448/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar

ICTR-98-41-AR73(B)
06 October 2005
(448/H - 450/H)

Registrar: Mr. Adama Dieng

Decision of: 6 October 2005

ICTR Appeals Chamber
Date: 06 October 2005
Action: R-J.
Copied To: See the attached Proof of Service

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B)

DECISION ON INTERLOCUTORY APPEALS OF DECISION ON WITNESS PROTECTION ORDERS

Office of the Prosecutor:
Mr. Hassan Bubacar Jallow
Mr. James Stewart
Ms. Barbara Mulvaney

Counsel for the Defence:
Mr. Raphaël Constant
Mr. Paul Skolnik
Mr. Frédéric Hivon
Mr. Peter Erlinder
Mr. André Tremblay
Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'Omanwa

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: CHARLES ZAMA
SIGNATURE: DATE: 6 October 2005

447/H

I. Background

1. On 1 June 2005, Trial Chamber I of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Trial Chamber" and "Tribunal", respectively), rendered its Decision on the Prosecution Motion to Harmonize and Amend Witness Protection Orders.[1]

2. The Prosecution[2] and Théoneste Bagosora, Gratien Kabiligi, Anatole Nsengiymunva, and Aloys Ntabakuze ("Accused" or "Defence")[3] filed applications for leave to appeal the Impugned Decision. The Trial Chamber certified two issues for appeal: (1) the Defence appeal of that part of the Impugned Decision that permits the Prosecution to make certain inquiries regarding the protected witnesses to national immigration authorities,[4] and (2) the Prosecution appeal of that part of the Impugned Decision that denies the Prosecution permission to disseminate protected witness information to any person working for the Office of the Prosecutor.[5]

II. Standard of Review

3. A Trial Chamber exercises its discretion in many different situations, including when deciding points of practice or procedure.[6] A Trial Chamber's decision on granting protective measures for witnesses is such an exercise of that discretion, drawing on the Trial Chamber's understanding of particular threats posed to specific witnesses and the practical demands of the case. These fact-intensive Trial Chamber decisions require a complex balancing of intangibles in

[1] *Prosecutor v. Bagosora, et al.*, Case No. ICTR-98-41-T, Decision on Motion to Harmonize and Amend Witness Protection Orders (amended and filed on 3 June 2005; "Impugned Decision").
[2] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Prosecutor's Motion, Pursuant to Rule 73(B), for Certification to Appeal the Trial Chamber's Decision on Motion to Harmonize and Amend Witness Protection Orders Dated 1 June 2005, 9 June 2005.
[3] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Ntabakuze Defence Request for Certification to Appeal one of the Conclusions of the Trial Chamber in the Decision on Motion to Harmonize and Amend Witness Protection Orders of 1 June 2005, 7 June 2005; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Nsengiyumva Defence Request for Certification to Appeal Part of the Trial Chamber Decision of 1 June 2005 on Motion to Harmonize and Amend Witness Protection Orders, 8 June 2005; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T Kabiligi Application for Certification for Appeal of the Trial Chamber's Decision on the Admissibility of Statements Obtained from Immigration Authorities, 9 June 2005.
[4] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, p. 5.
[5] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, p. 5.
[6] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9 ("*Milošević* Appeal Decision on Assignment of Counsel").

4446/H

crafting a case-specific order.[7] Therefore, in reviewing the Trial Chamber's exercise of discretion, the question is not whether the Appeals Chamber agrees with the Trial Chamber's conclusion, but rather whether the Trial Chamber has reasonably exercised its discretion in reaching that decision.[8] To prevail in their appeal, "the appellants must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion, or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly".[9] The Appeals Chamber has stated these factors as a "simple algorithm" according to which "a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[10]

III. The Defence Appeal

4. The dispute that is the subject of the Defence Appeal initially arose during a status conference on 1 March 2005 at which the Prosecution submitted that it would seek immigration records and refugee files of Defence witnesses from state authorities. On 14 March 2005, the Prosecution filed a motion to harmonize and amend the four Defence witness protection measures that were in place[11], proposing, among other things, that the "Prosecution be allowed to reveal the identity of protected witnesses to third parties for the purposes of investigation".[12]

5. Anatole Nsengiyumva ("Nsengiyumva"), Aloys Ntabakuze ("Ntabakuze"), and Théoneste Bagosora ("Bagosora") filed responses to the Prosecution motion on 21 March 2005, 24 March 2005, and 30 March 2005, respectively. On 21 April 2005, the Prosecution requested information regarding the country of residence of the Defence witnesses in order to obtain information from the witnesses' immigration files.[13] The Defence renewed its objections at that time.[14]

[7] *Milošević* Appeal Decision on Assignment of Counsel, para. 9.
[8] *Milošević* Appeal Decision on Assignment of Counsel, para. 10.
[9] *Milošević* Appeal Decision on Assignment of Counsel, para. 10.
[10] *Milošević* Appeal Decision on Assignment of Counsel, para. 10.
[11] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Motion to Harmonize and Amend Witness Protection Measures, 14 March 2003 ("Prosecution Motion to Harmonize and Amend").
[12] Impugned Decision, para. 1 (citing Prosecution Motion to Harmonize and Amend).
[13] Defence Appeal, para. 6.
[14] Defence Appeal, para. 6.

4445/H

6. On 26 April 2005, the Prosecution attempted to introduce, for purposes of cross-examination, a prior statement of Defence Witness LT-1 allegedly made by the witness to immigration authorities in the witness's country of residence. The Defence objected that the Prosecution's inquiries "might jeopardize the immigration status or safety" of witnesses,[15] and would "discourage Defence witnesses from coming to testify", adversely affecting the Defence ability to present its case.[16] The Prosecution claimed that the issue at stake was the ability of the Prosecution to cross-examine a witness using prior inconsistent statements of the witness.[17] The Trial Chamber adjourned questioning of the witness and invited written submissions on the issue.

7. On 28 April 2005, the Defence filed a joint brief arguing that the witness protection measures for Bagosora, Gratien Kabiligi ("Kabiligi"), and Ntabakuze should be read to prohibit the Prosecution from making inquiries of immigration authorities by prohibiting the Prosecution from "discuss[ing] witness identifying information either directly or indirectly with anyone outside the Prosecution team in this case".[18] The Prosecution argued that it was not in violation of the relevant witness protection orders because although it revealed the name of the witness to immigration authorities, it did not reveal the witness's status *as a witness* in the case in the course of seeking immigration files.[19]

8. On 1 June 2005, the Trial Chamber the Impugned Decision. The Trial Chamber "denie[d] the Defence objection to the tendering in court of a prior statement of Witness LT-1 on the ground that, by making inquiries to national immigration authorities, the Prosecution obtained the document in violation of the witness protection order".[20] Ntabakuze, Nsengiyumva, and Kabiligi separately filed applications to certify an appeal of the Impugned Decision[21], and on 21 July 2005, the Trial Chamber granted certification of the appeal.[22]

9. On 28 July 2005, the Accused filed a joint Defence Appeal arguing five grounds on which the Trial Chamber erred by holding that the protective orders permit the Prosecution to reveal the identity of protected witnesses to third parties for the purposes of investigation.[23] The Prosecution

[15] Defence Appeal, para. 5.
[16] Defence Appeal, para. 7.
[17] Defence Appeal, para. 7.
[18] Defence Appeal, para. 8 (internal quotations omitted).
[19] Defence Appeal, para. 8 (emphasis added).
[20] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 4 ("Certification of Defence Appeal") (internal quotations omitted).
[21] Filed on 7 June 2005, 8 June 2005 and 9 June 2005, respectively.
[22] Certification of Defence Appeal, para. 4.
[23] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73(B), Joint Defence Appeal Under Rule 73(B) from Part of the Conclusion in the 1 July 2005 Trial Chamber I 'Decision on Motion to Harmonize and Amend Witness Protection Orders', 28 July 2005 ("Defence Appeal").

responded to each of the grounds in its Response filed on 8 August 2005.[24] The Defence filed its reply on 12 August 2005.[25]

A. Grounds 1 and 2: the Trial Chamber erred by interpreting Clause 7 contrary to the plain meaning of its text and by erroneously assuming that it contained an implied exception.

10. The first two grounds of the Defence Appeal are interrelated and collectively argue that the Trial Chamber erred by finding that the witness protection orders permitted the Prosecutor to reveal the identity of protected witness to third parties for the purposes of investigation as long as the Prosecution does not, directly or indirectly, reveal that the protected person is a witness. These two grounds are taken together by the Appeals Chamber since both argue for a particular interpretation of the text of Clause 7 of the witness protection orders with regard to Bagosora, Kabiligi, and Ntabakuze.

11. Clause 7 provides that "the Prosecution team in this case shall keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information".[26] The protection order in *Prosecutor v. Nsengiyumva*[27] was worded differently before the harmonization ordered in the Impugned Decision and the Defence suggests that a clause requiring that "the names, addresses, locations and other identifying information of the defence witnesses contained in the supporting materials of the defence shall not be disclosed to the public or the media" was the analogous clause to Clause 7.[28] The Defence argues that the issue is whether the phrases "information identifying any witness" and "identifying information" in the context of the two protective orders should be interpreted to mean "information about the identity of the witness, that is, information that would lead one to discover his or her name and other identifying particulars", or "information as to the individual's status as a witness, that is, information that would lead one to discover that the individual in question had been or was to be a witness in these proceedings".[29]

12. The Defence argues that the former, more expansive interpretation is correct for two reasons. First, the Defence Appeal argues that the plain meaning of the text points to a more

[24] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73(B), Prosecutor's Response to the Joint Defence Appeal Under Rule 73(B) from part of the Conclusion in the 1 July 2005 Trial Chamber I Decision on Motion to Harmonize and Amend Witness Protection Orders, 8 August 2005 ("Prosecution Response").
[25] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73(B), Appellants' Reply to the Prosecutor's Response to the Joint Defence Appeal under Rule 73(B) from part of the Conclusion in the 1 June 2005 Trial Chamber I Decision on Motion to Harmonize and Amend Witness Protection Orders, 12 August 2005 ("Defence Reply").
[26] Impugned Decision, para. 11 (internal quotations omitted).
[27] Case No. ICTR-96-12-I, Decision on Protective Measures for Defence Witnesses and their Families and Relatives, 5 November 1997.
[28] Defence Appeal, para. 22 (citing Impugned Decision, fn 10).
[29] Defence Appeal, para. 23.

443/H

expansive interpretation of the protective measures than was provided in the Impugned Decision.[30] The Defence disputes the Trial Chamber's conclusion that the phrase "identifying information" in the *Nsengiyumva* order "necessarily implies information which identifies the person as a witness".[31] The Defence argues that the phrase "identifying information" in that context was the "residual part of a list that includes *names, addresses* and *locations*, none of which would identify the person as a witness", and that as such, it is reasonable to conclude that "*other identifying information* falls into the same category as the rest of the list, that is, information that tends to reveal the *identity* of the witness".[32] The Defence argues that since "identifying information" reasonably includes both information about the "identity *of* the witness" and the "identity *as* a witness", the "best interpretation of 'information identifying any witness' is to see it as *simultaneously* meaning all information either 'about the identity of the witness' or 'about his or her status as a witness in the case'".[33]

13. Second, the Defence argues that the plain meaning of the text should prevail over other interpretations, and that the Trial Chamber erred when it decided that the witness protection orders included "an exception that reflects an assumption which is implied".[34] The Defence argues that if the Witness Protection Orders were intended to include an exception that "authorize[s] reasonable investigations about protected witnesses" then it should have done so explicitly. The Defence argues that by reading in such an exception the Impugned Decision creates uncertainty in the protections afforded to witnesses and removes a protection that may have been relied upon by Defence witnesses.[35] Unlike sentencing guidelines and other regulations, witness protection orders require certainty and interpretive inflexibility in their application because they are "crafted in precise and narrow circumstances, [they] deal with the problems faced by specific individuals", and are relied upon by them for specific protections.[36]

14. The Prosecution responds that the Trial Chamber correctly rejected a strictly textual interpretation of Clause 7 and instead read the witness protection orders "purposively and holistically" to arrive at the conclusion that Clause 7 prohibits only the revelation that a person is a witness.[37] The Prosecution argues that a textual reading of Clause 7, construed without reference to the rest of the witness protection regime, would distort the scope of the protective measures.

---

[30] Defence Appeal, para. 23.
[31] Defence Appeal, para. 24 (quoting Impugned Decision, fn 10).
[32] Defence Appeal, para. 24 (emphasis in original).
[33] Defence Appeal, paras. 24-25 (emphasis in original).
[34] Defence Appeal, para. 30 (quoting Impugned Decision, para. 13).
[35] Defence Appeal, paras. 30-33.
[36] Defence Reply, paras. 21-22.
[37] Prosecution Response, para. 8 (quoting Impugned Decision, para. 11).

4421H

Instead, the Prosecution argues that reading Clause 7 in light of the entire witness protection regime, clearly shows that the protection orders allow the Prosecution to make reasonable inquiries.

15. In support of its interpretation, the Prosecution points to Clause 10 of the witness protection orders, which the Prosecution argues expressly carves out an exception to the non-disclosure rule. Clause 10 states: "[t]he information withheld . . . shall be disclosed by the Defence . . . to the Prosecution thirty-five days prior to the commencement of the Defence case, *in order to allow adequate time for the preparation of the Prosecution pursuant to Rule 69(C) of the Rules*".[38] Rule 69(C) of the Rules provides that, "[s]ubject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber *to allow adequate time for preparation of the prosecution and the defence*".[39] The Prosecution argues that the Impugned Decision correctly interpreted the witness protection regime to allow an exception to Clause 7 for disclosure of a witness's name so that "reasonable inquiries" can be made in preparation of the Prosecution's case.[40]

16. The Defence replies that reference to such "reasonable inquiries" is "entirely lacking from the witness protection orders", that the nature of such inquiries is left undetermined, and that rather than providing for "inquiries to third parties" the orders only speak of "preparation" which could include information gathering without revealing the names of individuals to third parties.[41] The Defence submits that the limits on disclosure in Clause 7 should be read to place limits on the "preparation" allowed in Clause 10, and that Clause 10 should not be read to create an exception to Clause 7.[42]

Analysis

17. The Appeals Chamber notes that following general principles of interpretation, the first step in the proper interpretation of a protective measure must always be an examination of its provisions. The terms used are construed according to their plain and ordinary meaning in their context and in the light of the instrument's object and purpose.

[38] Prosecution Response, para. 9 (quoting Clause 10 of witness protection orders, *see* Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003, p. 4) (emphasis added in the Prosecution Response).
[39] Prosecution Response, para. 9 (quoting Rule 69(C) of the Rules) (emphasis added in the Prosecution Response).
[40] Prosecution Response, para. 7.
[41] Defence Reply, paras. 10-11.
[42] Defence Reply, para. 13 (arguing that Clause 7 enjoins the Prosecution team in this case "to keep confidential to itself *all* information identifying *any* witness" and prohibits the Prosecution team in this case to "disclose, discuss or reveal *any* such information", and thus creates a "clear and total prohibition on disclosure of *any* and *all* identifying information [that] clearly places limits on the preparation envisaged in Clause 10") (internal quotations omitted).

441/H

18. The Trial Chamber considered the text of the witness protection orders at issue and determined that it prohibits "disclosure of information that would, directly or indirectly, reveal that the person is a witness", but that it does not "prevent use of the witness's name [by the Prosecution] to make reasonable inquiries".[43] The Appeals Chamber agrees and finds that the Trial Chamber's interpretation of Clause 7 is consistent with the text and the principles for adopting witness protection measures.

19. The Defence, in fact, concedes that two interpretations of Clause 7 are textually "reasonable":[44] the Defence interpretation (protecting information about the identity *of* the witness) and the Trial Chamber's interpretation (protecting information about the witness's status as a witness). The Defence argues, however, that because both can be accommodated by the text, Clause 7 should be interpreted to include both meanings. The construction proposed by the Defence emphasises the need to provide fair notice to the Defence and Defence witnesses. The Defence, however, fails to consider that when a Chamber interprets an existing protective measure it must consider that the measure was adopted to be the least restrictive measure necessary to provide for the protection of victims or witnesses.[45]

20. The Trial Chamber also considered that the Defence must have understood the witness protection regimes in this case to permit disclosure of some information about witnesses because the Defence itself used the names of protected witnesses during cross-examination, used prior statements by Prosecution witnesses, and sought and obtained the judicial dossiers of various Prosecution witnesses – all of which would violate the prohibition on use of "identifying information" that the Defence now proposes.[46] The Defence argued that its disclosure of "identifying information" should be distinguished from the Prosecution's because the Defence "would likely have" used the information discreetly, without disclosing the witness's connection to the Tribunal, whereas the Prosecution conducts its investigation as an identified organ of the Tribunal, causing, the Defence says, "governments to pay attention".[47]

21. Certainly, some inquiries by their very nature would lead a reasonable person to conclude that the subject of the inquiry is a witness to a case before the Tribunal, and such inquiries are prohibited by the Impugned Decision. The Appeals Chamber agrees with the Trial Chamber that to

[43] Impugned Decision, para. 11.
[44] Defence Appeal, para. 25.
[45] *See Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness P, 15 May 1996, para. 8 (stating "if a less restrictive measure can secure the required protection, that measure shall be applied").
[46] Impugned Decision, para. 12.
[47] Defence Appeal, para. 28.

avoid such inquiries the "inquiring party must scrupulously avoid, expressly or impliedly, suggesting that the person is a witness for, or otherwise associated with, one side or the other. If the third party demands explanations which would require revealing that information, then the investigation must cease. Investigations conducted within these parameters do not give rise to a breach of the witness protection order"[48] because not all inquiries from the Prosecution will *necessarily* reveal that the subject of the inquiry is a witness. The Appeals Chamber, for reasons that will be further discussed,[49] finds no error in the Trial Chamber's exercise of discretion to interpret the protective measure in the least restrictive manner necessary to provide sufficient protection.

22. Neither Prosecution nor Defence arguments regarding the use of Clause 10 as an indication of an implied exception to the protective measure are convincing. Clause 10 merely requires the Defence, pursuant to Rule 69(C) of the Rules, to disclose "the identity of the . . . witness[es] within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution".[50] Clause 10 provides the timing for disclosure of identifying information to the Prosecution, but says nothing about the manner in which the Prosecution may use that information in its preparation. Thus, it provides no guidance for interpreting the permissible extent of the Prosecution's preparation. The Appeals Chamber finds no error in the Impugned Decision, which gave no import to the terms of Clause 10 when interpreting Clause 7.

B. Ground 3: the Trial Chamber failed to consider properly Witnesses and Victims Support Section submissions that the safety of Defence witnesses and their families would be imperilled by Prosecution investigation of their statements to state authorities.

23. The Defence argues that the Trial Chamber failed to consider properly submissions by the Witnesses and Victims Support Section ("WVSS") of the Tribunal, which claim that Defence witnesses would be imperilled by the Prosecution's investigation. The Defence submits that the WVSS twice orally communicated to the Trial Chamber that the Prosecution's investigation would result in "serious risks of peril" for the Defence Witnesses.[51] The Registry also filed written submissions with the Trial Chamber.[52] The Defence argues that the Impugned Decision failed to weigh properly these submissions.

[48] Impugned Decision, para. 11.
[49] *See infra* paras. 27, 38.
[50] Rule 69(C) of the Rules.
[51] Defence Appeal, para. 34.
[52] Defence Appeal, para. 34 (quoting The Registrar's Submission under Rule 33 (B) of the Rules on the Prosecution Investigations and Questioning Concerning Protected Defence Witness's Immigration Files, 3 May 2005, para. 7).

439/H

24. The Prosecution responds that the Trial Chamber's failure to discuss WVSS submissions in detail does not indicate error because the Trial Chamber does not need to articulate all of the evidence that it considered in rendering the Impugned Decision.[53] The Prosecution also points to the express reference to the submissions of the Registry made in the third pre-ambulatory paragraph of the Impugned Decision, saying that the reference shows that the Trial Chamber considered the submissions.

Analysis

25. While it would have been desirable for the Trial Chamber to have analysed the WVSS submissions in the Impugned Decision, the Appeals Chamber has previously noted that "although the evidence produced may not have been referred to [in the Impugned Decision], based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account".[54] Thus, the failure to analyse the WVSS submissions in the Impugned Decision does not necessarily demonstrate that the Trial Chamber disregarded the WVSS statements. Instead, "[i]t is for an appellant to show that the finding made by the Trial Chamber is erroneous and that the Trial Chamber indeed disregarded some item of evidence, as it did not refer to it".[55]

26. The extent to which the Trial Chamber gave weight or sufficient weight to the WVSS submissions is determined in light of the circumstances of the case. The record of the proceedings in the present case shows that when the Defence told the Trial Chamber that Prosecution investigations were jeopardizing the safety of protected witnesses, the Trial Chamber twice sought out the opinion of WVSS on the matter. First, on 1 March 2005, after hearing oral submissions from Raphaël Constant, counsel for Bagosora, who asserted that Prosecution visits to the countries of residence of defence witnesses to review their refugee status would be disastrous and that the Trial Chamber should bear in mind the danger,[56] the Trial Chamber called for the opinion of Joseph Essombé-Edimo, Head of the Support Unit of the WVSS.[57] The Trial Chamber asked Mr. Essombé-Edimo to tell it whether he had any comment on the issue raised by Mr. Constant.[58] Then again, on 21 April 2005, in the context of a discussion on the advisability of permitting the Prosecution to reveal the names of protected witnesses to State authorities, the Trial Chamber

[53] Prosecution Response, para. 28 (citing *Prosecutor* v. *Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 483; *Musema* v. *Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 19).
[54] *Musema* v. *Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 19 ("*Musema* Appeals Judgement").
[55] *Musema* Appeals Judgement, para. 21.
[56] Transcript, 1 March 2005, p.24, lines 1-8.
[57] Transcript, 1 March 2005, p. 24.
[58] Transcript, 1 March 2005, p. 24, lines 13-15.

438/H

requested Mr. Emmanuel Onoja, a representative of WVSS, to explain the prior practice of the Tribunal in this situation.[59] The Trial Chamber subsequently received written submissions from the Registry, pursuant to Rule 33(B) of the Rules and, as the parties have noted, cited these submissions in the Impugned Decision.[60] In light of the affirmative steps taken by the Trial Chamber to receive submissions from the WVSS, it is reasonable to conclude that Trial Chamber took those submissions into account.

27. The question then is not whether the Trial Chamber accorded the weight to the WVSS submissions that the Appeals Chamber would have given, but instead whether the weight given by the Trial Chamber constituted an abuse of its discretion. The two submissions by the WVSS consisted of the following: First, Mr. Essombé-Edimo stated that the Prosecutor's proposal to "question[] the countries of residence of the witnesses" had him "perplexed".[61] Mr. Essombé-Edimo's response showed concern about the potential danger of revealing the identity of a protected person, stating, "I do not know, but when you put such questions to the State [authorities, they] would like to know why you are putting such questions to [them]. . . . And to answer your question, [*inaudible*] that will imperil not only the witnesses as individuals, but it would or may even threaten their personal safety and the safety of their family members, when necessary, where they are".[62] Subsequently, Mr. Onoja orally endorsed Mr. Essombé-Edimo's recommendations that witness's countries of residence not be disclosed, stating that he thought the recommendation "is still very relevant because of some of the issues that we are facing at the moment with regard to the security of these witnesses".[63] Mr. Onoja also expressed concern that "from the indicators" that the WVSS has, "it appears that sometimes when [witnesses] are in some of these foreign countries, they are afraid and they don't want to have contact with people they don't know".[64] The Registrar's written submissions, cited by the Trial Chamber, merely consisted of a statement that "the Registry would pray to the Trial Chamber that whatever investigations that the Prosecutor is conducting in this matter, the Chamber would ensure that they do not prejudice the status of the protected witnesses earlier ordered by the Trial Chamber, which would put the WVSS in a very difficult and untenable position to implement the Protective measures".[65]

[59] Transcript, 21 April 2005, p. 5, lines 12-16.
[60] Impugned Decision, p. 2.
[61] Transcript, 1 March 2005, p. 24, lines 18-23.
[62] Transcript, 1 March 2005, p. 24, lines 17-30.
[63] Transcript, 21 April 2005, p. 5, lines 18-24.
[64] Transcript, 21 April 2005, p. 5, lines 19-21.
[65] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, The Registrar's Submission under Rule 33(B) of the Rules on the Prosecution Investigations and Questioning Concerning Protected Defence Witness's Immigration Files, 3 May 2005, para. 7 ("Registrar Submission").

437/H

28. As noted above,[66] the Trial Chamber concluded that only in "exceptional" cases would Prosecution investigations imperil the witness. This conclusion appears to run against the opinion expressed by Mr. Essombé-Edimo that a State would want to know why the Prosecution was inquiring about an individual, and that such questioning will imperil the witness.[67] Considering, however, Mr. Onoja's statement that witnesses were sometimes concerned about being confronted in person by State authorities,[68] and that the Prosecution has not proposed inquiries that would involve in-person confrontation by State authorities, a reasonable finder of fact could conclude that an absolute bar on Prosecution inquiries to State authorities was not necessary to protect witnesses from intimidation. The Appeals Chamber finds that, particularly in light of the Trial Chamber's objective to seek the least restrictive measure necessary to provide for the protection of witnesses, the Trial Chamber reasonably concluded that "[a]s long as Prosecution investigations are conducted in scrupulous adherence to the principles set out in this decision, protected witnesses are insulated from any prejudice arising from cooperation with the Tribunal", and "[i]f the Defence believes that a witness is in a particularly precarious situation, such that any indication of cooperation with the Tribunal could be a danger to the witness's security, then special protective measures may be sought".[69]

29. In the Appeals Chamber's considered view, the Defence has not shown that the particular inquiry regarding Witness LT-1 necessarily revealed that person as a witness to the case or further that he and his family would be imperilled by the Prosecution investigation of their statements to State authorities.

C. Ground 4: the Trial Chamber erred by distinguishing the *Karemera* Decision

30. The Defence argues that a comparable issue arose in the case of *Prosecutor v. Karemera et al.* ("*Karemera*") and in that case, Trial Chamber III reached a different decision than Trial Chamber I did in the Impugned Decision.[70] The *Karemera* Decision held that Defence Counsel's inquiries to authorities of the State in which a protected witness resided violated an order prohibiting the Defence from disclosing information outside the defence team, because the "only criterion that the Order establishes with respect to the person receiving information is whether or not he or she is a member of the Defence team".[71] The Defence submits that the same reasoning in

---

[66] *Supra* paragraph 21.
[67] Transcript, 1 March 2005, p. 24, line 28.
[68] Transcript, 12 April 2004, p. 5, line 20.
[69] Impugned Decision, paras. 16-17.
[70] Defence Appeal, para. 38 (quoting *Prosecutor v. Karemera et al.*, ICTR-98-44-R46, Decision on the Prosecution Motion for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations, 19 April 2005 ("*Karemera* Decision on Sanctions"), para. 10).
[71] *Karemera* Decision on Sanctions, para. 10.

436/H

the *Karemera* Decision should apply to the present case because the witness protection orders and the facts regarding disclosure are analogous to each other. The Defence argues that, "as in the present case, only one half of the 'identity *of* the witness/identity *as* a witness' equation was revealed in *Karemera* and the same ambiguity as to whether or not a particular individual was to be a witness before the Tribunal [existed in both cases]".[72]

31. In response, the Prosecution first argues that the *Karemera* Decision was not binding authority on the Trial Chamber in this case, because the *Karemera* Decision was decided by another Trial Chamber.[73] Second, the Prosecution argues that the Impugned Decision properly distinguished the *Karemera* Decision because in that case, the witness protection measures provided extraordinary protection to an exceptionally vulnerable witness and the nature and content of contact between the *Karemera* Defence and the State was significantly different than the contact between the Prosecution and the State in the present case.[74] The Prosecution notes that the *Karemera* protective measure instructed that "the whereabouts of witnesses G and T *shall never* be disclosed to the public",[75] and the Prosecution notes that the *Karemera* Defence: disclosed to the State that "the witness was located in the respective state"; "identified the witness by pseudonym and advised the state that the witness would be testifying in the accused's trial"; and "advis[ed] that the Defence was seeking certain information . . . for the purpose of attempting to impeach the witness's credibility at trial".[76] The Prosecution concedes that if it were to carry out the investigations in the same manner as the *Karemera* Defence, then it too would be in violation of the protection orders in this case.[77]

32. The Defence replies that a careful reading of *Karemera* shows that it was the mere contact between the Defence and the State authorities, not the nature and content of that contact, that was found to violate the witness protection order, and the Defence urges the same result in this case.[78]

Analysis

33. Trial Chamber III's Decision in the *Karemera* case is not binding authority on Trial Chamber I, and Trial Chamber I need not have distinguished its Impugned Decision from the

[72] Defence Appeal, para. 39.
[73] Prosecution Response, para. 32.
[74] Prosecution Response, para. 34.
[75] Prosecution Response, para. 34 (quoting *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-I, Decision on the Prosecution's Motion for Special Protective Measures for Witnesses G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera, and Defence's Motion for Immediate Disclosure, 20 October 2003 ("*Karemera* Decision on Special Protection"), para. 15) (emphasis added in Prosecution Response).
[76] Prosecution Response, para. 36.
[77] Prosecution Response, para. 37.

Karemera Decision.[79] The Appeals Chamber nonetheless finds it useful to point to the clear distinction between the two cases, which is instructive of the ways that protective measures can be applied and interpreted. At the relevant time in the *Karemera* case, a witness protection order was in force that "prohibit[ed] the Defence from disclosing documents, records and other information relating to Witnesses G and T outside their teams".[80] Several features distinguish this protective measure from the one at issue in the present case. First, the *Karemera* protective measure prohibited disclosure of "information *relating to* [w]itnesses", whereas the protective measure in the present case prohibits disclosure of "information identifying any witness". A Trial Chamber could reasonably infer that the former prohibition on disclosing "information relating to a witness" is a broader prohibition than that against disclosing "information identifying a witness". Second, the witness protection measures in *Karemera* were designed specifically for the protection of two witnesses, not for all of the defence witnesses, as is the case here. Considering that a Chamber must construct measures to be the least restrictive necessary to protect the witness, it is entirely reasonable that a Trial Chamber would construct more restrictive measures for one or two witnesses requiring special protection than for an entire class. Indeed, the Trial Chamber here stipulated that, should the Defence believe that a witness is "in a particularly precarious situation . . . then special measures may be sought".[81]

D. Ground 5: the Trial Chamber failed to consider properly that the Impugned Decision will lead to a loss of Defence witnesses and will impede a fair trial.

34. The Defence claims that Defence witnesses are particularly fearful and vulnerable due to their political opposition to the current Rwandan government.[82] According to the Defence, many witnesses will refuse to testify at trial if the Prosecution makes the contested inquiries with State authorities, since the witnesses fear this will prejudice their immigration status and potentially lead to their return to Rwanda.[83] This, the Defence claims, will compromise the Accused's right to a fair trial. The Defence argues that, considering the collateral nature of the information sought by the Prosecution, and the nullifying effect the inquiries will have on the Accused's right to a fair trial, the Trial Chamber should not permit the inquiries.[84]

---

[78] Defence Reply, para. 27.
[79] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/I-A, Judgement, 24 March 2000, para 114 (noting that a Trial Chamber may follow another Trial Chamber's decisions if it finds them to be persuasive, but the decisions are not binding on it).
[80] *Karemera* Decision on Special Protection, p. 7.
[81] Impugned Decision, para. 17.
[82] Defence Appeal, para. 42.
[83] Defence Appeal, para. 42.
[84] Defence Appeal, para. 46.

35. The Prosecution responds that the Defence arguments regarding the loss of witnesses are not supported by "objective bases and specifics of the nature and reason of the alleged fears and [do not specify] whether those fears relate to all the witnesses".[85] The Prosecution argues that the Defence's proposed expansive interpretation of Clause 7 cannot be accepted, considering that the "witness protection regime . . . must . . . balance witness protection and the interests of justice", including the ability of the Prosecution to conduct its investigation.[86] The Prosecution argues that prior witness statements to immigration authorities are pertinent to the interests of justice because inconsistencies between them and statements made in court are useful in judging the weight of a witness's testimony.

36. Further, the Prosecution claims that the Impugned Decision adequately addresses the Defence concern that the exposure of inconsistencies between prior statements made to State authorities and witness's court testimony would endanger witnesses and contribute to their unwillingness to assist in the Defence's case. In this regard, the Prosecution notes that the Impugned Decision holds that "[t]his danger should . . . be obviated for the Prosecution and the Defence witnesses alike by ensuring that any inconsistencies which could identify the witnesses are raised in closed session".[87] As the fears of witness intimidation by the State authorities would be non-existent if the State authorities do not have access to any inconsistencies between the witness's prior statements and their in-court testimony, the Prosecution concludes that the Impugned Decision adequately considered the Defence's right to a fair trial, and left open the possibility that the Defence could seek exceptional protective measures if they are warranted by the circumstances.[88]

37. The Defence concedes that it cannot point to the loss of a single witness to date, but insists that if inquiries go forward, loss of witnesses will occur. The Defence implores the Appeals Chamber to bear "in mind the paramount consideration that the accused is entitled to a fair and expeditious trial".[89]

Analysis

38. The Appeals Chamber finds that it was reasonable in this instance for the Trial Chamber to construe the witness protection measures as permitting the inquiries made by the Prosecution. The Defence has not established any concrete reason to believe that it will be unable to prepare its case

[85] Prosecution Response, para. 39.
[86] Prosecution Response, para. 39.
[87] Prosecution Response, para. 41 (quoting Impugned Decision, fn 19).
[88] Prosecution Response, para. 41-42 (citing Impugned Decision, para. 17).
[89] Defence Reply, para. 31 (citing *Prosecutor v. Blaškić*, Case No. IT-95-14-AR72, Decision on Application for Leave to Appeal (Protection of Victims and Witnesses), 14 October 1996, p. 4).

effectively in light of the Prosecution's inquiries. For instance, it has not pointed to any witness whose testimony is important to its case and who might be particularly vulnerable and thus discouraged from testifying. In the event that one of the Defence witnesses is in such a situation, the Impugned Decision allows the Defence to seek specific protective measures. The Defence has not explained why this provision does not resolve any threat to the accused's right to a fair trial. Moreover, the fact that immigration officials will not have access to the transcripts of closed-session testimony alleviates the risk that testimony concerning prior contradictory statements of defence witnesses will endanger them. Nor will the Defence be unfairly prejudiced by the Trial Chamber's consideration of these potential contradictions; as the Trial Chamber explained, the probative value given to contradictory statements made by witnesses to immigration authorities can best be assessed by the Trial Chamber in light of the particular circumstances of the witnesses.[90] In short, the Appeals Chamber finds no error with the Trial Chamber's construction of this part of the witness protection measures.

IV. The Prosecution Appeal

39. On 4 August 2005, the Prosecution filed its appeal, which challenges the Impugned Decision on nine grounds.[91] The Accused filed a joint response on 15 August 2005,[92] to which the Prosecution replied on 19 August 2005.[93] On 4 August 2005, the Prosecution sought clarification on the permissible length of its appeals brief.[94] The Defence responded on 5 August 2005.[95] The Appeals Chamber notes that the Prosecution Appeal consists of 24 pages plus annexes, and falls within the limits established in the Practice Direction on the Length of Briefs and Motions on Appeal for briefs of an appellant in an interlocutory appeal where leave to file briefs is granted.[96] The Prosecution Appeal is therefore considered validly filed.

40. Each of the grounds of the Prosecution Appeal relate to the Trial Chamber's ruling in the Impugned Decision "that disclosure of information pertaining to the identity of protected Defence witnesses must be restricted to the Prosecution team . . . and cannot extend to anyone else within the

[90] Impugned Decision, para. 16.
[91] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Prosecutor's Interlocutory Appeal Pursuant to Rule 73(C), Respecting the Decision of Trial Chamber I on the Prosecutor's Motion to Harmonize and Amend Witness Protection Orders, 4 August, 2005 ("Prosecution Appeal").
[92] *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Joint Defence Response to "Prosecutor's Interlocutory Appeal, Pursuant to Rule 73(C), Respecting the Decision of Trial Chamber I on Prosecutor's Motion to Harmonize and Amend Witness Protection Orders", 15 August 2005.
[93] *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Prosecutor's Reply to Joint Defence Response to Prosecutor's Interlocutory Appeal, 19 August 2005.
[94] *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Motion for Clarification or Permission to File a Brief of a Certain Length, 4 August 2005.
[95] *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Joint Defence Response to 'Motion for Clarification or Permission to File a Brief of a Certain Length, 5 August 2005.

Office of the Prosecutor . . . who is not actively and directly engaged in work pertaining to the trial."[97] The Appeals Chamber finds it unnecessary to analyze each ground of the Prosecution Appeal and the Defence responses thereto. Rather, it can dispose of the Prosecution Appeal by jointly examining the Prosecution's interrelated and often inseparable points about its obligation and ability to disclose exculpatory evidence and other relevant material.

41. The Prosecution's arguments largely rest on its obligation to disclose information, stemming from Rule 68(A) ("Disclosure of Exculpatory Material") of the Rules of Procedure and Evidence of the Tribunal ("Rules"), which provides: "[t]he Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." Rule 68(E) of the Rules further provides that: "[n]otwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above." According to the Prosecution, this disclosure obligation with respect to exculpatory material has been recognized by the Tribunal as fundamental to the fair functioning of its proceedings.[98]

42. In the Impugned Decision, the Trial Chamber reasoned that information could be restricted to the Prosecution team in this case because "access should be limited to those with a *real need* for the information".[99] The Trial Chamber considered that the Prosecution's obligation to disclose only exists when it has actual knowledge of potentially exculpatory material.[100] Thus, the Trial Chamber concluded that because other Office of the Prosecutor staff would not have access to the information in this case, they would not have actual knowledge of it, and their obligation pursuant to Rule 68 to disclose it to the defence in other cases would not be triggered.[101] The Appeals Chamber finds the Trial Chamber's analysis is premised on an erroneous interpretation of the Prosecutor's obligation under the Rules.

43. As a general principle, interpretation of the Rules should be guided by the principles which may be drawn from Article 31(1) of the Vienna Convention on the Law of Treaties.[102] As

[96] 16 September 2002, § I.C.2.d.
[97] Prosecution Appeal, para. 2 (citing Impugned Decision, paras. 4-8).
[98] Prosecution Appeal, para. 33 (citing *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 180).
[99] Impugned Decision, para. 7.
[100] Impugned Decision, para. 6, fn 7.
[101] Impugned Decision, fn 7.
[102] *See Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000, para. 22 (citing Vienna Convention on the Law of Treaties (1969), U.N. Doc. A/CONF.39/27: "A treaty shall be interpreted in good faith in accordance

previously held by the Appeals Chamber, "[t]hese principles are considered today as general principles to be applied in the interpretation of all international instruments."[103] Therefore, the Rules are to be interpreted in accordance with their "ordinary meaning" and "in their context" and "in light of [the] object and purpose" of the Statute and Rules of the Tribunal. The ordinary meaning of the text of Rule 68(A) places the burden to disclose on the "Prosecutor". Indeed, parts four to eight of the Rules listing the functions of the Prosecutor describe those powers as belonging to the "Prosecutor". Obviously, the sheer amount of tasks ascribed to the Prosecutor under the Tribunal's Statute and Rules cannot be accomplished by one person; therefore, Rule 37 provides that the "Prosecutor's powers under Parts Four to Eight of the Rules may be exercised by staff members of the Office of the Prosecutor . . . ." Thus, the mandate to the Prosecutor as an individual organ of the Tribunal under the Statute and Rules applies to his or her Office as an extension of him or her. Nowhere in the Statute or Rules is it stated that the Prosecutor's obligations may be limited to specific teams within the Office of the Prosecutor, which in the practice of the Tribunal, are sometimes referred to as the "Prosecution" in an individual case. The ordinary meaning and context of the text of the Rules suggest that the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations.

44. Reading Rule 68 in light of its object and purpose supports this finding. The obligation to disclose stems from the recognition of the dual purposes of the Prosecutor: to investigate and to prosecute.[104] This obligation is continuous, affecting both the Trial and Appeals Chambers,[105] and is coterminous with and equally important to the function of the Prosecutor as the duty to prosecute.[106] In this way, the Prosecutor acts on the one hand in the public interest – the interest of the international community, victims, and witnesses[107] – and on the other as a distinct authority required to investigate[108] and then to disclose all exculpatory material to the defence out of respect for the fundamental rights of suspects and the accused.[109] The Appeals Chamber has recognized in this regard that "the Office of the Prosecutor has a duty to establish procedures designed to ensure that, particularly in instances where the same witnesses testify in different cases, the evidence

---

with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose") ("*Kordić and Čerkez* Decision").

[103] *Kordić and Čerkez* Decision, fn. 39.

[104] Article 15 of the Statute of the Tribunal.

[105] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 267.

[106] *Prosecutor v. Brđjanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for An Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3.

[107] *See* Prosecutor's Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel, para. 2(a) ("Prosecutor's Regulation No. 2").

[108] *See* Articles 15 and 17 of the Statute of the Tribunal; Rules 37, 39 and 47 of the Rules.

[109] Prosecutor's Regulation No. 2, para. 2(a).

4290/H

provided by such witnesses is re-examined in light of Rule 68 to determine whether any material has to be disclosed."[110]

45. Further, sub-Rule 75(F) of the Rules instructs that "[o]nce protective measures have been ordered in respect of a . . . witness" in one case, such protective measures "shall not prevent the Prosecutor from discharging any disclosure obligation" in another case. Underlying this rule is the proposition that evidence gained by one Prosecution team without the knowledge of others "may suggest the innocence or mitigate the guilt of an accused in another case, or affect the credibility of Prosecution evidence in that other case".[111] This is particularly true given the interrelationship that often exists between accused, witnesses, and events before the Tribunal. It is, moreover, significant that the Trial Chamber's construction of the protection order requires the Prosecution to designate individuals "including support staff or senior management who [are] actively and directly engaged in work pertaining *to this trial*".[112] Thus, it seems that those working on related prosecutions would not be able to access the identity of witnesses who hold exculpatory evidence.

46. Accordingly, the Appeals Chamber finds that the Trial Chamber erred by construing the protective measures in a manner that contradicts the Prosecutor's obligation pursuant to Rule 68 of the Rules. The Appeals Chamber therefore remits this matter to the Trial Chamber for reconsideration consistent with this decision.

V. Disposition

47. For the foregoing reasons, the Defence Appeal is **DISMISSED**, and the Prosecution Appeal is **GRANTED in part** and remitted to the Trial Chamber for further consideration consistent with this Decision.

Done in English and French, the English text being authoritative.

Done this 6th day of October 2005,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

[Seal of the Tribunal]

[110] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 302.
[111] Prosecution Appeal, para. 33.
[112] Impugned Decision, para. 7 (emphasis added).