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UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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**TRIAL CHAMBER III**

Original: English

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

Registrar: Mr Adama Dieng

Date: 28 March 2002

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

Case No. ICTR-98-41-I

JUDICIAL RECORDS DIVISION  
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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF THE  
DECISIONS RENDERED ON 29 NOVEMBER 2001 AND 5 DECEMBER 2001 AND  
FOR A DECLARATION OF LACK OF JURISDICTION**

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The Office of the Prosecutor:  
Mr Chile Eboe-Osuji  
Mr Drew White  
Ms Christine Graham

Defence Counsel:  
Mr Raphael Constant  
Mr Jean Yaovi Degli  
Mr Clemente Monterosso  
Mr Andre Tremblay  
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 "Defence Motion for Reconsideration of the Trial Chamber's Decisions Rendered on 29 November 2001, '*Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses*' and 5 December 2001, '*Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses*', and For a Declaration of Lack of Jurisdiction" dated 7 March 2002 and filed with the Registry on 13 March 2002;

**CONSIDERING** the Prosecutor's Response filed on 27 March 2002;

**RECALLING** the Decision on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses dated 29 November 2001 and the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, dated 5 December 2001 and filed 7 December 2001 (the "Harmonisation Decisions");

**NOW DECIDES** the matter on the basis of the written briefs pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the "Rules").

## **PLEADINGS**

### **SUBMISSIONS OF THE DEFENCE**

1. The Motion, filed jointly by Counsel for all four Accused, asserts that the Harmonisation Decisions were made in excess of jurisdiction and asks the Chamber to reconsider and to order the immediate disclosure to the Defence of all unredacted statements of witnesses and other materials.

#### *Jurisdiction*

2. The Motion presents a number of interrelated arguments purporting to explain how the Chamber exceeded its jurisdiction. First the Defence submits that the Harmonisation Decisions are inconsistent with the provisions of the Statute of the Tribunal (the "Statute") and the Rules and were therefore *ultra vires* and beyond the jurisdiction of the Chamber, rendering the Harmonisation Decisions null and void. According to the Defence, the Statute of the Tribunal is a treaty governed by the Vienna Convention on the Law of Treaties.<sup>1</sup> Therefore, proposes the Defence, the Statute must be interpreted pursuant to Article 31 of the Vienna Convention which adopts the "plain meaning rule" of statutory interpretation. The Defence argues that the practice of the ICTR and ICTY has largely been to disclose prosecution witness statements prior to the commencement of trial.
3. Relying on the English House of Lords case of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, the Defence argues that the Harmonisation Decisions were beyond the jurisdiction of the Tribunal. In the view of the Defence, the Decisions were grossly erroneous and were based on an error of law so serious that it caused the Chamber to go outside its jurisdiction. According to the Defence, the Accused, particularly Bagosora and Nsengiyumva, have been prejudiced by harmonisation. As there is no express legal basis for

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<sup>1</sup> 1155 UNTS 331.

harmonisation, it must be subordinate to the rights of the accused. The Defence argues that there has been an overemphasis on witness protection resulting in a violation of the rights of the Accused. In making the decisions, the judges acted *ultra vires* and denied the Accused the full protection of the law.

4. The Defence further argues that the Chamber lacked the power to alter decisions of other Trial Chambers. In doing so the Chamber went beyond its jurisdiction and assumed the role of an appellate body. Relying by analogy on Rule 75(D) of the ICTY Rules of Procedure and Evidence, the Defence submits that only the Chamber issuing the protective measures should be authorised to vary them.
5. The Defence asserts that if the Harmonisation Decisions remain in force the Defence will be irreparably prejudiced and a fair trial will be impossible. In particular, the Defence complains that they will not have sufficient time to evaluate the evidence or to undertake investigations needed to verify or rebut the Prosecutor's witnesses, or to attack their credibility. Therefore, it is posited that the right to cross-examination is rendered meaningless. The Defence argues that this is another violation of the rules of natural justice, which renders the Harmonisation Decisions null and void.

#### *Reconsideration*

6. According to the Defence, the Chamber has as a judicial body the inherent power to reconsider, vary or rescind its decision where fairness and the proper administration of justice so require. The Defence then submits that the Chamber should reconsider the Harmonisation Decisions, arguing that the Prosecutor's Pre-Trial Brief contains a list of 253 expected witnesses. Fifty of these statements, as well as many of the documents and other anticipated exhibits, are new and have not been disclosed to the Defence. The Defence argues that this unexpectedly large volume of evidence yet to be disclosed is a new fact which could have been a decisive factor in the Harmonisation Decisions.
7. The Defence further suggests that the Tribunal will be inconvenienced by the Harmonisation Decisions, as the Defence will inevitably have to recall witnesses who have already testified, resulting in delays and adjournments contrary to Article 20(4)(c). The Defence contends that it is impossible to go to trial without knowing the identity of the witnesses and the nature of their allegations.
8. The Defence also relies on Rule 5 in its request for reconsideration, as they argue that the Judges failed to comply with the Rules.
9. The Defence further submits that the Tribunal was biased and acted in bad faith. They argue that the Accused now face a *de facto* presumption of guilt.

#### **SUBMISSIONS OF THE PROSECUTOR**

10. The Prosecutor opposes the Motion, submitting that it fails to demonstrate any circumstances justifying reconsideration.

#### *Jurisdiction*

11. In response to the Defence arguments on jurisdiction, the Prosecutor rebuts that the Trial Chamber has wide discretion in striking a balance between the rights of the accused and the protection of witnesses.

12. According to the Prosecutor, the Defence suggestion that the Chamber acted *ultra vires* is “fanciful”. The Prosecutor submits that, on the contrary, the discretionary power to make such an order is well-established and is founded on Article 19 of the Statute and Rules 69 and 75. The Prosecutor disagrees with the Defence assertion that the Chamber misinterpreted the Statute and Rules. The Chamber, explains the Prosecutor, departed from a narrow reading of the Rules in order to address the specific witness protection concerns in this case. In doing so, the Chamber respected the rights of the Accused. The Prosecutor similarly rejects the *ultra vires* argument based on the *Anisminic* case.
13. Moreover, in the opinion of the Prosecutor, the Chamber has not violated the principles of natural justice. The Chamber, asserts the Prosecutor, acted in an unbiased and fair manner and afforded all parties the opportunity to be heard. The Decisions do not affect the Accused’s rights to be informed of the charges or to have adequate time to prepare the defence. The Prosecutor adopts the distinction between review and reconsideration endorsed by the Appeals Chamber in *Barayagwiza v. The Prosecutor*.<sup>2</sup>

#### *Reconsideration*

14. The Prosecutor points out that reconsideration is not specifically dealt with in the Rules, but has generally been understood to involve the reopening of a decision by the same judicial body that originally rendered the decision. Reconsideration is contrary to the principle of finality and should accordingly only be permitted in limited circumstances. The inherent power of a court to vary or rescind a previous order must therefore be exercised with caution. The fact that a first order is thought to be incorrect is insufficient, submits the Prosecutor, to rescind or vary the decision.
15. The Prosecutor argues that the new witnesses in the Pre-Trial Brief do not constitute a new fact justifying reconsideration of the Harmonisation Decisions. The new statements, explains the Prosecutor, are the result of on-going investigations and fresh disclosure of these statements can be anticipated.
16. The Prosecutor also clarifies that it is undoubtedly within the remit of the Trial Chamber to alter protection orders previously in place.

## **FINDINGS**

#### *Jurisdiction*

17. Articles 1 to 7 of the Statute set out the personal, territorial, temporal and subject matter competence of the Tribunal. Challenges to the jurisdiction of the Tribunal are governed by Rule 72(H) and are limited to challenging an indictment on the basis of these four jurisdictional heads.
18. The Motion does not allege that the Harmonisation Decisions do not relate to persons within the territorial, temporal and subject matter competence of the Tribunal. Rather, the Defence contends that the Chamber exceeded its jurisdiction by violating other provisions of the Statute and Rules or by surpassing the discretion afforded to the Chamber under them.

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<sup>2</sup> ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration) Separate Opinion of Judge Shahabuddeen, 31 March 2000, paras. 3-10.

19. The reasons set out in the Harmonisation Decisions show that the Chamber did not disregard the Statute and Rules with respect to jurisdiction and did not make any other errors going to jurisdiction.
20. Moreover, the Chamber rejects the Defence argument that it acted outside its jurisdiction by varying orders rendered by other Trial Chambers. The Chamber that is seised with a particular case is empowered to make decisions relating to it. In some circumstances this will require varying or rescinding orders made by other judges or chambers. The determination as to when such action is necessary or appropriate lies with the Chamber that is making the decision. In the context of the joined trial, it was necessary to revisit the earlier witness protection orders rendered by other trial chambers.

#### *Reconsideration*

21. The Chamber also possesses an inherent discretionary power to revisit its own previous decisions. This inherent power of reconsideration is distinct from the review procedure found in Rule 120, which is limited to the review of final judgments or other decisions that end proceedings and is triggered only by the discovery of a new and potentially decisive fact. In light of the principle of finality, which mandates that the parties should be able to rely and act on the binding decisions of the Tribunal without fear that the decisions will be lightly overturned, this inherent discretion to revisit should be sparingly exercised. Furthermore, this discretion is most often engaged in relation to procedural rulings rather than substantive matters. The determination of when this type of reconsideration is appropriate also lies with the Tribunal.
22. The Chamber does not consider this to be an appropriate case to engage its inherent discretionary power to reconsider its earlier decisions. In reaching this conclusion the Chamber has considered, *inter alia*, that the Defence has not brought forward any new argument that would have affected the Chamber's Harmonisation Decisions. The presentation in the Prosecutor's Pre-Trial Brief of 50 new witnesses, relied on by the Defence as a new fact, is insufficient to warrant reconsideration of the Harmonisation Decisions and would not have altered the original Harmonisation Decisions in any manner. To vary the Harmonisation Decisions at this late stage would inevitably disrupt and delay the imminent commencement of the trial. The Accused have been in custody for a significant period of time and the Chamber has been making strenuous efforts to commence the proceedings. Any further delay would not be in the interests of the Accused.
23. The Defence reliance on Rule 5 is also inapposite. Rule 5 provides a broad legal basis for the Chamber to grant relief for non-compliance with the Rules, which has caused material prejudice to another party. As the French text makes clear, this Rule is only engaged in disputes between the parties, and not as a platform on which to argue that the Chamber itself has violated the Rules.
24. Finally, the Chamber does not accept that the Harmonisation Decisions violated the principles of natural justice. The allegation of bias against the Chamber has already been considered and dismissed by the Bureau<sup>3</sup> as provided by the Rules and therefore it is wholly inappropriate for the Defence to argue this point in yet another motion. Before reaching its conclusions in the Harmonisation Decisions, the Chamber considered the written and oral submissions of all the parties and the reasons for the Harmonisation Decisions were fully explained.

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<sup>3</sup> *Prosecutor v. Bagosora et al.*, Determination of the Bureau pursuant to Rule 15(B), 20 February 2002.

25. For the foregoing reasons the Chamber DISMISSES the Motion in its entirety.

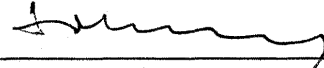
Arusha, 28 March 2002.



Lloyd George Williams Q.C.  
Judge, Presiding



Yakov Ostrovsky  
Judge



Pavel Dolenc  
Judge

*Seal of the Tribunal*