Cooperation of States

Commentary

1. Introductory remarks

Two of the decisions[1] under scrutiny here deal with the application of Article 28 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Rule 54 of the ICTR Rules of Procedure and Evidence (RPE).[2] These are general dispositions regulating cooperation matters. Article 28 of the ICTR Statute imposes on states a general obligation to cooperate with the ICTR in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. Correspondingly, and more precisely, Rule 54 of the ICTR RPE provides that ICTR judges may issue orders, subpoenas and any binding act that may be necessary for the purposes of conducting an investigation or of preparing and conducting a trial.

The question of whether the *ad hoc* tribunals are empowered to issue binding orders to states first arose in 1997 before the International Criminal Tribunal for the Former Yugoslavia (ICTY), in the Blaškić case.[3] In the Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997[4] (hereinafter 'Blaškić subpoena judgement'), the judges of the Appeals Chamber pronounced themselves on this matter and clarified the scope of the ICTY's 'incidental or ancillary jurisdiction' over states (and state officials). Obviously, both the ICTY and the ICTR only have jurisdiction over natural persons. However the two *ad hoc* tribunals – since they do not possess enforcement powers and must rely on states' cooperation to bring individuals to trial – have incidental mandatory powers complementing states' duty to cooperate included in Article 29 of the ICTY Statute and Article 28 of the ICTR Statute respectively.[5] To avert any confusion when considering these articles and states' duty to cooperate, it is probably more accurate to speak of the *ad hoc* tribunals' ancillary (or incidental) mandatory powers *vis-à-vis* states, instead of 'incidental or ancillary jurisdiction' over states.

In the Blaškić subpoena judgement, the ICTY Appeals Chamber also held that a subpoena could not be issued to a state official (in that case the Croatian minister of defence) who enjoys functional immunity. However, as we will show in commenting on Bagosora, there have been significant developments in the jurisprudence of the *ad hoc* tribunals on this specific matter.

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[1] ICTR, Decision on Nzuwonemeye's Motion Requesting the Cooperation from the Government of the Netherlands Pursuant to Article 28 of the Statute, *Prosecutor v. Bizimungu*, *Mugenzi*, *Bicamumpaka and Mugiraneza*, Case No. ICTR-00-56-T, T. Ch. II, 13 February 2006, in this volume, p. **PAGINA???** and ICTR, Decision on Request for a Subpoena, *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, T. Ch. I, 11 September 2006, in this volume, p. **PAGINA???.**

[2] Rule 54 of the ICTR RPE provides: "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

[3] On 15 January 1997, Judge McDonald issued a *subpoenae duces tecum* to the Republic of Croatia and its defence minister Šušak. The Trial Chamber upheld the validity of the subpoena and ordered compliance with it within 30 days (ICTY, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, T. Ch. II, 18 July 1997). Since Croatia contested the tribunal's authority to issue a subpoena it rejected the decision of the Trial Chamber and requested its review.

[4] ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, A. Ch., 29 October 1997, Klip/ Sluiter, ALC-I-245.

[5] *Ibid*., par. 29: "The prosecutor has submitted that Article 29 expressly grants the International Tribunal 'ancillary jurisdiction' over States. However, care must be taken when using the term "jurisdiction" for two different sets of actions by the International Tribunal. As stated above, the primary jurisdiction of the International Tribunal, namely its power to exercise judicial functions, relates to natural persons only. The International Tribunal can prosecute and try those persons only. The International Tribunal can prosecute and try those persons who are allegedly responsible for the crimes defined in Article 2 to 5 of the Statute. With regard to States affected by Article 29 the International Tribunal does not, of course, exercise the same judicial functions: it only possesses the power to issue binding orders or requests."

In the third decision,[6] the judges dealt with two separate issues that were closely intertwined in the case at hand. On the one hand, they had to appraise the possible consequences of a state's failure to cooperate as to the service of documents to one of the parties of the proceedings, more specifically on the request by the defence that the ICTR President report the alleged failure to the United Nations Security Council pursuant to Rule 7*bis* of the ICTR RPE. On the other hand, they had to decide whether to grant a prosecution application, pursuant to Rule 66, paragraph C of the ICTR RPE, for partial disclosure of some of the documents mentioned above, since they were obtained on a confidential basis.

2. Binding orders issued to a State to facilitate an interview with a prospective witness

Following the Blaškić subpoena judgement, the Trial Chambers of both the ICTY and ICTR issued binding orders to states on several occasions.

In Ndindiliyimana *et al*., the defence of one of the accused, Nzuwonemeye, requested the Trial Chamber to issue an order for cooperation and assistance to the Government of the Netherlands, in order to interview Major Van Putten with a view of possibly calling him as a witness at the trial. There are several precedents in this respect and ICTR case law is pretty much settled on the question of issuing binding orders to states in order to facilitate contact with potential witnesses. One may quote a recent decision in Bagosora *et al*.,[7] which was actually dealing with a request of the defence to issue an order to the Government of the Netherlands in order to interview the very same prospective witness, Major Van Putten.[8]

The jurisprudence is established along the following lines. In the first place, the party seeking the issuance of an order under Article 28 of the ICTR Statute or under Rule 54 of the ICTR RPE must specify the nature of the evidence or information sought and their relevance to the trial. It must also demonstrate that it has made appropriate efforts to obtain the voluntary cooperation of the states involved and that it has been unsuccessful. In any event, the judges have frequently asserted that when a party is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow this party to meet the witness and assess his testimony. Granting and order of cooperation was therefore the obvious decision in the case at issue.

The decision in Ndindiliyimana *et al*. does not come as a surprise for another reason as well. It is the policy of the government of the Netherlands, due to resource constraints, not to assent to non-mandatory requests related to cases before the *ad hoc* tribunals, but instead to comply only with binding orders.

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[6] ICTR, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions Under Rule 66 c) of the Rules, *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-T, T. Ch. III, 15 February 2006, in this volume, p. **PAGINA????**.

[7] ICTR, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, *Prosecutor v. Bagosora*, *Kabiligi*, *Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, T. Ch. I, 7 February 2005.

[8] There are other precedents, many of which related to the instant case, such as: ICTR, Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute, *Prosecutor v. Bagosora*, *Kabiligi*, *Ntabakuze and Nsengiyumva*, Case No. No. ICTR-98-41-T, T. Ch. I, 22 October 2004; ICTR, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, *Prosecutor v. Bagosora*, *Kabiligi*, *Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, T. Ch. I, 31 August 2004; ICTR, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, *Prosecutor v. Bagosora*, *Kabiligi*, *Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, T. Ch. I, 23 June 2004; ICTR, Request to the Government of Belgium for Cooperation and Assistance Pursuant to Article 28 of the Statute, *Prosecutor v. Bagosora*, *Kabiligi*, *Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, T. Ch. I, 17 September 2003. See also ICTR, Decision on the Extremely Urgent Motion to Summon a Witness Pursuant to Rule 54. *Prosecutor v. Kamuhanda,* Case No. ICTR-99-54A-T, T. Ch. II, 20 August 2002.

Finally, given the role of the prospective witness as a UNAMIR (United Nations Assistance Mission in Rwanda) officer in 1994, the Chamber also recalled that the United Nations Assistant for Legal Affairs consented to the meetings, subject to a number of conditions.[9]

3. Subpoenas *ad testificandum* issued to a government official

In Bagosora *et al*., Trial Chamber I was faced with a request that a *subpoenae ad testificandum* be issued to the incumbent minister of defence of the government of Rwanda and concluded that such an act was both necessary and appropriate for the conduct of the trial.[10] This decision is perfectly consistent with the current evolution of international law on this matter, as is argued below.

In cases where a chamber is seized of an application to obtain the testimony of an individual state official – and not to simply meet a prospective witness in order to evaluate the relevance of his potential testimony – the appropriate procedural tool is not a binding order to the state, but a subpoena addressed directly to the single state official.[11]

A relevant evolution can be traced in the jurisprudence of the *ad hoc* tribunals. In the Blaškić subpoena judgement, the ICTY Appeals Chamber held that a subpoena – in that case a *subpoenae duces tecum* and not a *subpoenae ad testificandum* – could not be issued to a state official, because state organs enjoy the so-called functional immunity and cannot be considered accountable for actions undertaken on behalf of their state. According to the Appeals Chamber, State officials "are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act."[12] On the other hand, the judges affirmed that a subpoena could be addressed to a private individual.

Leaving aside the lively doctrinal debate on the nature and extent of functional immunity accruing to state officials,[13] it must be stressed that the Appeals Chamber in Krstić gave a restrictive interpretation of the position previously taken in Blaškić. In Krstić, the Appeals Chamber

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[9] The defence annexed to the motion a letter from the United Nations Assistant Secretary General for Legal Affairs indicating that the United Nations had no objection to the meeting and interview of Major Van Putten, provided that the questions asked do not "concern (i) information that was provided in confidence to the United Nations by a third person or State or (ii) what happened during closed meetings or informal consultations of the Security Council or (iii) information the disclosure of which would place anyone's life in danger." It is worth noting that the ICTR also pronounced on the possibility of issuing a subpoena to a United Nations official and summoned General Romeo Dallaire (a Canadian national who was former Force Commander of UNAMIR) to appear as a witness in the proceedings against Jean Paul Akayesu. ICTR, Decision on the Motion to Subpoena a Witness, *Prosecutor v. Akayesu*, *Case* No. ICTR-96-4-T, T. Ch. I, 19 November 1997 (Akayesu (1997) 1995 – 1997 ICTR RODJ 57), Klip/ Sluiter, ALC-II-215. In that case, Hans Corell, Under-Secretary-General for Legal Affairs, declared that the Secretary General agreed to waive General Dallaire's immunity as a former Force Commander of UNAMIR, but he explicitly said that the waiver was limited to General Dallaire's appearance as a witness in the Akayesu case and to matters of direct relevance to the charges made against the accused.

[10] The ICTR did not often issue subpoenas to government officials. In fact, as it has been highlighted by some authors, the issuance of a subpoena "is a burdensome procedure for both the applying party and the Chamber that has to respond to it. Thus, one may anticipate difficulties in enforcing the subpoena and the applying party may think twice before causing a conflict with one of its witnesses", G. Sluiter, The ICTR and the Protection of Witnesses, 3 Journal of International Criminal Justice 2005, p. 966. See also, G. Sluiter, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Intersentia, Antwerp 2002, p. 253-268.

[11] ICTY, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch. I, 9 December 2005.

[12] Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, *supra* note 4, par. 38.

[13] For an overview, see A. Cassese, International Criminal Law, Oxford University Press, Oxford 2008, p. 303.

maintained that the decision in Blaškić was only concerned with the service of documents. Referring to its earlier decision, the Appeals Chamber contended that, in the case of a *subpoena ad testificandum*, "unlike the production of State documents, the State cannot itself provide the evidence which only such a witness could give".[14] The judges also recalled that in Blaškić they "did not say that the functional immunity enjoyed by State officials includes an immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions".[15] In other words, it was made clear that the fact that the state official is called to give evidence about something he saw or heard while on official duties or as a private person does not have any bearing whatsoever on the possibility of being summoned by the tribunal.

These developments are to be welcomed, since the position that state officials are immune from the duty to testify before a foreign or an international court does not reflect the current evolution of international law.[16] First of all, this kind of immunity traditionally extends only to very limited categories of state organs, namely diplomatic agents and heads of states, exercising very crucial functions on behalf of their state and covered not only by functional immunity but, while in office, also by personal immunities.[17] Secondly, such immunity, even for those state officials who benefit from it, is well established before domestic courts, whereas it is not unquestionably settled before international criminal tribunals.

In this respect, it is worth mentioning the decisions delivered by the Special Court of Sierra Leone (SCSL) concerning the possible issuance of a *subpoena ad testificandum* to the acting president of the republic of Sierra Leone, Ahmed Tejan Kabbah. The Trial Chamber applied Rule 54 of the SCSL RPE (identical to Rule 54 of the ICTY and ICTR RPE), guided by criteria developed by the ICTY, and decided not to summon the incumbent president on the grounds of opportunity.[18] As it is well known, the ICTY developed standard criteria to be applied to applications for subpoenas. In the first place, the ICTY maintained that, before issuing a summons to testify, the judges should consider whether the information presumably in possession of the prospective witness is necessary for the resolution of specific issues in the trial ('legitimate forensic purpose requirement'). In other words, evidence to be collected through a statement under oath must be of crucial significance for a clearly identified issue that is relevant to the trial.[19] In the second place, the ICTY affirmed that the judges should consider whether the information in possession of the prospective witness may be obtained by other means ('last resort requirement').[20] In the case at hand, the judges of the SCSL found that these conditions were not met and considered that it was not necessary for the conduct of the trial to issue a *subpoena* to a serving head of state.

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[14] ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33, A. Ch., 1 July 2003, Klip/ Sluiter, ALC-XIV-521, par. 24.

[15] *Ibid*., par. 27. However, the judges recognised that a state agent could decline to answer the questions on the grounds of confidentiality (par. 28).

[16] *Contra* A. Chaumette, The ICTY's Power to Subpoena Individuals, to Issue Binding Orders to International Organisations and to Subpoena Their Agents, 4 International Criminal Law Review 2004, p. 357.

[17] Personal immunities include immunity from the duty to give evidence before a foreign court, as provided for in Article 31, paragraph 2 of the 1961 Vienna Convention on Diplomatic Relations: "A diplomatic agent is not obliged to give evidence as a witness". A similar rule applies, by analogy, to serving heads of state, see Sir A. Watts, The legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, in 247 Recueil des cours de l'Académie de droit international, 1994 (III), p. 21.

[18] SCSL, Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a *subpoena ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic for Sierra Leone, *Prosecutor v. Fofana, Kondewa and Norman,* Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006.

[19] Decision on Application for Subpoenas, *Prosecutor v. Krstić*, *supra* note 14, par. 10.

[20] ICTY, Decision on the Issuance of Subpoenas, *Prosecutor v. Halilović*, Case No. IT-01-48, A. Ch., 21 June 2004, par. 7.

In its decision, the SCSL Trial Chamber did not specifically address the issue of immunity of heads of states from the duty to appear as a witness before national or international courts; however, some of the judges addressed the question in their individual opinions. Judge Mutanga Itoe, in his separate concurring opinion appended to the decision, explicitly maintained that President Kabbah enjoys immunity from the service of process in front of the SCSL.[21] On the contrary, according to the dissenting opinion of Judge Thompson, President Kabbah enjoys no immunity from the service of process.[22] The Trial Chamber decision was later upheld by the Appeals Chamber,[23] which also failed to mention the immunity argument, simply confirming that the Trial Chamber rightly followed the standard criteria developed by ICTY jurisprudence.[24]

In sum, the possibility to summon a head of state was not definitively excluded on immunity grounds. It was instead reasserted that subpoenas should not be issued lightly "for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".[25] This is all the more true, of course, where the potential witness to be summoned is a serving head of state or prime minister. The very same position was taken by the ICTY in Milošević, when the judges declined to summon the former German chancellor Gerhard Schröder and the incumbent British prime minister Tony Blair.[26]

In conclusion, it may be contented that state officials, in general, do not enjoy immunity from the duty to give evidence before international criminal tribunals. Hence, if they do not voluntarily testify, they may be compelled to do so by a subpoena. However, certain conditions have to be met for the issuance of a subpoena and particular caution must be used for those state officials, namely heads of state and diplomatic agents, who are traditionally immune from the duty to testify before foreign courts. The ultimate objective, of course, must be that of reconciling the fair conduct of the trial with the prevention of any possible risk of abuse or manipulation that may derive from the involvement of high-ranking state officials as witnesses in criminal proceedings.

4. Striking the delicate balance between a defendant's right to fair trial and security and public interests put forward by a state

In Karemera *et al*., Trial Chamber III first had to deal both with the submission that the authorities of a certain state provided some documents, as requested by the judges themselves, only to the prosecution and not to the defence and with the defence's motion, pursuant to Rule 7*bis* of the

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[21] SCSL, Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a *subpoena ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Prosecutor v. Fofana, Kondewa and Norman*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, par. 94.

[22] SCSL, Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a *subpoena ad testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Prosecutor v. Fofana, Kondewa and Norman*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, par 14.

[23] SCSL, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, *Prosecutor v. Fofana, Kondewa and Norman*, Case No. SCSL-04-14-T, A. Ch., 11 September 2006.

[24] Judge Robertson, who appended a dissenting opinion to the Appeals Chamber's decision stated that: "Where an incumbent government minister is the subject of a subpoena, the court will consider very carefully whether the evidence he could give is important enough to incommode him: *Prosecutor v. Milošević* provides a good example where careful examination demonstrated that the evidence sought to be elicited from the Prime Minister of Britain and the former Chancellor of Germany did not in fact relate to any live issue in the trial." SCSL, Dissenting Opinion of Hon. Justice Robertson on Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, *Prosecutor v. Fofana, Kondewa and Norman*, Case No. SCSL-04-14-T, A. Ch., 11 September 2006, par. 49.

[25] See for instance Decision on the Issuance of Subpoenas, *Prosecutor v. Halilović*, *supra* note 20, par. 6.

[26] ICTY, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch. I, 9 December 2005.

ICTR RPE, to report a state to the United Nations Security Council for failing to cooperate with the tribunal.

In the case at hand, the question related to the disclosure of some documents pertaining to a certain witness and evolved along an unusual pattern, which needs to be briefly recalled for a better understanding of the questions raised. Initially, on 23 February 2005, the Trial Chamber had requested a state to provide its assistance serving certain documents to all the parties to the proceedings.[27] A few months later, the prosecution made its own request to obtain these documents and, having obtained them, applied to allow partial disclosure to the defence under Rule 66, paragraph C of the ICTR RPE. The defence opposed this application and asked for the immediate disclosure of all documents; in a separate motion, the defence also moved the Trial Chamber to request the President of the ICTR to report the state involved to the United Nations Security Council. For its part, the prosecution asserted that such a request was not appropriate, since the state was willing to cooperate with the tribunal, as attested by the fact that the requested files were disclosed to the prosecution, which then applied for partial disclosure. The state was also called to make submissions to the Trial Chamber and made it clear that it did not disclose the documents to the defence in order to protect witness T and other witnesses potentially at risk.

At this stage, with the positions of all the parties involved clearly expressed, the Trial Chamber first had to pronounce on the state's failure to cooperate and attempted to weigh up the rights of the accused to have access to all relevant documents with the security concerns expressed by a state. As has been asserted several time by the judges, for instance, of the European Court of Human Rights (ECtHR) the entitlement of a defendant to disclosure of relevant evidence is not an absolute right and must be weighed against other competing interests, such as states' security interests, including the need to safeguard the rights of another individual or to protect witnesses potentially at risk.[28] In the case at hand, the documents related to witness T, who was on trial in the state that was asked to produce the documents; hence, the state explained that full disclosure of the documents would be contrary to domestic law and, moreover, it would infringe witness T's right to a fair trial. It could also place at risk the security of other witnesses identified in the documents. The Trial Chamber's decision to accept these as valid reasons not to fully disclose the requested documents to the defence and, as a consequence, to find that the state did not fail to fulfil its obligation to cooperate, is therefore to be commended.

As a matter of fact, under Rule 7*bis* of the ICTR RPE, the chambers have a discretionary power to make a preliminary finding as to whether a state has failed to comply with a chamber's order and, as already affirmed in previous decisions, exceptional circumstances including security interests, may relieve a state from its obligations to cooperate.[29] In this case, the decision of the Trial

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[27] ICTR, Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du gouvernement d'un certain Etat, *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-T, T. Ch. III, 23 February 2005.

[28] European Court of Human Rights, Judgement, *Edwards and Lewis v. the United Kingdom*, Application Nos. 39647/98 and 40461/98, 22 July 2003, par. 53: "The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1." See also European Court of Human Rights, Judgement, *Doorson v. the Netherlands,* Application No. 20524/92, 26 March 1996, par. 70; and European Court of Human Rights, Judgement, *Van Mechelen and Others v. the Netherlands*, Application Nos. 1363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, par. 58.

[29] ICTR, Décision relative à la requête de la défense aux fins de faire injonction au département des opérations de maintien de la paix des Nations Unies de produire certains documents, *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-T, T. Ch. III, 9 March 2004.

Chamber seems particularly appropriate, since the security interests invoked by the state relate to the protection of witnesses and the need to guarantee the right to a fair trial in its internal system. In other words, it is not one of those cases where states invoke national security interests only to circumvent their obligation to cooperate with the tribunals. However, it must be stressed that the choice to convey a state's position, in the first place, through the prosecution, is not the most appropriate to comply with an order of the tribunal and, more generally, with the principle of equality of arms. On the other hand, it must be recalled that the ICTR RPE do not include an equivalent to Rule 54*bis* of the ICTY RPE, which was inserted in 1999 in order to provide a procedure for states to be heard in relation to Article 29 of the ICTY Statute and to raise, prior to the production of documents, matters of concern, such as issues of national security.[30]

The Trial Chamber then had to pronounce on the prosecution's motion for partial disclosure and, more specifically in the instant case, to evaluate whether granting the motion could avoid any possible infringement of witness T's right to a fair trial before the courts of a certain state. The judges faced the difficult task of weighing the right to a fair trial of the accused before the ICTR against the right to a fair trial of witness T before its national courts. In striking this balance, the Trial Chamber recalled that the RPE provides for exceptions to the prosecution's disclosure obligations – they explicitly referred not only to Rule 66, paragraph C,[31] but also to Rule 68, paragraph D[32] and Rule 70, paragraph B[33] of the ICTR RPE – which take into account the need not to run contrary to a public interest of a state, and thus considered that most of the prosecution motion must be granted.[34]

Here again, the decision is consistent with the case law of the ECtHR relating to guaranteeing the accused a right to a fair trial. As repeatedly stated by the ECtHR judges: "In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures

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[30] See, more specifically, Rule 54*bis*, paragraph E, sub iii and iv of the ICTR RPE: "(iii) a State may, within fifteen days of service of the order, apply by notice to the Judge or Trial Chamber to have the order set aside, on the grounds that disclosure would prejudice national security interests. Paragraph (F) shall apply to such a notice as it does to a notice of objection; (iv) where notice is given under paragraph (iii), the order shall thereupon be stayed until the decision on the application".

[31] Rule 66, paragraph C of the ICTR RPE provides: "Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-Rules (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential".

[32] Rule 68, paragraph D of the ICTR RPE provides: "The Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential".

[33] Rule 70, paragraph B of the ICTR RPE provides: "If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused".

[34] See the final part of Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions Under Rule 66 c) of the Rules, *Prosecutor v. Karemera et al*., *supra* note 6. The prosecution was allowed not to disclose certain documents at the current stage of the proceedings. It was ordered that some of the documents should not be disclosed without the consent of the state and that some other documents could be disclosed after witness T's trial. The prosecution was also authorized to maintain a redacted version of witness T's statement previously served to the defence.

restricting the rights of the defence which are strictly necessary are permissible under Article 6§1".[35]

Finally, the Trial Chamber denied the defence's requests for the postponement or exclusion of the testimony of certain prosecution witnesses, stressing that the interests of justice would not be served by such measures.

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[35] Judgement, *Van Mechelen and Others v. the Netherlands*, *supra* note 28, par. 58; European Court of Human Rights, Judgement, *Rowe and Davis v. the United Kingdom*, Application No. 28901/95, 16 February 2000, par. 61.