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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER III

Original: English

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: 5 December 2001

THE PROSECUTOR
v.
THÉONESTE BAGOSORA
ANATOLE NSENGIYUMVA
GRATIEN KABILIGI and
ALOYS NTABAKUZE

Case No. ICTR-98-41-I

DECISION AND SCHEDULING ORDER ON THE PROSECUTION MOTION FOR HARMONISATION AND MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

The Office of the Prosecutor:
Mr. Chile Eboe-Osuji
Ms. Patricia Wildermuth
Ms. Amanda Reichman

Defence Counsel:
Mr. Raphael Constant
Mr. Jean Yaovi Degli
Mr. Clemente Monterosso
Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'omanwa

The International Criminal Tribunal for Rwanda (the "Tribunal"), sitting today as Trial Chamber III composed of Judges Lloyd George Williams, Presiding, Yakov Ostrovsky, and Pavel Dolenc (the "Chamber");

BEING SEISED OF the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses dated 5 July 2001 and filed on 10 July 2001 (the "Motion");

RECALLING the Chamber's Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures issued on 29 November 2001 in which the Chamber indicated that it would make a scheduling order no later than 11 December 2001 specifying a deadline by which the Prosecutor is to disclose unredacted statements and other identifying data for her protected witnesses pursuant to Rule 69(C) of the Tribunal's Rules of Procedure and Evidence (the "Harmonisation Decision");

RECALLING the Chamber's consultation with the Chief of the Witnesses and Victims Support Section for the Prosecution ("WVSS-P") pursuant to Rule 69(B) on 26 November 2001;

NOW DECIDES the matter in accordance with the following deliberations and findings.

DELIBERATIONS AND FINDINGS

1. In the Harmonisation Decision, the Chamber reserved making a specific order indicating a deadline by which the Prosecutor was to disclose copies of unredacted statements and other witness-identifying data to the Defence pursuant to Rule 69(C) of the Tribunal's Rules of Procedure and Evidence (the "Rules"). In the instant decision the Chamber answers the question it reserved in the Harmonisation Decision: Which method of calculating the disclosure period of unredacted witness statements and other identifying data is most consonant with the letter and spirit of Articles 20 and 21 of the Statute and Rule 69 -- one measured from the date of the commencement of trial or one measured from the date a particular protected witness is to give *testimony* before the Trial Chamber? After resolving the foregoing question, the Chamber will address itself to the task of determining what length of non-disclosure is strictly necessary to facilitate the protection of victims and witnesses while respecting the rights of the Accused to receive identifying-data in sufficient time to mount an effective cross-examination of the witnesses against them.

2. In fashioning an order that is consistent with Rule 69(C), the Chamber must first interpret the Rule, employing well settled and widely recognised canons of construction in national jurisdictions practising under the common law and the civil code. The starting point of all interpretation of rules and statutes is the language of the rule or statute itself. Moreover, when interpreting the words of a rule a court is charged with according the words their common and ordinary meaning to give full effect to its provisions. In addition, proper interpretation mandates that a court must never construe words of a rule in isolation nor must it interpret a rule apart from its place within the regulatory scheme. *See*, by analogy, the Vienna Convention on the Law of Treaties Article 31, U.N. Doc. A/CONF. 39/97 (indicating that treaties are to be interpreted according to the plain meaning of words employed within the context of the object and purpose of the treaty). Finally, where the words of a rule or statute are unambiguous, a court may look

beyond the plain language of the rule only if application of its plain meaning would lead to an absurd result or one which is contrary to a clear legislative intent.

A. The Plain Language of Rule 69(A) and Rule 69(C)

3. Any principled analysis of a rule must commence with an interpretation of the plain words of the rule, according them an ordinary meaning. Thus, the point of departure is Rule 69, which provides:

> Rule 69: Protection of Victims and Witnesses
> (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the *non-disclosure of the identity* of a victim or witness who may be in danger or at risk, *until the Chamber decides otherwise*.
> (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult with the Victims and Witnesses Support Unit.
> (C) Subject to Rule 75, the identity of the victim or witness shall be *disclosed in sufficient time prior to the trial* to allow adequate time for preparation of the prosecution and the defence.
> (Emphasis added).

4. First, it is important to note that Rule 69(A) contains in substance, if not verbatim, the words of our previous order derived from the Bagosora Decision. Thus, we ordered that the Prosecutor not disclose the identity of her protected witnesses "until further order." In this manner, the previous order is eminently consistent with the letter and spirit of Rule 69(A). Whereas Rule 69(A) permits the Chamber to exercise its discretion to delimit a proper deadline for the disclosure of witness identities, Rule 69(C) restrains the Chamber's discretion in this regard by mandating that the identity of witnesses must be disclosed in sufficient time *prior to trial* to permit an accused a fair opportunity to adequately prepare his defence.

5. All of the Defence teams indicated that the Rule 69(C) obligates the Prosecutor to disclose *all* unredacted witness statements and other witness-identifying data before the commencement of trial. The Prosecutor, however, stressed that disclosure should be made on a rolling basis, measured from the date that a particular witness is scheduled to testify.

6. The plain language of Rule 69(C) calls upon the Chamber to make an order requiring the Prosecutor to disclose all protected witnesses' identifying data before the commencement of trial. Such an application of the strict letter of the Rule, without regard for its object and purpose, however, would render nugatory the remainder of the provisions of Rule 69(C), which provides the "*raison d'être*" of the provision, i.e., "to allow adequate time for preparation of . . . the defence". It is this purpose that drives the provision and which must guide the Chamber in assessing what amount of advance disclosure of witness-identifying data is necessary to fulfil its obligations to assure and make effective the Accused's statutorily guaranteed right to cross-examination and the Chamber's statutory mandate to protect victims and witnesses. Neither of these mandates can be sacrificed in service of the other. Rather, a proper balance must be struck to determine what amount of advance disclosure is strictly necessary to serve the twin aims of Rule 69.

7. More important, an interpretation according force to the letter of Rule 69(C) would divest the Chamber of the broad discretion at its disposal pursuant to Rule 69(A).

B. Legislative History of Rule 69

8. The jurisprudence of the Yugoslavia Tribunal interpreting the Rules and Statute is instructive to this Tribunal.[1] *See Prosecutor v. Tadic*, (IT-94-1-I), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, at paras. 23, 24. (August 10, 1995); *Prosecutor v. Tadic*, (IT-94-1-T) Judgement (7 May 1997).

9. In light of the existence of the exceptional circumstance, the Chamber finds that it is necessary to prevent the wholesale disclosure of witnesses names and addresses before trial because to do otherwise would be against the intent of the drafters of Rule 69 and the other Rules aimed at providing protection to victims and witnesses. Moreover, since it was the generally declared intent of the drafters that the Rules have some elasticity to permit the Chambers to make determinations, where warranted, on a case-by-case basis to address specific concerns, the Chamber believes that it is unreasonable under the particular circumstances of this case to give effect to the literal words of Rule 69(C) which require disclosure of all protected witness identities *before trial*. To make an order effectuating the letter of Rule 69(C) is ill advised because it would unnecessarily tax any real notion of witness protection without advancing the Accused's right to effective cross-examination in any meaningful way.

C. Rule 69 Within the Overall Scheme of the Statute and Rules

10. The exegesis of the overall scheme of the Statute and of the Rules makes plain the intent of the Judges who drafted the Rules regarding protection for victims and witnesses. There are no less than four rules and an article in the Statute specifically aimed at facilitating the appearance and testimony of witnesses before the Tribunal. The analysis of the International Tribunal for the Former Yugoslavia in the matter *Prosecutor v. Tadic* (IT-94-1-T) in its Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995) is instructive in this regard

> 24. In drafting the Rules . . . the Judges of the International Tribunal endeavoured to incorporate rules that addressed issues of particular concern, such as the protection of victims and witnesses, thus discharging the mandate of Article 22 of the Statute. (Annual Report, *supra*, para. 75). Provision are made for the submission of evidence by way of deposition, i.e., testimony given by a witness who is unable or unwilling to testify in open court (Rule 71). Another protection is that arrangements are made for the identity of witnesses who may be at risk not to be disclosed to the accused until such time as the witness is brought under the protection of the International Tribunal (Rule 69). Additionally appropriate measures for the privacy and protection of victims and witnesses may be ordered including, but not limited to, protection from public identification by a variety of methods (Rule 75). Also relevant is the

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[1]. From its very earliest days this Tribunal has relied upon the jurisprudence of the Yugoslavia Tribunal to inform its analysis and decisions on matters concerning witness protection. *See e.g. Prosecutor v. Rutaganta* (ICTR-96-3-T), Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses (26 September 1996) (including in the recitation the following: "TAKING INTO CONSIDERATION the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, notably its decisions of 10 August 1995 and 14 November 1995 . . .").

> establishment of the Victims and Witnesses Unit within the Registry to provide counselling and recommend protective measures (Rule 34).

11. So significant was the concern for the protection of witnesses that it is specifically mentioned in Article 14 of the Statute which engages the Judges of the Tribunal to adopt Rules of Procedure and Evidence for the conduct of all proceedings, including rules governing the protection of victims and witnesses. Moreover, Article 19(1) of the Statute, which governs the commencement and conduct of trial proceedings provides:

> The Trial Chambers shall ensure that a trial is fair and expeditious and that the proceedings are conducted in accordance with the [Rules], with full respect for the rights of the accused and *due regard for the protection of victims and witnesses.*
> (Emphasis added).[2]

12. Article 21 of the Statute of this Tribunal, which is identical to Article 22 of the Yugoslavia Tribunal's Statute, provides:

> The [Tribunal] *shall provide* in its Rules of Procedure and Evidence for the *protection of victims and witnesses*. Such protection shall include, but shall not be limited to, the conduct of in camera proceedings and the *protection of a victim's identity*.

13. Read together the various articles of the Statute and the Rules charge the Chamber with assuring the protection of victims and witnesses and vest it with broad discretionary authority in discharging this momentous mandate. *See* Rule 69(A).

14. This mandate to protect witnesses does not stand alone; rather it stands along side the Tribunal's obligation to ensure fair proceedings, in conformity with the rights of the accused. *See* Article 20. Among the rights which the accused enjoys is a minimum guarantee "[t]o examine, or have examined the witnesses against him or her . . . " as provided under Article 20(4)(e). However, this right seemingly unfettered and absolute at first blush has an explicit limitation in the form of Article 20(2) which provides: "In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject *to Article 21 of the Statute*." The Statute and the Rules envisioned therefore that the rights of the accused to a fair trial included the right of the Chamber to control the exercise of that right to a certain prescribed degree in service of the obligation to provide protection to victims and witnesses.

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[2]. The French version of Article 19 is slightly different in a very important way. In its French incarnation Article 19(1) provides:

> La Chamber de première instance veille à ce que le procès soit équitable et rapide et à ce que l'instance se déroule conformément au Règlement de procédure et de preuve, les droits de L'Accusé étant pleinement respectés et *la protection des victimes et des témoins dûment assurée.*

(Emphasis added).

When translated into English, the relevant portion of the French version provides: "the rights of the accused being fully respected and the *protection of victims and witnesses duly assured.*" In its French incarnation Article 19 places even more emphasis on the need to assure protection of victims and witnesses.

15. No one questions the potential value of unredacted statements and other witness-identifying data in the preparation of a defence. The point of departure for an effective cross-examination often involves asking the witness questions about his or her identity and where she or he lived or lives. Thus, if the Accused is to make effective use of his or her right to cross-examine witnesses against him he must be aware of the identity of the person he seeks to question, otherwise he is deprived of the very facts that would enable Defence Counsel to demonstrate that a witness is hostile, prejudiced, or otherwise unreliable so as to impugn the witness's credibility. All of this identifying data opens valuable avenues for in-court cross-examination and out-of-court investigation before the witness is to appear to testify.

16. The question remains therefore, what amount of advance disclosure is strictly necessary to serve the rights of the defence and preserve protection of victims and witnesses. What is truly in the balance is not the Accused's right to a fair trial against the safety of victims and witnesses. There is nothing within the Statute that indicates that an accused's right to a fair trial is somehow hampered or compromised in service of witness protection. The concepts of protective measures for witnesses, including delayed disclosure of identity, did not streak like a meteor across the existing statutory and regulatory landscape of the accused's right to a fair trial and effective cross-examination. Rather, it was an integral part of this Tribunal's procedures from its inception. Both concepts, fair trial for the accused and witness protection, were preoccupations of equal importance in the minds of the drafters of the Statutes and Rules. *See Tadic*, Protective Measures Decision, *supra*, at para. 25. It is not surprising therefore that several of the Tribunals Statutes and Rules speak of witness protection and the rights of the accused in the same breath. For example, Article 20(2) of the Statute contains a significant "subject to" clause: "In determination of the charges against him the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute". Similarly, Rule 75 which deals with the measures aimed at protecting the disclosure of witness-identifying data to the public and media, is bounded by the explicit requirement that any measures imposed pursuant must nevertheless be "consistent with the rights of the accused".

17. To give effect to only that part of the provisions of Rule 69(C) which indicates that disclosure is be to made *before trial*, without consideration of the object and purposes of such advance disclosure would do violence to the very intent of the drafters in making the provision: (i) to provide witness protection in "exceptional cases" and (ii) to provide sufficient notice to the accused so that he may effectively exploit his right to cross-examination of the witnesses against him.

D. Caveat: Must Avoid Results Repugnant to Intent of Rulemakers: Some Practical Considerations

18. On 26 November 2001, the Chamber consulted with the WVSS-P pursuant to Rule 69(B) to learn about the limits, if any, on its capacity and resources to place witnesses under the protection of the Tribunal. During our consultation, we learned that the WVSS-P lacks the capacity and resources to place under its protection more than 200 witnesses before the commencement of the trial proceedings in the instant case under logistical time constraints imposed by the workings of the Office of the Prosecutor. The manner in which the WVSS-P must operate permits it to place under protection only a limited number of witnesses at any given time. In addition, this capacity is further limited by the fact that each of the three Trial Chambers

is engaged in at least two trial requiring the protection and subsequent production of a large number of protected witnesses. For example in the so-called Butare Case, *Prosecutor v. Nyramasuhuko* et al., ICTR-98-42-T, the Prosecutor intends to call more than 100 witnesses, each of whom must be placed under the Tribunal's protection before his or her identification data is disclosed to the Defence. It is also critical to recall in this regard that once a witness comes under the protection of the Tribunal he or she continues to be under protection until the conclusion of the mandate of this Tribunal. The list of witnesses that the WVSS-P must maintain under its protection is therefore growing with the commencement of each new trial. Against such a factual backdrop, any order requiring the Prosecutor to disclose the identity of the more than 200 protected witnesses expected to testify in her case-in-chief in this case, would place an untenable burden on the already strained resources of the WVSS-P.

19. It is not desirable for a Chamber to make an order that cannot effectively be implemented. Consequently, the Chamber refrains from making an order as proposed by the Defence, directing the Prosecutor to make one single omnibus disclosure of unredacted witness statements and other identification data sixty days before the commencement of trial. Although such an order would track the letter of Rule 69(C), it neglects to respect the spirit of Article 21 of the Statute, which mandates that the Chamber provides witness protective measures.

20. In addition, even if the WVSS-P had the capacity to place under its protection all the witnesses in advance of trial, the Chamber would nevertheless be constrained not to make an order requiring disclosure of all unredacted statements and identities before trial. In this respect, the Chamber is mindful that the trial of this matter may take a year or more. If the names of all witnesses, irrespective of the anticipated date of their testimony, were revealed to the Defence, such unwarranted advance disclosure may severely compromise the safety and security of protected witnesses who may in the interim become targets for coercion or other threats which would prevent or at least discourage them from testifying at trial. Moreover, the Chamber gives due regard to the fact that the WVSS-P is not equipped to provide full-fledged witness protection on the order of what is available in some more developed national jurisdictions. As such, temporary anonymity is a critical measure used by the WVSS-P to maintain the confidentiality and safety of the protected victims and witnesses. No one can justifiably argue that an effective defence requires the disclosure of unredacted statements a year or more in advance of the date of a particular witness's testimony.

21. Were the Chamber to grant the measure advocated by the Defence, i.e., sixty day in advance of trial, which in effect might amount to one year or more before a particular witness might be called to testify, it would be abdicating its statutory duty to provide measures for the protection of witnesses and victims with no corresponding advancement of the Defence's right to a fair trial and effective cross-examination. More important, an order requiring wholesale disclosure of unredacted statements and other identifying data would result in an absurd and unintended compromise of the safety of the overwhelming majority of the protected victims and witnesses. Such an eventuality could not be more repugnant to the intent of the drafters of the Statute and Rules of the Tribunal. Rule 69 exists because it was anticipated that there are potential sources of risk to the safety of prosecution witnesses. It is for this reason that the Rule permits the temporary non-disclosure of witness identities to the defence upon a finding of the existence of exceptional circumstances.

22. Giving due consideration to the particular facts of this case, the Chamber is persuaded by the arguments of the Prosecutor that the deadline for disclosure of witness statements should be done on a rolling basis measured from the anticipated date a particular witness is expected to testify. The Chamber does not, however, subscribe to the notion that twenty-one days under the particular circumstances of this case is a sufficient period of advance disclosure to provide the Defence with a fair opportunity to effectively exploit the witnesses' unredacted statements and identification data to formulate an effective cross-examination. The exigencies of this particular case require that the Prosecutor make the relevant disclosures at least thirty-five days before the testimony of a given witness. Recalling the manner in which the Defence described it would use the data, the Chamber believes that the rights of the accused to a fair trial, complete with the right tools for effective cross-examination, will be adequately served.

E. Conclusion

23. For all the foregoing reasons, the Chamber concludes that the terms "sufficient time prior to trial" must be informed and interpreted through the filter of the main object and purpose of Rule 69 and of the overall scheme of the Tribunal's Statute to equally serve the rights of the accused to a fair trial, including the right to be provided information for effective cross-examination of the witnesses against him, and the mandate of the Tribunal to provide meaningful protection for vulnerable victims and witnesses. Deference to the fundamental rules of statutory construction requires that the Chamber refrain from making an order, which although consistent with the unambiguous letter of Rule 69 (C), does violence to its spirit by resulting in a practical situation that is repugnant to the object and purpose of the relevant Statutes and Rules of the Tribunal.

24. Accordingly, the Prosecutor shall be required to disclose unredacted statements and other witness-identifying data, including name, address, age, ethnicity, etc., on a rolling basis to be measured from the date of the scheduled date on which a witness is to appear before the Tribunal to testify. The Prosecutor shall provide such information no later than thirty-five days before the date of testimony of a particular witness, or when the witness comes under the protection of the Tribunal, whichever is earlier.

25. In making this order, where disclosure is done on a rolling basis measured from the date of testimony rather than in advance of trial, the Chamber is acutely aware that it has departed from the strict letter of Rule 69(C). Such a departure is eminently justified when it is done to avoid a result that is repugnant to the intent of providing meaningful protection for victims and witnesses, which intent was the subtonic of the drafters of the Statute and Rules of the Tribunal concerning witness protection. Such an order in no way abrogates the Accused's right to a fair trial. Rather, it invigorates the Chamber's broad discretion under Rule 69(A) to strike the right balance, respecting the right of the accused to effective cross-examination of the witnesses against him, while providing protection to vulnerable witnesses, some of whom might not testify absent this very limited protection in the form of delayed disclosure of their identities.

26. Accordingly it is

27. **ORDERED** that the Prosecutor disclose to the Defence the identity of her protected victims and witnesses as well as their non-redacted statements, no later than thirty-five days before the protected witness is expected to testify at trial, or until such time as the said protected victims or witnesses are brought under the protection of the Tribunal, whichever is earlier.

28. The foregoing constitutes the decision and order of the Chamber.

29. Judge Dolenc dissents from the decision and order of the Chamber and appends his separate opinion.

Arusha, 5 December 2001

Lloyd George Williams, Q.C.
Judge, Presiding

Yakov Ostrovsky
Judge

Pavel Dolenc
Judge
(see separate opinion!)

Seal of the Tribunal

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International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 7 December 2001

THE PROSECUTOR
v.
THÉONEST BAGOSORA
ANATOLE NSENGIYUMVA
GRATIEN KABILIGI
ALOYS NTABAKUZE

Case No. ICTR-98-41-I

SEPARATE DESSENTING OPINION OF JUDGE PAVEL DOLENC ON THE DECISION AND SCHEDULING ORDER ON THE PROSECUTION MOTION FOR HARMONISATION AND MOFICATION OF PROTECTIVE MEASURES FOR WITNESSES

The Office of the Prosecutor:

Mr. Chile Eboe-Osuji
Ms. Patricia Wildermuth
Ms. Amanda Reichman

Defence Counsel :
Mr. Raphael constant
Mr. Jean Yaovi Degli
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Mr. Gershom Otachi Bw'omanwa

5216

SEPARATE DISSENTING OPINION OF JUDGE PAVEL DOLENC ON THE DECISION AND SCHEDULING ORDER ON THE PROSECUTION MOTION FOR HARMONISATION AND MODIFICATION OF PROTECTIVE MEASURES FOR WITNESSES

1. I have had the opportunity to review the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses issued by the Majority of Trial Chamber III (the "Scheduling Order"), and respectfully dissent.

2. In the Harmonisation Decision of 29 November 2001, Trial Chamber III ruled that the identifying data of protected prosecution witnesses should not be disclosed to the Defence until further order. In the Scheduling Order, the Majority of the Chamber modifies the Harmonisation Decision, deciding that the Prosecutor shall disclose to the Defence the identity of its protected witnesses and their non-redacted statements not later than 35 days before the date of expected testimony or until the witnesses are brought under the protection of the Tribunal, whichever is earlier.

3. The Scheduling Order departs from the language of Rule 69(C), which requires that the identity of the protected prosecution witnesses shall be disclosed prior to trial. The Majority reasons that departure from the letter of this provision is justified by the specific circumstances of this case and that the application of the plain language of Rule 69(C) would unreasonably compromise the safety and security of witnesses without advancing the Accused's rights. In the view of the Majority, the appropriate interpretation of the Statute and the Rules requires a balancing of two equally important aims: the Accused's right to a fair trial and specifically to a full cross-examination; and the effective protection of victims and witnesses. This balancing of the two interests results in the Majority's conclusion that disclosure may be delayed until after commencement of trial.

4. I respectfully disagree with this interpretation and application of the Statute and Rules. It is my further view that the Majority's conclusion, that disclosure of the identity of all witnesses prior to trial would render witness protection ineffective, is incorrect.

5. Finally, in my opinion, the Scheduling Order is inconsistent with Rule 82(A) and runs contrary to the Chamber's assertion at paragraph 25 of the Harmonisation Decision that the Accused would not be prejudiced by harmonisation. This was the basis upon which I agreed to the Harmonisation Decision. That Decision did not prejudice the existing rights of the Accused and did not adversely affect the preparation of the Defence. Pursuant to the Harmonisation Decision, each of the Accused would have received disclosure at the same time or earlier than if he were being tried separately. The Majority Decision reverses this situation, as two of the Accused will now be receiving disclosure later than they could have expected it prior to joinder.

6. An Accused's right to the minimum procedural guarantees, which are enshrined in Article 20(4) of the Statute and which constitute part of a fair trial, must be afforded more legal significance than the protection of victims and witnesses. Moreover, the Accused's minimum rights may not be "balanced" against the interests of witness protection as proposed in paragraphs 6 and 16 of the Scheduling Order.

7. In this dissent, I will explain my understanding of the applicable provisions of the Statute and Rules. I will give the terms their ordinary meaning, considered within the context of the object and purpose of the Statute and Rules. In my view, the resulting interpretation is neither ambiguous nor obscure; nor does it lead to an unreasonable result. I will then apply supplementary methods of interpretation to confirm the meaning derived from the grammatical and teleological interpretation.

8. This separate opinion is limited to the question of the disclosure of the identity of protected victims and witnesses, since this is the scope of Rule 69(C). However, the same reasoning necessarily applies to the order for disclosure of witnesses' unredacted statements, which inevitably contain identifying information.

The Statute

9. The Statute both guarantees the rights of the Accused and provides for the protection of witnesses. A full understanding of the relationship between these two objectives must be based on an analysis of Articles 19, 20, and 21 of the Statute.

10. Pursuant to Articles 19(1) and (4) and Article 20(2), a Trial Chamber must assure a fair, public, and expeditious trial. These rights of the Accused are developed in Articles 20(4)(b) and (e), which require that the Accused have the right to adequate time to prepare his defence and the right to examine the witnesses against him.

11. Article 19(1) states that the Tribunal "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the [Rules]". In doing so, the Trial Chamber is obliged to pay "full respect" to the rights of the Accused and "due regard" to the protection of victims and witnesses. This language indicates that the rights of the Accused must prevail over the protection of witnesses.

12. Article 21 of the Statute directs the Tribunal to create Rules for the protection of victims and witnesses. There are no specific witness protection provisions in the Statute itself. Rather, the Statute instructs the Tribunal to adopt rules, *inter alia*, for the conduct of in camera proceedings and for the protection of a victim's identity. This broad instruction to create rules stands in stark contrast to the detailed provisions guaranteeing the rights of the Accused in Article 20 of the Statute. The distinction lends further support to the interpretation, derived from the language of Article 19(1), that the rights of the Accused are paramount.

13. The interrelationship between the rights of the Accused and the protection of witnesses is also apparent in Article 20(2), which expressly states that the right to a fair and public hearing is subject to Article 21. It is easy to envisage how witness protection measures may infringe the Accused's right to a public trial. Indeed, such exceptions are consistent with Article 21, which requires the Tribunal to create Rules for the conduct of in camera proceedings and for the protection of victim's identities, and with Article 19(4), which permits closed-session proceedings in accordance with the Rules. Moreover, it is generally accepted in both international and national criminal law that the public nature of the trial may sometimes be compromised, *inter alia*, to protect victims of crime.

14. However, the Accused's right to a fair trial may not be limited for reasons of witness protection. Indeed, the Tribunal has an affirmative obligation, pursuant to Article 19(1), to ensure a fair trial with "full respect for the rights of the Accused". Moreover, Article 20(3), which assures the presumption of innocence and Article 20(4), which sets out other minimum guarantees, are strikingly unencumbered by any reference to witness protection. These minimal guarantees are non-negotiable and cannot be balanced against other interests. The use of the word "minimum" demonstrates that these enumerated rights are an essential component of every trial.

15. It is therefore logical to conclude that while measures designed to protect witnesses may limit the Accused's right to a public trial, witness protection measures cannot encroach on the minimal guarantees of fair trial enumerated in Articles 20(3) and (4).

The Rules

16. Rules 69 and 75 were developed pursuant to the direction in Article 14 and 21 that the Tribunal adopt Rules for the protection of victims and witnesses. Rule 69 deals specifically with witness protection in relation to the disclosure of witness identity to the Accused, while Rule 75 is concerned generally with the protection of victims and witnesses.

17. Rule 75 grants the Chamber the power to 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." While Rule 75(A) is broadly framed, its focus is apparent from the enumerated measures in Rules 75(B) and (C). The objective of Rules 75(B)(i) and (ii) is to protect the identity of the victim from disclosure to the public or to the media. Rules 75(B)(iii) and 75(C) are concerned with measures to prevent re-traumatisation of witnesses, through closed-circuit television and judicial control over the manner of questioning.

18. In exceptional circumstances, a Trial Chamber may, pursuant to Rule 69(A), allow the Prosecutor to conceal from the Accused the identity of a witness who may be at danger or risk. Unless such an order for witness protection has been made, Rule 67 requires the Prosecutor to notify the Defence of the names of her witnesses "as early as reasonably practicable and in any *event prior to the commencement of the trial.*" In the absence of a witness protection order to the contrary, the Prosecutor must also disclose, pursuant to Rule 66(A)(ii), her unredacted witness statements no later than 60 days *prior to the date set for trial.* These statements inevitably include identifying particulars of the protected witnesses.

19. Rule 69(C) requires, even when the Prosecutor has been permitted to temporarily conceal the witnesses' identities from the defence pursuant to Rule 69(A), that the identities be disclosed to the Defence "*prior to the trial*". Rule 69(C), however, is expressly subject to Rule 75. In my opinion, the specific provisions in Rules 66(A)(ii), 67(A) and 69(C), all of which require disclosure of identity prior to the trial, must take precedence over the general language in Rule 75(A), pursuant to the interpretive principle *lex specialis derogat legi generali.* To interpret Rule 75 to permit the Prosecutor to withhold the identities of witnesses from the Defence would run contrary to the clear instructions of Rule 69(C), which specifically addresses the protection of victims and witnesses in relation to disclosure to the Defence. Moreover, a narrow interpretation of Rule 75(A) is consistent with the list of suggested measures in Rule 75(B), which is exclusively addressed to protecting witnesses' identities from the public and media and to protecting witnesses from re-traumatisation. Nothing in the enumerated list suggests, either directly or by analogy, that Rule 75 may be used to conceal the identity of a witness from the Defence.

20. Most importantly, Rule 75(A) is itself expressly limited to measures that are "consistent with the rights of the Accused". These rights are minimum guarantees set out in Article 20(4) of the Statute, which cannot be limited for reasons of witness protection. As discussed above, the Rules anticipate that disclosure of witness identities and statements be made prior to the commencement of trial.

21. The Majority is of the opinion that non-disclosure after the commencement of trial "in no way abrogates the Accused's right to a fair trial" (Scheduling Order, paragraph 25). In my view, non-disclosure of this information will compromise the Accused's right to prepare for trial and his right to examine the witnesses against him. In particular, I accept the arguments raised by the Defence that in order to prepare for the cross-examination of the first witnesses, Counsel must have a complete understanding of the evidence to be given by and the credibility of the later witnesses. This is especially important when two or more witnesses will testify about the same events. Counsel must be able to explore any contradictions and variations in the witnesses' accounts. In order to do so, the Defence must know who these witnesses are.

22. Therefore, I respectfully disagree with the Majority and find that disclosure of witness statements and witness identities must be made prior to the commencement of trial in accordance with the Statute and Rules.

23. The Majority accepts that its conclusion is a departure from the language of the Rules, but finds that such a deviation is necessary as a result of a perceived contradiction between the language of Rule 69(C) and its object and purpose. I disagree with this conclusion.

24. First, I do not accept that there is any conflict or ambiguity in the language of Rule 69(C), which could permit the Majority to look beyond their plain meaning. Rule 69(C) presents a codified limitation on the Chamber's discretion. This interpretation is supported by the French version of the Rule, which provides:

> (C) Sous réserve des dispositions de l'Article 75, l'identité des victimes ou des témoins *visés au paragraphe A)* doit être divulguée avant le commencement du procès et dans des délais permettant à la défense et au Procureur de se préparer. (emphasis added)

The French text clearly indicates the interrelationship between paragraphs (A) and (C) of this Rule.

25. Similarly, I do not understand how disclosure before trial would "render nugatory" the object of allowing adequate time for the preparation of the defence, as the majority posits (Scheduling Order, paragraph 6). On the contrary, disclosure prior to trial advances the objective of securing the rights of the Accused.

26. Second, I also disagree that requiring disclosure to be completed prior to the commencement of trial would result in an "absurd and unintended compromise" of the safety of witnesses, as alleged in paragraph 21 of the Scheduling Order. In this regard, I do not accept the Majority's premise that pre-trial disclosure is inextricably linked to witness protection. The deadline set for disclosure of witness identities to the Defence determines neither when the Prosecutor should advise the WVSS-P of the witness identities nor when the WVSS-P should implement witness protection measures. The Prosecutor should provide witness information to the WVSS-P well in advance of the commencement of trial so as to facilitate the work of that section.

27. The Majority suggests a false dichotomy between "rolling disclosure" measured from the date of scheduled testimony and what it calls a "single omnibus disclosure" prior to the commencement of trial. Pre-trial disclosure, in conformity with the Rules, could also be made on a rolling basis. In this manner, the Prosecutor could provide witness information to the WVSS-P on an ongoing basis, and the WVSS-P could continually place witnesses under its protection. Preferably, all witnesses would be under the protection of the Tribunal by the time that the final disclosure is made to the Defence before the start of the trial. From the consultation with the WVSS-P, I am convinced that this Section has the resources to provide protection to a large number of

witnesses. As long as the Prosecutor furnishes the necessary information in sufficient time for the WVSS-P to make the labour-intensive arrangements at the outset, pre-trial disclosure could be managed in the same manner as the "rolling disclosure" during the trial.

28. Finally, I cannot accept that "Rule 69 exists because it was anticipated that there are potential sources of risk to the safety of prosecution witnesses (Scheduling Order, paragraph 21). General sources of potential risk to a witness may be grounds for protective measures pursuant to Rule 75. To order non-disclosure of witness identity to the Defence under Rule 69(A), a Trial Chamber must be satisfied that specific exceptional circumstances demonstrate that disclosure to the Defence of the witness' identity may put the witness in danger or at risk.

29. Therefore, disclosure of witnesses' identities and statements must be made before the commencement of the trial. In reaching this conclusion, I agree with the reasoning of Trial Chamber I of the ICTY, which explained in *Prosecutor v. Blaskic* (IT-95-14-T), Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, (5 November 1996), at para. 24:

> The Philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the Accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the Accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.

30. For the foregoing reasons, the Chamber should have required that the Prosecutor disclose witness identities to the Defence prior to the commencement of the trial. Therefore, a Trial Chamber's discretion to fix an appropriate date for disclosure to the Defence is limited to the determination of what period prior to the trial is adequate for the preparation of the defence. This period should be fixed on a case-by-case basis, depending on the specific circumstances of the case, but must be completed prior to the commencement of the trial.

Pavel Dolenc
Judge

Seal of the Tribunal