took place and, in any event, was not a member of the Defence team for Kanyabashi at the said period; and
- (ii) An Interoffice Memorandum of the Safety & Security Section of the Tribunal in Kigali and a waiver signed on 25 May 2001 by Mr. Boubou Diabira, pertaining to the latter's mission and presence in Kigali at the time of the events alleged by the Prosecutor to have been committed in the Butare *préfecture*.

11. For the same reasons, the following further prayers for orders pertaining to the Prosecution's allegations of contempt are dismissed:

- (i) "[T]hat the Registrar investigate and (...) take action under Rule 46(D), if appropriate" (para. 30(C) of her Motion), "for the immediate surrender to the Tribunal of the passport and other travel documents in the possession of persons investigated pending investigation" (para. 30(D) of her Motion);
- (ii) "[T]hat each member of the Defence team of Kanyabashi, and persons in the employ of the Defence, submit sworn affidavits in this matter, an[d] in particular about all of the allegations above, including whether or not any representation was made as to being an official staff member of the Tribunal (...)" (para. 30(E) of her Motion);
- (iii) That any persons found guilty of contempt of the Tribunal be sentenced under Rule 77(C) of the Rules (para. 30(G) of her Motion);
- (iv) That sanctions be imposed against any persons engaged in misconduct (para. 30(H) of her Motion);
- (v) That any such persons be immediately removed from the Defence teams concerned (para. 30(I) of her Motion);
- (vi) "[T]hat any person removed return all materials in his or her possession related to the Tribunal to the Trial Chamber for appropriate restitution" (para. 30(J) of her Motion); and, finally,
- (vii) That "the Registrar (...) advise the appropriate authorities in Rwanda that they should insist on inspecting the official Tribunal identification bearing a staff member's title before any contact" (para. 30 M of her Motion) are hereby dismissed.

12. This being said, the Chamber, recalling the gravity of allegations of contempt, especially in respect of witnesses, wishes to state that, should any such allegations be brought in the future by a party, this must be done on the basis of properly prepared and substantiated submissions.

(b) The Prosecutor's Request for Harmonisation of the Witness Protection Measures in Force in the 'Butare' Cases

13. In light of the allegations of contempt referred to above, the Prosecutor further requests the Chamber to add the following order to the protective measures currently in force for her witnesses in the Kanyabashi and Ndayambaje cases: "that the Accused, Defence Counsel, member of the Defence team, or any other person in the employ of the Defence, shall make a written request, on reasonable notice to the Prosecutor, to the Trial Chamber to contact any potential prosecution witness or any relative of such person. The Trial Chamber, with consent of such person, may grant an interview of such person by the Defence and the Registry shall make contact and undertake arranging such interview" (para. 30(A) of her Motion). This, she submits, would harmonise the Kanyabashi Decision of 6 March 1997 and the Ndayambaje Decision of 11 March 1997 with the other prosecution witness protection orders in force in the 'Butare' cases, regarding Accused Nyiramasuhuko, Ntahobali, Nsabimana and Nteziryayo.
14. As contended by Counsel for Kanyabashi, the Prosecutor has not justified this request in view of the unclear and unproven allegations of intimidation of witnesses by members of the Defence for Accused Kanyabashi. Nor have they proven any such allegation with respect to Accused Ndayambaje, who is not even alluded to in the Prosecutor's allegations, as pointed out by Counsel for Ndayambaje.
15. However, the Prosecutor has thus drawn the Chamber's attention to discrepancies between the protection measures granted in respect of the Prosecutor witnesses in the present proceedings, with respect to the conditions to which contacts of the Defence with the said witnesses are subject. The Chamber further notes in this respect that similar discrepancies are found in the corresponding orders in force with respect to the Defence witnesses.
16. The Chamber notes that a harmonization in this respect would affect some of the Parties in the present proceedings. Indeed:
 - (i) On the one hand, should the orders for witness protection measures rendered in all the present cases be harmonised in line with those rendered in the Nyiramasuhuko, Ntahobali, Nsabimana and Nteziryayo cases, the Defence of Accused Kanyabashi and Ndayambaje would be in a less favorable position with respect to preparation of their cases. Counsel for Kanyabashi and Ndayambaje indeed submit that such an order would impede their work;
 - (ii) On the other hand, should the conditions for contacts with Defence witnesses be harmonised in line with those more stringent protection measures which are presently applicable to prosecution witnesses or to those of other Accused in the present proceedings, the Prosecutor would likewise be in a less favorable position than under some of the protective orders currently in force.
17. However, it is the view of the Chamber that such prejudice, if any, would not be substantial and, in any event, would be balanced by the following factors:
 - (i) The fundamental principle of the equality of arms between the Parties and the Prosecutor could be at stake, should the Defence of some Accused in the instant proceedings (namely, Nyiramasuhuko, Ntahobali, Nsabimana and Nteziryayo) continue to be under more restrictive orders with respect to contacts with the

Prosecutor's witnesses. Such a situation could possibly have an adverse effect on the Accused Nyiramasuhuko, Ntahobali, Nsabimana and Nteziryayo's respective preparation of their cases, as opposed to that of Accused Kanyabashi and Ndayambaje;

The Chamber recalls in this regard that "the Accused should be put in the same position, one with respect to the other, in view of their respective preparation [of their cases] in these joint proceedings" ("Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses", The Prosecutor v. 'Butare', 8 June 2001, para. 20).

- (ii) The same principle could also be at stake, should the Prosecution continue to be in a position where he could contact the witnesses to be called by the Defence of some of the Accused under less stringent conditions than those in force for the witnesses to be called by other Accused. For instance, at present, the Prosecution needs to request leave from the Chamber or a Judge thereof prior to contacting a Defence witness to appear on behalf, notably, of Accused Nyiramasuhuko, Ntahobali and Nsabimana, whereas it needs only to make such a request to Counsel for Nsabimana, should it wish to contact any of their witnesses;
- (iii) A harmonisation along the lines of the more comprehensive orders in force in the present proceedings would warrant an equal level of protection to all the witnesses to be called by all the Parties. For instance, at present, contacts between the Prosecution and Accused Nsabimana's and Ndayambaje's witnesses who are below 18 years of age are not subject to the consent of a concerned member of that witness's family or his or her parents or guardian as opposed to the witnesses to be called by the Prosecutor or by other Accused;

18. The Prosecutor's request for harmonisation being thus granted, in the interests of justice, for the above reasons, the Chamber will not rely on the Prosecutor's submission in this regard, based on Reports by the Witness and Victim Support Section of the Tribunal, according to which the Kanyabashi and Ndayambaje Decisions on protective measures for victims and witnesses of 6 and 11 March 1997 do not adequately address the present situation in Butare, Rwanda, and the safety and security of the Prosecution witnesses from that area, as opposed to the more recent and more restrictive measures applicable to the other Accused in these joint proceedings.

19. So as to properly harmonise all the relevant Orders rendered in the present proceedings in respect of contacts with another Party's witnesses, the Chamber will not retain the formulation suggested by the Prosecution, which in any case differs from all the orders rendered in these proceedings with respect to contacts with its witnesses, and decides *proprio motu* that the Order applicable to all the protected witnesses in these proceedings shall read as follows:

"[THE TRIBUNAL HEREBY ORDERS] That contact or communication with either prosecution or Defence protected victims or witnesses, or their close family members, that is to say, the witness's father, mother, spouse(s) and children, is subject to a written request to the Trial Chamber or a Judge thereof, on reasonable notice to either the Prosecution or the concerned Defense. If leave is granted, and with the consent of the concerned protected person or his or her parents or guardian if that person is under the age of 18,

the party on behalf of which the victim or the witness would testify at trial shall undertake the necessary arrangements to facilitate such contact.”

(c) The Prosecutor’s Allegations of a Conflict of Interests

20. The Prosecutor contends that one of the four Defence team members alleged to have been in contempt is Kanyabashi’s son-in-law. According to her, such a personal relationship between a member of his Defence team and the Accused may give rise to a conflict of interest, pursuant to Article 9(3)(c)(ii) of the Code of Conduct, according to which “(...) the Counsel’s professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by (...) the Counsel’s own (...) personal interests (...)”. The Prosecutor asserts that there is no advisement of the Accused or written waiver of a conflict of interest.
21. The Chamber notes in this respect that since Lawrence Morgan, according to his affidavit produced by Counsel for Kanyabashi, clearly mentioned on his application form the fact that he was married to Marie-Josée Uwimana, daughter of Joseph Kanyabashi, such a personal relationship must not have been considered by the Registrar of the Tribunal as giving rise, *per se*, to a conflict of interest.
22. Whatever the case may be, the Chamber notes that Lawrence Morgan solemnly declares in the said affidavit that he was a Defence investigator for Kanyabashi for the sole period of 6 December 2000 to 5 March 2001 and that his assignment as a member of the Defence for the Accused ended on 6 March 2001. Since any possible conflict of interests thereafter ceased to exist, the Chamber denies the corresponding Prosecutor’s prayers for the following orders:
 - (i) “[T]hat each member of the Defence team of Kanyabashi, and persons in the employ of the Defence, submit sworn affidavits in this matter, an in particular about all of the allegations above, including whether or not any representation was made as to being an official staff member of the Tribunal and/or being the son-in-law of Kanyabashi” (para. 30(E) of her Motion);
 - (ii) “[T]hat each member of the Defence team of Kanyabashi, and persons in the employ of the Defence, submit sworn affidavits to attest to the fact that any member of the Defence team is or is not in any way related, including by marriage, to Kanyabashi” (para. 30(F) of her Motion);
 - (iii) “[F]or an affidavit of advisement of client of potential conflict of interest if any member of the Defence team, or person in the employ of the Defence, is in any way related, including by marriage, to Kanyabashi” (para. 30(K) of her Motion);
 - (iv) “[I]f appropriate, that Kanyabashi submit to the Trial Chamber a statement that he was advised by Counsel as to a potential conflict of interest and written waiver of any potential conflict of interest, if a member of the Defence team or person in the employ of the Defence, is in any way related to Kanyabashi, including by marriage” (para. 30(L) of her Motion).
23. The Chamber further notes that these matters could be addressed administratively by the Registry.

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(d) The Defence Requests for Sanctions against the Prosecutor's Counsel Alleged Misconduct

24. Counsel for most Accused in the instant proceedings object to the Prosecutor's "careless" conduct in the matter, in that:

- (i) The principle of presumption of innocence was violated: Counsel for Kanyabashi and Nsabimana object to the substantial doubt thus cast on the Accused on the basis of unsubstantiated allegations; Counsel for Nyiramasuhuko objects to the reference made to Accused Nyiramasuhuko in the Memorandum by the OTP Coordinator, Mr Fomuso, as though she was singled out in spite of the absence of any allegations actually made against her; Counsel for most of the Accused similarly object to substantial doubt cast on all the Accused in these proceedings, in that the allegations appear to be pertaining to all the Defence teams in the instant proceedings;
- (ii) The reputation and professional credibility of all Counsel in the present proceedings have been affected;
- (iii) The safety of the Defence investigators has since been jeopardised. In that respect, Counsel for Nyiramasuhuko object to the disclosure, in the Annexure to the Prosecutor's Motion, of the identity of the members of all Defence teams, including the Defence investigators whose security was thus jeopardized. The Prosecutor however replies that the information contained in the list of the 'Butare' case Defence team members is an official document of the Tribunal, made available to them by the Registry and generally available to the public. Furthermore, Counsel for Nsabimana, whose Defence investigator Joseph Biroto Nzabirinda was singled out, notably as being "a former member of the *Interahamwe*" in the Prosecutor's Motion, submit that the latter's life has thus been put at risk.

The Prosecutor's Breach of the Principle of Presumption of Innocence and Attack on the Professional Credibility of Counsel

25. The Chamber does not consider that all the Accused in the instant proceedings or all their Counsel may have been prejudiced with respect to a possible breach of the principle of presumption of innocence and/or the possible blow to their professional reputation, in that the allegations brought, as opposed to the general wording or the title of the Motion, singled out only one specific Defence team, that of Accused Kanyabashi and, as it later proved from Counsel for Nsabimana's submissions in reply to the Motion, Nsabimana's Defence team as well. Only these Counsel and their respective Accused could therefore have suffered prejudice, if any, from such allegations, in the way they were brought.
26. This being said, the Chamber does not find that the principle of presumption of innocence was violated as a consequence of the Chamber's being seized of allegations of contempt linked to these Defence teams in the instant proceedings. Indeed, the Judges of the Tribunal are professional jurists capable of distinguishing between the issues at stake and those that are or will be alluded to at trial. Furthermore, the Chamber recalls that it dismissed the Prosecutor's allegations for lack of *prima facie* evidence.
27. Neither does the Chamber find that the concerned Counsel professional credibility and reputation was affected by the allegations brought by the Prosecutor against investigators

members of their Defence team, these allegations having been dismissed. The Chamber further notes in this respect that, although the Prosecutor could in the first place have proved more careful in not disclosing to the public at large all the information identifying the persons which were alluded to in her Motion and Annexes, she generally acted in good faith, in the overall urgency necessary in dealing with any possible threat to the security of her actual or potential witnesses.

The Prosecutor's Disclosure of the Identity of Defence investigators

28. The Chamber does not find that the Prosecutor, in attaching to her Motion a list of all the members of the Defence teams in the 'Butare' case, including their investigators, proved negligent and caused any prejudice in this respect. The Chamber particularly acknowledges the Prosecutor's submission that this list originates from the Registry and is not, *per se*, a confidential document, and further notes that the Defence did not contend that prior notice was given to the Registry that disclosure of the identity of specific members of their teams could affect their security.

The Prosecutor's Withdrawn Allegation that Joseph Biroto Nzabirinda, Investigator of the Defence for Nsabimana, Inter Alia, was "a former member of the Interahamwe"

29. The Chamber has duly noted the Prosecution's withdrawal, in their Reply to the Defence Responses and at the hearing of 25 June 2001, of all allegations pertaining to Joseph Biroto Nzabirinda, member of the Defence for Accused Nsabimana, on the basis of new evidence proving that "an error" was made.
30. The Chamber notes that these allegations, and notably that of his being "a former member of the *Interahamwe*", may since have been echoed in the Rwandese and international Media, as contended by Counsel for Nsabimana, thus possibly jeopardising the security, if not the life, of the concerned Defence investigator, and thus possibly hampering the defence investigations.
31. The Chamber further notes in this regard that, although acting in good faith so as to urgently act on possible threats to the security of her witnesses, the Prosecutor should have acted more diligently in avoiding disclosure to the public at large of the identity of the members of the Defence teams concerned, so as to avoid such an unfortunate situation as that of Nsabimana's investigator. The Chamber accordingly finds that the attitude of the Prosecution qualifies in this regard as Misconduct of Counsel, within the meaning of Rule 46(A) of the Rules.
32. Contrary to Counsel for Nsabimana's assertions in this regard, the Chamber did not address a Warning, pursuant to Rule 46 of the Rules, to the Prosecutor's Counsel in the present case during a hearing of 12 August 1999 when, according to the English authoritative version of the transcripts of that date, the Chamber only orally "admonish[ed] the Prosecutor" without having recourse to the specific procedure laid out under Rule 46 of the Rules.
33. The Chamber, having found the Prosecutor's Counsel to have conducted themselves improperly and recklessly in respect of the disclosure of the identity of Defence personnel allegedly in contempt of the Tribunal, consequently warns

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them in terms of Rule 46(A) of the Rules to desist from such conduct, which is contrary to the interests of justice.

FOR THE ABOVE REASONS,

THE TRIBUNAL

I. GRANTS, in part, the Prosecutor's Request for harmonisation of the protection measures afforded to her witnesses in the present proceedings; and

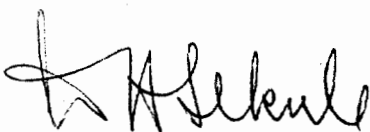
II. ORDERS, *proprio motu*, in respect of all protected witnesses in the present proceedings:

"That contact or communication with either prosecution or Defence protected victims or witnesses, or their close family members, that is to say, the witness's father, mother, spouse(s) and children, is subject to a written request to the Trial Chamber or a Judge thereof, on reasonable notice to either the Prosecution or the concerned Defense. If leave is granted, and with the consent of the concerned protected person or his or her parents or guardian if that person is under the age of 18, the party on behalf of which the victim or the witness would testify at trial shall undertake the necessary arrangements to facilitate such contact."

II. DISMISSES the Prosecutor's Motion in all other respects;

III. WARNS the Prosecutor's Counsel in the present proceedings, pursuant to Rule 46(A) of the Rules.

Arusha, 10 July 2001



William H. Sekule
Presiding Judge



Winston G. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge

