



**ICTR-98-41-T**  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
**08-10-2004**  
**(22067-22062)**

**22067**  
**IVAN**

OR: ENG

**TRIAL CHAMBER I**

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 8 October 2004

**THE PROSECUTOR**  
v.  
**Théoneste BAGOSORA**  
**Gratien KABILIGI**  
**Aloys NTABAKUZE**  
**Anatole NSENGIYUMVA**

*Case No. : ICTR-98-41-T*

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2004 OCT-8 A 9 20

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**DECISION ON PROSECUTION REQUEST FOR TESTIMONY OF WITNESS BT  
VIA VIDEO-LINK**

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*ph*

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

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED** of the Prosecution “Urgent and Confidential Request to Allow Witness BT to Give Testimony Via Video-link”, filed on 1 October 2004;

**HAVING CONSIDERED** the “Reply” filed by the Defence for Bagosora on 4 October 2004; the “Response”, and an “Addendum” thereto, filed by the Defence for Ntabakuze on 4 October 2004; the Responses filed by the Defence for Nsengiyumva and Kabiligi on 5 October 2004;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. On 25 August 2004, the Chamber granted the Prosecution request for the issuance of a subpoena commanding the appearance of Witness BT before the Chamber to give testimony. In its decision, the Chamber considered the alternative requests by the Prosecution that testimony be given by video-link, or by deposition, to be premature. The Chamber has been advised that a subpoena was served on Witness BT on 7 September 2004. On 9 September 2004, the Prosecution filed a motion under Rule 71 to take the testimony of the witness by deposition, noting that the witness had refused to comply with the subpoena issued by the Chamber. On 29 September 2004, the Chamber indicated orally that it would deny the motion. In written reasons for that decision issued on 4 October 2004, the Chamber found that the Prosecution had not established, as required by Rule 71 (A), that “exceptional circumstances” existed, nor proven that it would be in the interests of justice to receive evidence by deposition which the Prosecution contended was highly incriminating of the Accused. The Prosecution filed the present motion on 1 October 2004.

**SUBMISSIONS**

2. The Prosecution relies on its two previous motions concerning Witness BT to justify the taking of testimony by video transmission from Belgium. It argues that Witness BT refuses to travel to Arusha to testify notwithstanding the issuance of the subpoena requiring her attendance. As the Chamber has denied the motion for a deposition, and as Belgian law does not allow for a witness to be compelled to travel beyond Belgian territory, the only means by which the witness’s testimony can be heard is by video-link. The Prosecution has submitted, in particular, that Witness BT will testify that she heard words spoken by the Accused Bagosora immediately following a meeting at the *Ecole Superieure Militaire* on the morning of 7 April 1994, to the Accused Ntabakuze and three other officers. It argues that this incident, about which the Chamber has heard hearsay testimony from Expert Witness Filip Reyntjens, is highly incriminating of the Accused.

3. All four Defence teams oppose the motion. Permitting testimony by video-link, merely because the witness does not wish to travel to Arusha, would set a dangerous precedent that undermines the integrity of the Tribunal and would encourage witnesses to choose the venue of their testimony. The Defence notes that many of its witnesses have expressed a similar unwillingness to travel to Arusha, and that any ruling should apply equally to Defence witnesses. The poor image and sound of previous video transmissions to the Chamber is an inadequate substitute for live testimony, and the Chamber has already

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remarked upon the need for directly observing the demeanour of the witness. The Prosecution has not established that the stringent conditions for permitting such testimony, expressed in previous case law of the Tribunal, exist. In particular, the Prosecution has not shown how audio-video testimony would preserve the witness's anonymity or security, as has been required in previous cases. Mere unwillingness to testify before the Tribunal should not be accepted as a basis for authorizing such testimony, particularly where, as here, the basis of the witness's fears have been neither defined nor substantiated by the Prosecution.

4. According to the Defence, the Prosecution has also failed to substantiate its claim that Belgian law does not allow a witness to be compelled to testify outside of its territory. No effort has been made to prove the law of Belgium, and the claim appears to contradict the Prosecution's submissions requesting the subpoena. On the contrary, the Defence infers from an email sent by a Belgian judge concerning the service of the subpoena on Witness BT that coercive measure are, in fact, available under Belgian law and should be applied. The Defence notes that it is unclear whether the Prosecution wishes to conduct the questioning of the witness itself, or whether it will ask a Belgian *juge d'instruction* to conduct the questioning. The latter proposal does not comply with the Rules and, in any event, the witness should not be permitted to choose the judge presiding over her testimony.

#### DELIBERATIONS

5. Recourse to video-link for the hearing of testimony was first granted by a Chamber of the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). In *Tadić*, the Chamber authorized this medium of testimony for seven Defence witnesses who refused to travel to the seat of the Tribunal because they feared arrest in The Hague by the Prosecutor of the ICTY.<sup>1</sup> The Chamber recognized that Rule 71 (D), which permitted the holding of a deposition by video-conference, did not apply to real-time electronic transmission of testimony from a remote location to the Chamber. Nevertheless, it authorized the procedure on the basis of Rule 54, which permits the Chamber to "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".<sup>2</sup> The Chamber indicated that transmission of testimony would be permitted where "the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal".<sup>3</sup> The Chamber nonetheless reiterated the "general rule" that "a witness must be physically present at the seat of the International Tribunal".<sup>4</sup>

6. The ICTY Rules were amended on 15 July 1997 to specifically permit testimony by "video-conference link", and Rule 71*bis* was subsequently inserted to provide that such testimony may be ordered where it is "in the interests of justice."<sup>5</sup> Criteria which have been applied in assessing whether such testimony is in the interests of justice include: the

<sup>1</sup> *Tadić*, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC) ("*Tadić* Decision"), 25 June 1996, para. 19.

<sup>2</sup> *Id.* p. 12. See *Delalic et al.*, Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony By Means of Video-link Conference (TC), 28 May 1997 (authorizing video testimony under Rule 54).

<sup>3</sup> *Tadić* Decision, para. 19.

<sup>4</sup> *Id.* paras. 19, 21.

<sup>5</sup> The first version of the rule permitting electronic transmission of testimony was found in Rule 90 (A), which read in its entirety: "Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71 or where, in exceptional circumstances and in the interests of justice, a Chamber has authorized the receipt of testimony via video-conference link." Rule 71*bis*, adopted on 17 November 1999, deleted the requirement of "exceptional circumstances": "At the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link."

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importance of the testimony; the inability or unwillingness of the witness to attend; and that a good reason has been adduced for the inability or unwillingness to attend.<sup>6</sup> No requirement has been imposed that the witness is unable to attend, for example, because of infirmity.

7. The Rules of Procedure and Evidence of the ICTR (“the Rules”) do not expressly provide for the taking of testimony by electronic transmission. Nevertheless, in *Nahimana et al.*, this Chamber authorized the electronic transmission of testimony, relying on the *Tadić* decision.<sup>7</sup> Although the request was part of a Prosecution motion for protective measures for a witness, the Chamber did not rely on witness protection concerns as the basis for its decision.<sup>8</sup> The Chamber relied, *inter alia*, on *Tadić*, and ordered electronic transmission of the testimony as being “in the interests of justice”:

The Chamber is of the opinion that the testimony is sufficiently important, that it will be in the interests of justice to grant the application for a video link solution, and that the Accused will not be prejudiced in the exercise of his right to confront the witness. The crucial question is whether the witness is unable or unwilling to come to the Tribunal.<sup>9</sup>

In applying the “interests of justice” standard, the Chamber adopted the same approach as had been codified in Rule 71*bis* of the Rules of the ICTY.

8. Video transmission of testimony may also be ordered under Rule 75 of the Rules, which authorizes Chambers to “order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that such measures are consistent with the rights of the accused”. In such cases, the applicant must make some showing that giving testimony in that manner is necessary to safeguard the witness’s security. The electronic transmission of the testimony of a witness in the present case has been heard after a finding that he was “an extraordinarily vulnerable witness and that testimony from a remote location would assist in preserving his anonymity and security”.<sup>10</sup>

9. The Prosecution has not expressly indicated whether it seeks electronic transmission of the witness’s testimony as a witness protection measure under Rule 75, or because it would be in the interests of justice under Rule 54. However, the Prosecution has previously argued that it would be in the interests of justice to hear the witness’s testimony.<sup>11</sup> Accordingly, the request will be considered in accordance with Rule 54, under the “interests of justice” standard set forth in *Nahimana et al.* and applied before the ICTY.

<sup>6</sup> *Sikirica et al.*, Order for Video-Conference Link (TC), 11 July 2001 (ordering video testimony of five witnesses on basis of showing that “all five witnesses are unable or unwilling for good reason to come to the International Tribunal); *Mrksic et al.*, Decision on Defence Motions for Video-Conference Link (TC), 29 April 1998 (on basis that “testimony of these witnesses is sufficiently important as to make it unfair to proceed without it and that the witnesses are unable or unwilling to for good reason to come to the International Tribunal”); *Kordic & Cerkez*, Order for Video-Conference Link (TC), 24 February 2000 (“the Prosecution has established that the testimony of these witnesses is sufficiently important as to make it unfair to proceed without it and that the witnesses are unable or unwilling for good reason to come to the International Tribunal”).

<sup>7</sup> *Nahimana et al.*, Decision on the Prosecutor’s Application to Add Witness X to Its List of Witnesses and for Protective Measures (TC) (“*Nahimana* Decision”), 14 September 2001.

<sup>8</sup> Paras. 36-37 (“The Chamber considers that it may be possible to adopt sufficient measures to ensure that Witness X can testify here in Arusha ... it does not follow clearly from the documentation that [the witness refusal to attend] will be maintained if he is given thorough explanations about the extraordinary measures that will be taken during his stay here”).

<sup>9</sup> *Nahimana* Decision, para. 35.

<sup>10</sup> *Bagosora et al.*, Decision on the Prosecution Motion for Special Protective Measures for Witness A Pursuant to Rules 66 (C), 69 (A) and 75 of the Rules of Procedure and Evidence (TC), 5 June 2002; *Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003.

<sup>11</sup> Urgent and Confidential Request for a Subpoena, etc., 19 July 2004, para. 14.

10. A sufficient evidential foundation has been laid that the witness is unwilling to testify in person at the Tribunal, despite repeated efforts to convince or compel the witness to appear. On 29 September 2004, the Chamber heard representations from the Registry indicating that a subpoena from the Tribunal had been served on the witness, who nevertheless continued to refuse to travel to Arusha. The Chamber is of the view that, as a practical matter, further measures are not likely to lead to the witness's attendance at the Tribunal.

11. The witness's testimony is undoubtedly of importance to the Prosecution case. Although it is limited in scope, it concerns an utterance by one of the Accused to another Accused which could be probative of several elements of the Prosecution case. The testimony is claimed to be the only direct evidence of the event alleged. The Chamber has already heard testimony from Expert Witness Filip Reyntjens concerning his interpretation of the significance of this alleged event. Further evidence on this matter may assist the Chamber.

12. The importance and limited scope of the testimony, however, also increases the Chamber's need to carefully observe the witness during her testimony. In its previous decision denying a deposition of this witness in lieu of testimony, the Chamber stated that "[t]he witness's credibility is, accordingly, of particular significance and should be tested before the Chamber, which can then directly observe the witness's demeanour".<sup>12</sup> Direct observation of the witness's demeanour is not, however, incompatible with electronic transmission. Experience has shown that electronic transmissions can provide a very clear audio and visual image of the witness to the judges and parties in the courtroom.<sup>13</sup> Representation by the parties at the point of transmission ensures that the conditions of testimony are impartial and fair. The real-time nature of the broadcast facilitates the direct intervention of the judges during the testimony. The quality of the transmission must, however, actually be adequate to permit direct observation of the witness. As an extra safeguard against possible transmission interruptions that might interfere with a complete appreciation of the witness's testimony, the Chamber shall order that the testimony of the witness be video-recorded for subsequent review, if necessary.

13. The Prosecution has represented that the basis for the witness's refusal to come to Arusha is fear of reprisals against her family. Without further information, the Chamber is unable to assess whether this fear is objectively justified. However, the witness's continued refusal to come to Arusha in spite of the service of a subpoena indicates that these fears are genuinely and deeply held. In that sense, they are no less real than the basis for the refusal of the seven witnesses in *Tadić* who feared arrest by the Prosecution of the ICTR.

<sup>12</sup> *Bagosora et al.*, Decision on Prosecution Request for Deposition of Witness BT (TC), 4 October 2004, para. 9.

<sup>13</sup> *Kupreškić et al.*, Decision on Appeal By Dragan Papić Against Ruling to Proceed By Deposition (Separate Opinion of Judge Hunt), 15 July 1999, paras. 29-30 ("It is, of course, of the utmost importance that any tribunal of fact should have the opportunity of seeing the demeanour of the witnesses and of observing the way in which various questions put to them in cross-examination are answered. This is particularly so where the witnesses are vital to the determination of significant factual issues ... Such is the geography of the courtrooms used by the Tribunal that the view of the witness and of the witness's demeanour on the television screens provided throughout the courtroom is usually better than that from across the room"). Many national jurisdictions also permit electronic transmission or recording of testimony. See e.g., *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), cert denied, 120 S. Ct. 931 (2000); (informant allowed to testify via two-way closed-circuit television against Genevose family boss, Vincent "The Chin" Gigante); *Federal Magistrates Act*, 1999, (Australia), s. 67 (permitting testimony before the Federal Magistrates Court or the Federal Magistrate by way of video link or audio link).

14. In light of the opportunity that the Chamber will have to observe the witness's demeanour, the nature of the witness's testimony and her persistent refusal to accede to requests to come to the Tribunal, and the unlikelihood that any further measures will convince or compel the witness to appear before the Tribunal, the Chamber finds that it is in the interests of justice to hear the witness via electronic transmission from Belgium.

15. This in no way detracts from the general principle, and the Chamber's strong preference, that most witnesses should be heard in court.<sup>14</sup> Electronic transmission of testimony may, under certain circumstances, be time-consuming and inefficient. The testimony of witnesses heard through electronic media runs the risk of being less weighty than that of in-court testimony if the quality of the transmission impairs the Chamber's assessment of the witness.<sup>15</sup>

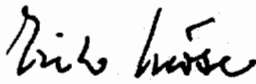
16. The procedure shall be the same as that followed in respect of Witness BY, who was recently heard by video-link from Belgium. A *juge d'instruction* may be present at the point of transmission during the testimony to conduct certain formalities in compliance with Belgian law. The Chamber will then be in charge of taking the testimony in accordance with the procedure normally followed in a courtroom in Arusha. The Prosecution will conduct the direct examination, followed by cross-examination by the Defence. A prior written statement of the witness could only be entered as an exhibit in lieu of oral testimony if a request under Rule 92bis were granted.<sup>16</sup> No such application has been made.

**FOR THE ABOVE REASONS, THE CHAMBER**

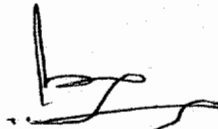
**GRANTS** the motion;

**ORDERS** the Registry, in consultation with the parties, to make all necessary arrangements in respect of the testimony of Witness BT via secure audio-video transmission link, and to video-tape the testimony for possible future reference by the Chamber.

Arusha, 8 October 2004



Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]



<sup>14</sup> Of eighty-three Prosecution witnesses heard so far, this will only be the third to have testified by video-link.

<sup>15</sup> *Tadić* Decision, para. 21.

<sup>16</sup> T. 20 November 2003, p. 15.