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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 15 February 2006

The PROSECUTOR

v.

**Arsène Shalom NTAHOBALI and
Pauline NYIRAMASUHUKO**

Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

2006 FEB 15 11:12
ICTR

**DECISION ON ARSÈNE SHALOM NTAHOBALI'S EXTREMELY URGENT
MOTION FOR VIDEO LINK TESTIMONY OF DEFENCE WITNESS WDUSA IN
ACCORDANCE WITH Rule 71 (A) and (D) OF THE RULES OF PROCEDURE AND
EVIDENCE**

Office of the Prosecutor:

Ms Silvana Arbia
Ms Adelaide Whest
Ms Holo Makwaia
Mr Gregory Townsend
Ms Althea Alexis
Mr Micheal Adenuga
Ms Astou Mbow

Counsel for the Defence:

Mr Normand Marquis
Mr Louis Huot

AMS

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

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEIZED OF the Defence's «*Requête en extrême urgence de Arsène Shalom Ntahobali pour faire témoigner WDUSA par voie de vidéo conférence conformément à la Règle 71 (A) et (D) du Règlement de Procédure et de Preuve*»,¹ filed on 31 January 2006 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Video Conference Link Testimony of WDUSA" filed on 1 February 2006 (the "Response"); **AND** the Defence's "*Réplique à la Réponse du Procureur intitulée 'Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Video Conference Link Testimony of WDUSA'*" filed on 3 February 2006 (the "Defence's Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 71(A) and (D) of the Rules;

HEREBY DECIDES the Motion on the basis of the written submissions of the Parties, pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES*The Defence*

1. Defence Witness WDUSA, who is to testify on the alibi of the Accused, was added to the Defence witness list by Decision of 27 January 2006.² Following the grant of his addition to its list, the Defence submits that it would be in the interests of justice for WDUSA to testify via video conference from The Hague pursuant to Rule 71 (D).
2. The Defence relying on the *Bagosora et al.* Decisions of 8 October 2004,³ and of 20 December 2004,⁴ submits that WDUSA is unable to travel to Arusha to give testimony as a result of a heart surgery he underwent in 2002. In the same year, WDUSA was authorised to testify via video link from The Hague in the *Cyangugu* trial,⁵ and to this date, he is unable to undertake long journeys.
3. The Defence submits that the testimony of WDUSA is important since he is the only alibi witness who is not related to the Accused who is expected to testify to having been in *Cyangugu* with the Accused during the events of 1994. Furthermore, the Defence reminds the Chamber of its Decision of 27 January 2006 where the importance of WDUSA's testimony was considered.

¹ Unofficial translation: "The Defence's Extremely Urgent Motion to Have Witness WDUSA Testify by Video Link in accordance with Rule 71 (A) and (D) of the Rules of Procedure and Evidence."

² *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC) Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsene Shalom Ntahobali" of 27 January 2006, para 31

³ *Prosecutor v. Bagosora et al.* ICTR-98-41-T, (TC) Decision on Prosecution Request for Testimony of BT via Video-Link of 8 October 2004, paras. 5-7 (the "Bagosora Decision of 8 October 2004")

⁴ *Prosecutor v. Bagosora et al.* ICTR-98-41-T, (TC) Decision on Testimony by Video-conference of 20 December 2004, para 4.

⁵ *Prosecutor v. Ntagerura et al.*, Oral Decision of 16 July 2002, p. 3

The Prosecutor

4. The Prosecution objects to the Motion submitting that the *Bagosora et al.* Decisions relied upon by the Defence are distinguishable from the current circumstances: WDUSA is not of advanced age, no unredacted statement of the witness has been disclosed to the Prosecution and there is no medical evidence that the witness is unable to travel for medical reasons.

The Defence's Reply

5. Regarding the Prosecution's allusions to the fact that WDUSA is not of an advanced age, the Defence refers to the *Bagosora et al.* Decision of 20 December 2004 and the *Brdanin*⁶ Order of the ICTY and submits that the Chamber does not need to consider the age of the witness rather it is required to consider the material inability of the witness to travel due to medical reasons.

6. Regarding the production of a medical report in support of its request, the Defence submits it had assumed it would not need to produce another certificate in this case since such a certificate was produced when WDUSA testified in the *Cyangugu* trial. Notwithstanding, the Defence produces a medical report dated 2 February 2006 annexed to its Reply.

HAVING DELIBERATED

7. The Chamber underscores the general rule articulated in Rule 90(A), that "witnesses shall, in principle, be heard directly by the Chamber."⁷ The Chamber recalls its reasoning in the *Nyiramasuhuko et al* Decision of 1 March 2005 that, "[a]lthough the testimony of witnesses via video-link has been granted in other cases, such measure was granted under absolute necessity only and the Tribunal regularly recalled that it had a clear preference for testimony in court."⁸

8. Nonetheless, the Chamber recalls that it has discretion to grant the hearing of testimony by video-conference in lieu of physical appearance where it is in the interests of

⁶ *Prosecutor v. Brdanin*, IT-99-36-T, (TC) Order to Allow Testimony via Video-Conference in Accordance with Rule 71bis, 23 September 2003.

⁷ *Prosecutor v. Tadic*, Case No. IT-94-1-T, (TC) Decision on the Defence Motion to Summon and Protect Defence Witnesses. And on the Giving of Evidence by Video-Link, of 25 June 1996 at para. 19

⁸ *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC) Decision on Nyiramasuhuko's Strictly Confidential *ex-parte* under seal Motion for Additional Protective Measures for some Defence Witnesses of 1 March 2005 at para. 40 quoting: *Prosecutor v. Nahimana* ICTR-99-52-I, (TC) Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures of 14 September 2001 (the "*Nahimana* Decision of 14 September 2001"); *Prosecutor v. Bagosora*, ICTR-96-7-I, (TC) Decision on the Prosecution Motion for Special Protective Measures for Witness 'A' Pursuant to Rule 66(C), 69(A) and 75, of 5 June 2002; *Prosecutor v. Milosevic*, IT-02-54-T, (TC) Decision on Confidential with an *ex parte* Annexure Prosecution Motion for Video Conference Link and Protective Measures for Witness named Herein, of 19 March 2003; *Prosecutor v. Karemera*, ICTR-98-44-I, (TC), Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases and Co-Accused Ndirumpitse and Karemera, and Defence's Motion for Immediate Disclosure, of 20 October 2003; *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, (TC), Decision on Prosecutor's Extremely Urgent Motion Requesting a Location at The Hague and other Related Special Protective measures Pursuant to Article 21 of the Statute and Rules 73 and 75(C) of 4 June 2004. Also quoting: *Nahimana* Decision of 14 September 2001 at para. 37; *Bagosora* Decision of 8 October 2004 at para. 15;

justice, based on an assessment of; i) the importance of the testimony, ii) the inability or unwillingness of the witness to attend, iii) whether a good reason can be adduced for that inability and unwillingness. The burden of proof for authorising a witness' testimony to be taken by way of video-conference lies with the Party making the request.⁹

9. With respect to the first criterion, the Chamber recalls that in its Decision of 27 January 2006, it granted the addition of Witness WDUSA as an alibi witness whose expected testimony will be limited to the presence of the Accused in *Cyangugu*. Indeed his addition to the Defence list of witnesses indicates that the specific testimony Witness WDUSA proposes to give is sufficiently important. The Chamber also recalls that the unredacted will-say statement of the proposed testimony of Witness WDUSA was considered when the Chamber made its Decision of 26 August 2005 regarding the Defence Motion to modify its list of witnesses.¹⁰

10. Regarding the second and third criteria, the Chamber finds that on the basis of the medical report dated 2 February 2006, the Defence has established that Witness WDUSA is, for medical reasons, unable to travel to Arusha to give evidence.¹¹

11. In the Chamber's opinion, the Defence has demonstrated exceptional circumstances warranting that Witness WDUSA testifies by video-conference from The Hague. For the above reasons and in the interests of justice, the Chamber grants the Defence Motion. Accordingly, the Chamber authorises Witness WDUSA to give his testimony via video conference from The Hague in lieu of his physical presence in Arusha.

12. To facilitate organisation for the taking of a testimony via video conference from The Hague, and recalling the Chamber's direction that the case for the Defence for Ntahobali be closed at the latest on 10 March 2006, the Chamber directs the Defence to liaise immediately with the Registry to facilitate the proceedings and the scheduling of the testimony of Witness WDUSA.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion and orders that Defence Witness WDUSA give his testimony via video conference from The Hague in lieu of his physical presence in Arusha.

DIRECTS the Registry to make all the necessary arrangements in respect of the testimony via video conference of Defence Witness WDUSA from The Hague;

DIRECTS the Defence to diligently assist the Registry with the necessary arrangements to ensure that the video conference testimony of Defence Witness WDUSA is taken without delay.

⁹ *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC) Decision on Nyiramasuhuko's Strictly Confidential *ex-parte* under seal Motion for Additional Protective Measures for Defence Witness WBNM of 17 June 2005, para. 9.

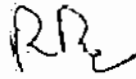
¹⁰ *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, (TC) Decision on the Defence Motion to Modify the List of Defence witnesses for Arsene Shalom Ntahobali, of 26 August 2005, para. 6; See also para. 8 of the Decision of 27 January 2006.

¹¹ The *Bagosora* Decision of 20 December 2004 at para. 5; *Brdanin* Decision; *Prosecutor v. Milosevic*, IT-02-54-T, (TC) Order on Prosecution Motion for the Testimony of Nojko Marinovic *visa* Video-Conference Link of 19 February 2003; *Prosecutor v. Krnojelac* (TC) Order for Testimony via Video-Conference Link of 15 January 2001.

Arusha, 15 February 2006



William H. Sekule
Presiding Judge



Arlette Ramarason
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

