



ICTR-98-41-I  
5/12/01  
(5206-5202)

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International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

**TRIAL CHAMBER III**

Original: ENG

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

Registrar: Mr. Adama Dieng

Date: 5 December 2001

**THE PROSECUTOR**

v.

**THÉONESTE BAGOSORA  
ANATOLE NSENGIYUMVA  
GRATIEN KABILIGI  
ALOYS NTABAKUZE**

**ICTR-98-41-I**

JUDICIAL RECOGNITION DIVISION  
ICTR  
2001 DEC -5 P 4: 02  
*Dieng*

**DECISION ON PROSECUTOR'S MOTION FOR  
DEPOSITION OF WITNESS OW**

The Office of the Prosecutor:

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

Defence Counsel:

Mr. Raphaël Constant  
Mr. Jean Yaovi Degli  
Mr. Clemente Monterosso  
Mr. Kennedy Ogetto  
Mr. Gershom Otachi Bw'omanwa

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

**SITTING** as Trial Chamber III, composed of Judges Lloyd George Williams Q.C., presiding, Yakov Ostrovsky and Pavel Dolenc (the "Chamber");

**BEING SEISED** of the "Prosecution Motion for Deposition of Witness OW, Rule 71, Rules of Procedure and Evidence," filed under Case No. ICTR-96-12-I on 27 July 2001 and the "Amendment to Prosecution Motion for Deposition of Witness OW," filed 30 July 2001 (the "Motion");

**CONSIDERING** Ntabakuze's "Réponse à la Requête du Procureur pour Obtenir une Commission Rogatoire afin d'Interroger le Témoin OW au Rwanda," dated 7 September 2001 and filed 10 September 2001;

**CONSIDERING** Nsengiumva's "Defence Response to the Prosecution Motion for Deposition of Witness OW and Amendment to Prosecution Motion for Deposition of Witness OW," dated 6 September 2001 and filed 10 September 2001;

**CONSIDERING** Bagosora's "Memoire en Replique," filed on 7 September 2001;

**CONSIDERING** Kabiligi's "Memoire en Reponse à la Requête du Procureur aux fins de Deposition du Témoin OW," filed 10 September 2001;

**HAVING HEARD** the parties in a closed session hearing on 3 December 2001;

**NOW CONSIDERS** the matter:

**SUBMISSIONS OF THE PROSECUTOR**

1. The Prosecutor requests the Chamber to order the deposition of witness OW pursuant to Rule 71. Witness OW is an elderly man living in Gisenyi, Rwanda. The Prosecutor explains that the witness' age and physical condition do not permit him to travel to Arusha. Details relating to Witness OW's condition are outlined in the affidavit and supplementary affidavit of the Prosecutor's Kigali-based investigator, Mr. Clemens Bessem-Asu, which was filed with the confidential motion.
2. The Prosecutor further submits that the security situation in Gisenyi is too dangerous to move Witness OW. In support of this, the Prosecutor relies on transcriptions of various Rwandan radio broadcasts, profiling recent dangerous events in the region.
3. The proposed deposition, indicates the Prosecutor, would cover the contents of Witness OW's witness statement, which is limited to allegations against Anatole Nsengiyumva. The Prosecutor expects the witness to give eyewitness testimony, *inter alia*, about the killing of Tutsis by soldiers and Interahamwe and about the distribution of weapons in Gisenyi. Other matters included in the witness statement relate to the witness' occupation.

4. The Prosecutor makes the following logistical proposals:
  - (a) That the deposition be taken at a safe house in Gisenyi, to be designated by Investigative Team, Armed Unit 2.1; ...
  - (c) That Nsengiyumva's defence team and relevant ICTR personnel be escorted to the safe house on the date of the deposition; and
  - (d) That the deposition be scheduled for 23 August 2001.
5. The Prosecutor initially sought an Order to protect the identity of Witness OW from disclosure to the Defence. When the Prosecutor discovered that inadvertent disclosure had already been made to one of the Defence teams, the Prosecutor distributed this information to the other Defence teams and the Tribunal granted the Prosecutor's request to withdraw its prayer. Similarly, the Chamber granted the Prosecutor's request to withdraw the request that only Counsel for Nsengiyumva be permitted to attend the deposition.

#### **SUBMISSIONS OF THE DEFENCE**

6. All Defence Counsel contend that the Prosecutor has failed to demonstrate the exceptional circumstances required for a deposition under Rule 71. In particular, all Defence Counsel assert that the Prosecutor's investigator is not qualified to attest to the medical condition of the witness and that the Prosecutor has not provided any probative medical evidence about his condition. Counsel for Ntabakuze further observes that the Prosecutor has failed to mention the name or address of the witness as required by Rule 71(B).
7. The Defence teams of Nsengiyumva and Ntabakuze remonstrate that the Prosecutor has failed to prove that the testimony of Witness OW is important to the Prosecutor's case. They argue that the Trial Chamber is presently unable to assess the value of the Witness OW's testimony, since the Prosecutor has not yet indicated which witnesses she intends to call to testify at trial.
8. On a theoretical level, Nsengiyumva's Defence Counsel further objects to the witness giving evidence by deposition because this would deny the Accused his fundamental right to confront his accusers and to be present at the examination of the witness as guaranteed in Article 20(4)(e). The Defence notes that this will similarly prevent the Chamber from assessing the demeanour and credibility of the witness.
9. As a practical matter, Counsel for Bagosora observes that the Accused will not be able to attend a deposition in Gisenyi and that this will create a problem because Counsel will not be able to consult with their clients in order to prepare for cross-examination. Counsel for Kabiligi highlights the serious security concerns in the region of Gisenyi and confirms that neither Counsel nor the Accused would attend if the deposition were scheduled for Rwanda. Kabiligi's Defence submits that this

would therefore violate Article 20 of the Statute and Article 14 of the International Covenant of Civil and Political Rights.

10. Counsel for Kabiligi proposes that the best approach is to depose the witness in Arusha without delay. In the alternative, he suggests that the deposition could also be taken by way of video-conference pursuant to Rule 71 (D). Counsel for Bagosora concurs that the witness should be deposed by way of video-conference because this would permit the witness to be heard quickly without displacing him from Gisenyi, while still allowing the accused and Counsel to attend.

## **DELIBERATIONS**

11. The general rule is that a witness must testify in person before the Trial Chamber during the trial. Pursuant to Rule 71 a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial. The party applying for a deposition must comply with the formal requirements of Rule 71(B). The onus is on the moving party to demonstrate that exceptional circumstances exist and that the taking of testimony by deposition is in the interests of justice.

### ***(a) Exceptional Circumstances***

12. The Chamber accepts that the advanced age, frailty, and poor health of the witness constitute an exceptional circumstance. In reaching this conclusion notwithstanding the Prosecutor's failure to adduce medical evidence in support of her Motion, the Chamber relies on the affidavit of the Prosecutor's investigator and on the unredacted witness statement of OW.

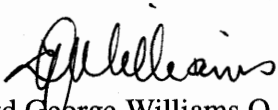
### ***(b) Interests of Justice***

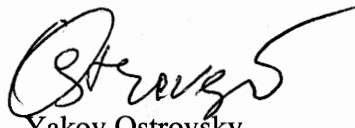
13. The evaluation of what is in the interests of justice in respect of the instant Motion presents a novel problem for this Tribunal: this being the first time that a party has asked for a deposition to be taken in another country in advance of trial. The Chamber therefore draws guidance by analogy from the decisions of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), which set out the test to be satisfied before issuing an order for a witness to give testimony by video-link. *Prosecutor v. Delalic et al.* (IT-96-21), Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, builds on earlier decisions of the ICTY to enunciate three criteria for assessing whether evidence can be given in this manner:

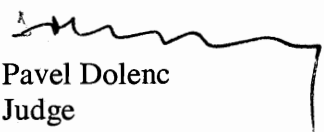
- (1) That the testimony of the witness is sufficiently important to make it unfair to proceed without it;
- (2) That the witness is unable or unwilling to come to the Tribunal; and
- (3) That the accused will not thereby be prejudiced in the exercise of his right to confront the witness.

14. The Chamber finds that these same criteria are apposite to the instant case and will assist the Chamber in evaluating whether a deposition is in the interests of justice. The Chamber will nevertheless add a further factor to this list: that the practical considerations (including logistical difficulty, expense, and security risks) of holding a deposition in the proposed location do not outweigh the potential benefits to be gained by doing so.
15. In relation to the first factor, the Chamber is of the view that the Prosecutor has failed to prove that this witness' testimony is sufficiently important to make it unfair to proceed without it. In the context of this case, in which the Prosecutor has indicated that she intends to call more than two hundred witnesses, it has not been demonstrated that the testimony sought from this witness is unique. Moreover, the Prosecutor has not established that the same testimony could not be garnered from another eyewitness.
16. With regard to the second factor, the Chamber accepts that there is insecurity in the Gisenyi region. In light of the exceptional circumstances relating to the age and health of the witness, it is understandable that the witness is unable or unwilling to come to the Tribunal.
17. Finally, the Chamber must consider whether the practical considerations outweigh the potential benefit of this witness' testimony. The logistical difficulties and costs of transporting the necessary court staff, the judicial officer, and the representatives of the Prosecutor and the Defence to Rwanda are substantial. More significantly in this case, the Prosecutor has asked that this deposition be taken in an area where recent news reports indicate that there has been armed conflict. The Chamber is wary of sending the parties and the court staff into a region where they may face security risks, in spite of the assurances of protection offered by the Prosecutor.
18. Therefore, the Chamber finds that it would not be in the interests of justice to order a deposition of Witness OW to take place in Gisenyi, Rwanda at this time.
19. In light of this finding, it is unnecessary for the Chamber to consider the third factor relating to possible prejudice to the Accused's right to confront the witness.
20. For the foregoing reasons, the Chamber **DENIES** the Prosecutor's request.

Arusha, 5 December 2001.

  
Lloyd George Williams Q.C.  
Judge, Presiding

  
Yakov Ostrovsky  
Judge

  
Pavel Dolenc  
Judge

Seal of the Tribunal