



ICTR-98-42-T  
25/09/2001  
(3827 — 3817)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Adama Dieng

Date: 25 September 2001

JUDICIAL RECORDS  
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WHR

**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, and**  
(Case No. ICTR-96-15-T)

**Élie NDAYAMBAJE**  
(Case No. ICTR-96-8-T)

**DECISION ON THE PROSECUTOR'S MOTION FOR, *INTER ALIA*,  
MODIFICATION OF THE DECISION OF 8 JUNE 2001**

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WHR

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“the Tribunal”),

**SITTING** as Trial Chamber II, composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the “Chamber”);

**BEING SEIZED of:**

- (i) The “Prosecutor’s Urgent Motion for a Stay of the Decision of 8 June 2001, and Modification and Harmonisation of Witness Protection Measures Due to Newly Discovered Information” (the “Prosecutor’s Motion for Stay”) filed on 14 June 2001;
- (ii) The “Prosecutor’s Withdrawal of her Prayer for a Stay of the Decision of 8 June 2001, and Further Submissions” (the “Prosecutor’s Withdrawal of her Prayer for Stay and Further Submissions”) filed on 15 June 2001;
- (iii) The “Réponse à la Requête du Procureur afin de suspendre la Décision du 8 Juin 2001, et de modifier et harmoniser les mesures de protection des témoins sur la base d’informations nouvellement découvertes” (“Kanyabashi’s Response”) filed by the Defence for Kanyabashi on 20 June 2001;
- (iv) The “Réponse de Pauline Nyiramasuhuko à la ‘Prosecutor’s Urgent Motion for a Stay of the Decision of 8 June 2001, and Modification and Harmonisation of Witness Protection Measures due to Newly Discovered information’ (Nyiramasuhuko’s Response’) filed on 20 June 2001;
- (v) The “Réplique à la Requête du Procureur en sursis de la Décision du 8 Juin 2001 et en modification et harmonisation de mesures de protection des témoins du fait de nouvelles informations” (“Ndayambaje’s Response”) filed by the Defence for Ndayambaje on 25 June 2001;
- (vi) The “Prosecutor’s Reply to the Defence Responses to the Prosecutor’s Urgent Motion for Modification and Harmonisation of Witness Protection Measures Due to Newly Discovered Information” (“Prosecutor’s Reply”) filed on 5 July 2001;
- (vii) The “Réplique de Pauline de Nyiramasuhuko suite au dépôt à la Chambre d’un document de la Section de la protection des victimes et témoins du Procureur à l’appui de sa Requête urgente «For a Stay of the Decision of 8 June 2001, and Modification and Harmonisation of Witness Protection Measures due to Newly Discovered Facts»” (“Nyiramashuko’s Replique”) filed on 4 July 2001;
- (viii) The “Prosecutor’s Reply to Nyiramasuhuko’s ‘Réplique’” filed on 6 July 2001 Regarding the Prosecutor’s Urgent Motion for Modification and Harmonisation of Witness Protection Measures Due to Newly Discovered Information” (the “Prosecutor’s Reply to Nyiramasuhuko’s *Réplique*”) filed on 9 July 2001;

**CONSIDERING** that the Parties were informed that the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence (the “Rules”), would be decided upon on the basis of their written briefs only;

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**CONSIDERING** that Court Management Section ("CMS") issued an Internal Memorandum on 28 June 2001 informing the Parties of a deadline set on 4 July 2001 for the filing of any Defence response to the Prosecutor's Motion, and of another, on 6 July 2001, for the filing of any reply by the Prosecutor;

**NOTING** that:

- (i) On 8 June 2001, the Chamber rendered two Decisions in the so-called 'Butare' cases:
  - (a) The "Décision relative à la Requête de la Défense en extrême urgence tenant au respect par le Procureur de la "Décision relative à la Requête de la Défense en communication de preuves" rendue le 1<sup>er</sup> novembre 2000" (the "Disclosure Decision"), in which the Chamber, *inter alia*, ordered the Prosecutor:
    - (1) To disclose to the Defence of Accused Nyiramasuhuko and the other Accused the information contained in the fact sheets of the statements of the witnesses the Prosecutor intends to call at trial; notably, (1) the name of the investigators and interpreters having conducted the interview, (2) the place and (3) the date of the interview, and (4) the language or languages used to conduct the interview (*See Order VII*);
    - (2) To seek leave not to disclose any of the information referred to above, upon providing the Chamber with the precise reasons for non-disclosure of that information, by 18 June 2001 (*See Order No. VIII*);
  - (b) The "Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses" (the "Harmonisation Decision") in which the Chamber, *inter alia*, ordered:
    - (1) (a) The Witnesses and Victims Support Section (the "WVSS") to report to the Chamber and the Parties concerned on whether the protective measures in the instant proceedings have been enforced; (b) The Parties to disclose thereupon to the other Parties the unredacted statements and the identity of the concerned witnesses yet undisclosed; (c) The WVSS to take all necessary steps to enforce such measures for witnesses not yet placed under protective measures. The Parties thereafter proceed with the full disclosure of the unredacted statements and the identity of the corresponding witnesses (*See Order I*);
    - (2) The Prosecutor to immediately disclose to the Defence of all the Accused all her unredacted witness statements with additional information on their identity (*See Order II of the Harmonisation Decision*);
    - (3) The Prosecutor to seek leave not to disclose such information as contained in the fact sheets upon fully detailing the reasons therefor, by Monday 11 June 2001 (*See Order III*);

- (ii) In compliance with the said Decisions, the WVSS filed two reports, on 10 and 13 June 2001, expressing its concerns about full disclosure of the identity and unredacted statements of protected witnesses, particularly "in light of recent events in Rwanda, namely the fighting that has broken out in parts of Rwanda between the Government and other, anti-Government forces, which has led to the imposition of a curfew in several parts of Rwanda, including Butare". On 2 July 2001, the WVSS filed a third report, reiterating that "the objective conditions on the ground still remain unchanged, and the compulsions which operated then [on 10 and 13 June 2001] are still the same now";
- (iii) On 11 June 2001, Mr. Maxwell Nkole, Commander for Investigations in the Office of the Prosecutor, submitted an affidavit attesting to the insecure situation in Rwanda, especially in Southern and Western Rwanda and with regard to one road leading to Butare. Furthermore, on 14 June 2001, the Prosecutor filed a Motion on Contempt (the "Prosecutor's Motion on Contempt") pertaining to allegations of witness intimidation;
- (iv) In light of the two reports of the WVSS, the affidavit of Mr. Nkole and the annexes to the Motion on Contempt, the Prosecutor, in her Motion of 14 June 2001, moved for a stay of the Harmonisation Decisions of 8 June 2001 as for the disclosure to the Defence of seven non-redacted witness statements and fact sheets by 15 June 2001 (*See* para. 30 (D) in the Motion for Stay). While her Motion was pending, the Prosecutor notified that she fully complied, on 15 June 2001, with the Harmonisation Decision of 8 June 2001 as for Order I (B). On 16 June 2001, the Prosecutor subsequently withdrew her prayer for a stay of the Harmonisation Decision of 8 June 2001 in regard of the said Order, as being moot;
- (v) The Motion for Stay remains with regard to paragraphs 30 (A) to 30 (C). The Prosecutor prays that the Trial Chamber issue:
  - (a) An Order to harmonise the Kanyabashi Decision rendered on 6 March 1997 and the Ndayambaje Decision rendered on 11 March 1997, both granting protective measures to the Prosecutor's witnesses, to conform with the other prosecution witness protection orders in place in the other two 'Butare' cases, namely ordering:
 

“(...) [T]hat 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”;
  - (b) An Order to harmonise the deadlines for disclosure of non-redacted witness statements to 30 days prior to testimony;
  - (c) An Order to modify the Disclosure Decision of 8 June 2001 for the Prosecutor not to disclose the names of the investigators and interpreters having conducted or assisted in the interview, as well as the place where

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the interview took place, since such information places witnesses and Tribunal personnel at risk;

**NOTING** further that:

- (i) In their responses, the Defence for Nyiramasuhuko, Kanyabashi and Ndayambaje essentially submit that since neither the First and Second WVSS Reports and the affidavits annexed to the Prosecutor's Motion for Stay, nor the Third WVSS Report contain any new information, the Chamber should reject the Prosecutor's Motion for Stay;
- (ii) The Defence for Nyiramasuhuko submits that there is no reason for the Chamber to reverse its Disclosure Decision of 8 June 2001 that order is the Prosecutor to immediately disclose all the unredacted witness statements. Furthermore, they contend that the Prosecutor is not allowed to seek non-disclosure of the names of the investigators and interpreters, and the place of the interview as disclosure would make it possible to identify the witness in question;
- (iii) The Defence for Ndayambaje alleges that the underlying reason for the Prosecutor's filing of the Motion is to avoid having to disclose the unredacted witness statements and the identity of her protected witnesses as she is obliged to, pursuant to the Harmonisation Decision of 8 June 2001. In addition, the Defence for Ndayambaje and Kanyabashi submit that the Prosecutor's Urgent Motion is aimed only at reversing the two Decisions rendered by the Chamber on 8 June 2001. The Defence teams argue that the Prosecutor's Urgent Motion is a disguised appeal and that, if granted, it would cause prejudice to all Accused;
- (iv) In reply to the Defence responses, the Prosecutor submits that the only three Defence Responses filed, by the Defence for Kanyabashi, Nyiramasuhuko and Ndayambaje (the "Defence Responses"), may be inadmissible because they were allegedly filed out of time. In this respect, the Prosecutor argues that the Registry should provide the Trial Chamber proof of service of her Motion for Stay. The Prosecutor further submits that Nyiramasuhuko's *Réplique* was filed two days after the deadline and is therefore inadmissible. In the absence of any admissible response by the Defence, the Prosecutor requests the Trial Chamber to grant her Motion for Stay;

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules;

**NOW REVIEWS** the Prosecutor's Motion, taking into account her subsequent Withdrawal of the Prayer for Stay and Further Submissions.

**HAVING DELIBERATED,**

1. The Chamber will review the issues arising from the Parties' submissions and decide upon them in the following order: (a) admissibility of the Defence Responses and Nyiramasuhuko's *Réplique*, (b) the Prosecutor's request for harmonisation of witness

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protection orders to restrict contact with her witnesses; (c) the Prosecutor's request for harmonisation of witness protection orders for rolling deadlines for disclosure; (d) the Prosecutor's request for non-disclosure of the names of investigators and interpreters, and the place of the witnesses' interviews.

**(a) Admissibility of the Defence Responses and Nyiramasuhuko's Réplique**

2. The Prosecutor contends that the Defence Responses and Nyiramasuhuko's *Réplique* were filed out of time pursuant to Rule 73(D) of the Rules and that they are therefore inadmissible. The Chamber however notes that the Defence Responses were filed before the deadline of 4 July 2001 as set in the Internal Memorandum issued by CMS on 28 June 2001 further to the Chamber's instructions. The Defence Responses are therefore admissible.
3. It is not in dispute, on the other hand, that the Defence for Nyiramasuhuko filed her *Réplique* to the Third WVSS Report on 6 July 2001, that is, after expiration of the deadline of 4 July 2001. The Chamber however notes that the said Report was filed in both working languages on 2 July 2001 only. The Chamber accordingly finds that there is good cause to grant relief for a waiver of the deadline of 4 July 2001 and, thus, shall review Nyiramasuhuko's *Réplique*.

**(b) The Prosecutor's Request for Harmonisation of Witness Protection Orders to Restrict Contact with her Witnesses**

4. At para. 30(A) of her Motion for Stay, the Prosecutor requests the Chamber to harmonise the Kanyabashi Decision of 6 March 1997 and the Ndayambaje Decision of 11 March 1997 so as to conform with the other prosecution witness protection orders in place in the other two 'Butare' cases, in ordering as follows:  

"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."
5. The Chamber notes that the above order is the same as the one sought at para. 30(A) of the Prosecutor's Motion on Contempt of 14 June 2001. Since this request was decided upon in the "Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel" of 10 July 2001 in the instant cases (the "Decision on Contempt of 10 July 2001"). The Prosecutor's request is therefore *res judicata* and, accordingly, dismissed. The Chamber, for the sake of clarity, recalls that the Order in force in respect of all the protected witnesses to be called by the Parties in these proceedings reads as follows:

"That contact or communication with either prosecution or Defence protected victims or witnesses, or their close family members, that is to say, the

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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 Defence. 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." (Order II, Decision of 10 July 2001)

**(c) The Prosecutor's Request for Rolling Deadlines for Disclosure to the Defence of the Identity and Unredacted Statements of her Witnesses**

6. The Chamber firstly recalls the Prosecutor that the deadlines for disclosure of the unredacted statements and identity of the Parties' witnesses in the present joint cases were harmonised by the Decision of 8 June 2001. The Chamber therein ordered that the said statements and identity be disclosed immediately to the opposing Party, subject to confirmation of the enforcement of the protection measures by the WVSS.
7. Thus, the Chamber denied the Prosecutor's request for a deadline of 21 days prior to testimony. The Prosecutor now requests the Trial Chamber to "modify" this Decision, so that the said disclosure be carried out in respect of each of her witnesses "on a rolling basis", 30 days prior to each testimony.
8. The Chamber agrees with the Defence for Kanyabashi and Ndayambaje that the Prosecutor's request for modification could be construed as an appeal against the Harmonisation Decision of 8 June 2001 whereas, pursuant to Rule 73(B) of the Rules, no appeal lies for interlocutory Decisions. It especially seems so when the Prosecutor states in her Motion, that "[she] would be extremely concerned (...) if the Trial Chamber's Decision of 8 June 2001 (...) was intended as a form of sanction against the Prosecutor".
9. However, the Chamber notes that the Prosecutor thereafter submits that her request is based on new information which allegedly affects the security of her witnesses. Thus, the Prosecutor's apparent appeal is, in fact, a request for review of the Decision of 8 June 2001.
10. The Chamber notes the authority given to a Trial Chamber by Rule 69 of the Rules 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*" (our emphasis). The Chamber further recalls that it held, upon a similar request made in other circumstances by the Defence in the Kamuhanda Case that "the Defence is obviously at liberty, pursuant to Rule 75 of the Rules, to request a Judge or Trial Chamber, at any time, to amend the protective measures sought or to seek additional measures for its witnesses, if necessary" (*The Prosecutor v. Kamuhanda*, Case No. ICTR-99-54-T, "Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses", 22 March 2001, para. 24). What is true for one party in respect of its witnesses also applies, *mutatis mutandis*, to the other party in respect of its witnesses.

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11. It is the Trial Chamber's view therefore that a review of a Decision on protective measures for witnesses, or, as in this case, of one having an impact on the protection of one party's witnesses can at all times be requested on the basis of new information, notably in regard of a change in the circumstances surrounding the initial Decision.
12. In this respect, the Prosecutor relies on the First WVSS Report of 10 June 2001 which reads at para. 10:  

"We felt [that the unredacted witness statements being disclosed 21 days prior to date of testimony, on a rolling basis, and not prior to commencement of trial] was a good arrangement because it can take up to six or eight months, or even longer for the Prosecution to complete the testimony of all its witnesses, and having all the details of the witnesses known to the accused and perhaps even the Defence investigators, may increase the risk for witnesses. This is a risk the WVSS would prefer to minimise."
13. The mere reference to the operating procedures for witness protection in general and to the status of the implementation of the protective measures for Prosecution witnesses in the Butare cases specifically, as otherwise elaborated upon in the Second WVSS report of 13 June does not, in this respect, constitute good cause to revert Order II of the Harmonisation Decision of 8 June 2001.
14. The Prosecutor further relies on the following "newly discovered information" which increase "the potential danger [for her witnesses] of making such [identifying] information available too far in advance of testimony":
  - (a) Her further allegations of contempt in the form of undue interference with witnesses in the present cases (*See*, the Prosecutor's Motion on Contempt);
  - (b) "The perception of Defence investigators amongst witnesses in Rwanda [which] has recently suffered", notably in view of the allegations of contempt raised by the Prosecutor in the present cases (First WVSS Report);
  - (c) The general security situation in certain parts of Rwanda. The Prosecutor notably relies on the following information:
    - (i) "[T]he fighting that has broken out in parts of Rwanda between the government and other anti-government forces, which has led to the imposition of a curfew in several parts of Rwanda, including Butare" (First WVSS Report);
    - (ii) "The security situation in Rwanda especially Southern, Northern and Western parts [which] remains classified as insecure due to ongoing fighting between the Government forces and infiltrators believed to be ex-Interahamwe and ex FAR fighters (Affidavit of Mr. Maxwell Nkole, Commander of Investigations of the Office of the Prosecutor, Annexure to the Motion for Stay).
15. The Chamber agrees with the Defence that none of the above reasons submitted by the Prosecutor provide good cause to modify Order II of the Harmonisation Decision of 8 June 2001. The Chamber particularly notes in this regard that:



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*Request for non-disclosure of the names of the investigators and interpreters having collected the witness statements*

19. The Prosecutor submits that the above-mentioned precarious security situation in certain areas of Rwanda, due to ongoing fights between the Rwandan Government and Rebel infiltrators, highlight "the existence of the risk of harm" to her personnel.
20. The Trial Chamber is aware of the said situation. It is however not satisfied that the risk of harm to the Prosecutor's employees is such that disclosure of the names of the investigators and interpreters who have collected the witness statements would in all likelihood jeopardise their safety. The mere reference to "a risk of harm" in view of an ongoing precarious security situation in certain areas of Rwanda is not sufficient to warrant non-disclosure of information which the Chamber holds to be an integral part of the witnesses statements, attesting to the modalities of collection of the said statements (*See, The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, "Décision relative à la Requête de la Défense en extrême urgence tenant au respect, par le Procureur, de la « Décision relative à la Requête de la Défense en Communication de preuves » rendue le 1er novembre 2000", 8 June 2001, at para. 21). The Chamber particularly notes that in any case, the names of the said Prosecution personnel would exclusively be disclosed to the Defence in the instant cases, as opposed to the public at large.
21. Furthermore, the Chamber does not agree with the Prosecutor's submission that this information is not relevant for the Defence. The Chamber recalls that it held, in contrast, that such information was necessary for the Defence to prepare for cross-examination. Indeed, it could notably attest to the accuracy and to the modalities of collection of statements given by witnesses. The Prosecutor's request is therefore dismissed.

*Request for non-disclosure of the place of collection of the witness statements*

22. The Chamber notes that the Prosecutor submits that this information would in fact provide the Defence with the current address of the witnesses, since the place of the interview often coincides with the residence of the concerned witness or some nearby location. The chamber recalls that it held in this respect, that the Prosecutor was not to disclose such information (*See, the Disclosure Decision of 8 June 2001 at para. 28 in fine; See also, The Prosecutor v. Delalic et al.*, Case No. IT-96-21, "Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses", 18 March 1997, wherein the ICTY Trial Chamber held, at para. 20, that "[t]he term 'identity' does not necessarily include the present addresses of the witnesses" and that, as a consequence, it is not a 'substantial identifying information' which the Prosecutor is bound to disclose "so that the Defence can adequately conduct its own investigations").
23. The Prosecutor's request is therefore granted.

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- (i) Although the further allegations of Contempt raised by the Prosecutor since the Decision of 8 June 2001 could amount to newly discovered information, the Chamber considers, as did the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") seized of the Kupreskic case, when deciding upon a similar request from the Prosecutor acting on the basis of allegations of intimidation of her witnesses, that "[i]f the course of action proposed (...) were granted, it would not be possible for the Defence adequately to prepare its case for trial" (See, *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16, "Decision on the Motion to Delay Disclosure of Witness Statements and Identities", 21 May 1998), while it could adversely affect the trial proceedings, and the right of the Accused to a fair and expeditious trial would be at stake;
- (ii) The deterioration of the perception of Defence investigators amongst witnesses in Rwanda is not an objective factor which can be taken into account in deciding upon this issue;
- (iii) The ongoing fights between the Rwandan forces and rebels infiltrating the country, and the general instability of the country in several of its areas as detailed above can hardly qualify as new information warranting such a review. The Trial Chamber particularly notes in this respect that the affidavit by Mr. Nkole explains that the security situation in these areas "remains classified as insecure" (our emphasis);

16. The Chamber thus dismisses the Prosecutor's Motion for modification of Order II of the Harmonisation Decision of 8 June 2001 in respect of the disclosure of the identity and unredacted statements of her witnesses. The Prosecutor is thus ordered to disclose these elements to the Defence upon confirmation of the enforcement of the protection measures by the WVSS.

**(d) The Prosecutor's Request for Non-disclosure, on the Fact Sheet Attached to each Witness Statement, of the Names of Investigators and Interpreters Having Collected the said Statement, and of its Place of Collection**

17. The Chamber recalls that it ordered in its Disclosure Decision of 8 June 2001, at Order VIII, that:

« s'il considérait que l'une ou l'autre de ces dernières informations, relativement à l'un ou l'autre des témoins protégés ou susceptibles de mesures de protection qu'il entend citer, permet d'identifier le témoin en question, d'en faire état par écrit auprès de la Chambre, et de donner les raisons précises pour lesquelles il considère que cette information ne devrait pas être communiquée, dans les dix jours au plus tard suivant la date de la présente Décision ».

18. The Chamber finds, contrary to the Defence assertion, that the Prosecutor's present request was timely filed, on 14 June 2001, before the deadline of 18 June 2001 above-stated.

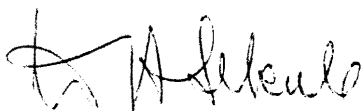
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**FOR THE ABOVE REASONS,**

**THE TRIBUNAL**

- I. GRANTS** the Prosecutor's request for non-disclosure, on the fact sheet attached to the witness statements, of the place of collection of said statements;
- II. DISMISSES** the Prosecutor's Motion in all other respects.

Arusha, 25 September 2001



William H. Sekule  
Presiding Judge



Winston C. Matanzima Maqutu  
Judge



Arlette Ramaroson  
Judge

