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**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 02 March 2006

ICTR-97-21-T
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The PROSECUTOR

v.

Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

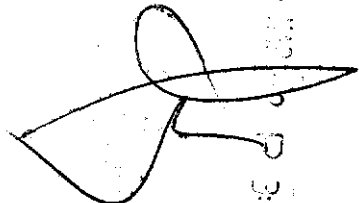
**DECISION ON ARSÈNE SHALOM NTAHOBALI'S EXTREMELY URGENT-
STRICTLY CONFIDENTIAL- UNDER SEAL- MOTION TO HAVE WITNESS NMBMP
TESTIFY VIA VIDEO-LINK**

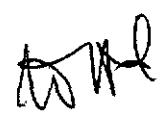
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

BEING SEISED of the "*Requête en extrême urgence de Arsène Ntahobali pour faire témoigner NMBMP par voie de vidéo conférence- strictement confidentiel et sous scellés (Art.73A), 71D) et 71A) du Règlement de procédure et de Preuve*", filed on 6 February 2006 (the "Motion");

CONSIDERING :

- i. The "Prosecutor's Response to the "*Requête en extrême urgence de Arsène Ntahobali pour faire témoigner NMBMP par voie de vidéo conférence- strictement confidentiel et sous scellés*""", filed on 8 February 2006 (the "Prosecutor's Response");
- ii. The "*Réplique à la réponse du Procureur intitulée « Prosecutor's Response to the "Requête en extrême urgence de Arsène Ntahobali pour faire témoigner NMBMP par voie de vidéo conférence strictement confidentiel et sous scellés »*", filed on 10 January 2006 (the "Defence Reply");

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

NOW DECIDES the Motion, pursuant to Rule 73 (A), on the basis of the written briefs filed by the Parties.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence moves the Chamber to allow Witness NMBMP to testify by means of a video-conference, pursuant to Rule 71 (D), from the United States, where she currently resides, specifically either from Boston or from the United Nations' Headquarters in New York City. Alternatively, the Defence submits that if this prayer fails, it seeks that a Presiding Officer be mandated to take Witness NMBMP's deposition, pursuant to Rule 71 (A).
2. The Defence submits that it is impossible for Witness NMBMP to travel outside the United States before 28 March 2006, when she is due to appear before an Immigration Judge.¹ On 31 January 2006, the Defence received an e-mail from Mr McHaffey,² Witness NMBMP's immigration Counsel in the United States, enumerating various reasons for the witness' inability to travel outside the United States before 28 March 2006.³
 - Witness NMBMP is currently on "removal proceedings"⁴ and may not therefore travel without the prior permission known as "advance parole" from the Immigration

¹ Paragraph 7 of the Motion. Annex G of the Motion.

² The said e-mail was attached to the Motion as Annex B.

³ Paragraph 13 of the Motion.

⁴ See Annex C of the Motion.



Service.⁵ An “advance parole” can only be obtained from the Office of International Affairs in Washington, D.C.

- Second, a person subject to a “removal proceeding” who leaves the country without an “advance parole” will not be allowed to return. Further, an “advance parole” can be revoked while the beneficiary is outside the country, and the Court has no jurisdiction to review the decision of revocation.⁶
 - Third, Witness NMBMP does not have a valid passport⁷ which makes it impossible for her to travel, even if she were granted an “advance parole”. Witness NMBMP is applying for political asylum in the United States, and any request for a passport from the Rwandan Embassy may negatively affect her application for asylum.
 - Fourth, Witness NMBMP is afraid of coming to Tanzania as she fears reprisals from the Rwandan government.
 - Finally, Mr. McHaffey indicates that Witness NMBMP is still willing to testify for the Accused even though it is impossible for her to leave the United States for the reasons cited above.⁸
3. The Defence submits that as an alibi witness, Witness NMBMP’s testimony is of great importance to Ntahobali’s case.⁹

The Prosecution

4. The Prosecution submits that the Defence has failed to demonstrate that it has sought the assistance of the Witness and Victims Support Section (WVSS) in its endeavours to have Witness NMBMP testify in Arusha. WVSS has the ability to contact and facilitate the travel and related matters pertaining to witnesses with the relevant authorities of a country where the witness is residing. Fear of arrest or persecution is not a ground for a witness’ refusal to appear in Arusha.
5. The Prosecution opposes the request for Witness NMBMP to testify under Rule 71 (A), given the importance being attributed to this witness by the Defence. If the witness is not able to come to Arusha, then she should testify via video-link, which would allow the Trial Chamber to assess her demeanour.

The Defence Reply

6. The Defence submits that WVSS has indicated that it cannot guarantee that the American authorities would allow Witness NMBMP to re-enter the country, if she leaves it.¹⁰ In addition, even assuming that WVSS would be able to assist Witness NMBMP in obtaining all the requisite travel documents, including the “advance parole”, it cannot

⁵ See Annex D of the Motion.

⁶ See Annex E of the Motion.

⁷ See Annex F of the Motion.

⁸ Paragraph 14 of the Motion.

⁹ Paragraphs 30 and 40 of the Motion.

¹⁰ Paragraph 6 of the Defence Reply.

guarantee that the "advance parole" will not be revoked while the witness is outside American territory.¹¹

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."¹² 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."¹³
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 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.¹⁴ The burden of proof for authorising a witness' testimony to be taken by way of video-conference lies with the Party making the request.¹⁵
9. With respect to the first criterion, after having reviewed Witness NMBMP's *will-say* statement,¹⁶ the Chamber finds that the Defence has demonstrated that Witness NMBMP's testimony is sufficiently important to the Accused's defence in that she is expected to challenge prosecution allegations that the Accused abducted and raped young girls at Hotel Ihuliro,¹⁷ and in that she is an alibi witness.

¹¹ Paragraph 7 of the Defence Reply.

¹² *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, 25 June 1996, para.19.

¹³ *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 Ngirumpatse 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.

¹⁴ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on prosecution Request for testimony of Witness BT via Video-Link, 8 October 2004, para.6.

¹⁵ *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.

¹⁶ See Annex A of the Motion.


¹⁷ Paragraph 36 of the Motion.


10. With respect to the second and third criteria, the Chamber observes that it is submitted that Witness NMBMP is unable and also unwilling to come to testify at the Tribunal.
11. As far as her alleged inability is concerned, the Chamber is of the view that it has not been demonstrated that the witness's alleged current immigration status or the requisite immigration procedure she may be pursuing render her unable to travel outside the United States. The Chamber therefore concludes that no good reason has been adduced to support Witness NMBMP's alleged inability to testify at the Tribunal.
12. With respect to Witness NMBMP's unwillingness, the Chamber has noted Annex B, a copy of an e-mail purportedly sent by Mr McHaffey Witness' immigration counsel. In the email, the Witness is alleged to be unwilling to travel to Arusha in order to give testimony because of alleged fears of some sections of the Rwandan government. According to the Tribunal jurisprudence, the applicable test is "real fear underscored by an objective basis", and that "subjective fear is insufficient."¹⁸ In the instant case, the Chamber notes that the Defence merely submits that the Witness fears to come to Tanzania, while her application for political asylum is pending. She is further alleged to fear reprisals from certain sections of the Rwandan Government without demonstrating the objective basis in support of her alleged fears. The Chamber recalls that the Witness is already subject of protective measures. The Chamber therefore finds that the Defence has failed to demonstrate that there is a real fear underscored by an objective basis preventing Witness NMBMP from testifying in Arusha and that her "unwillingness to attend" is not supported by any good reason.
13. In light of the above, the Defence request to have Witness NMBMP testify via video-link is therefore denied.
14. As for the alternative prayer under Rule 71 (A), the Chamber considers that given the alleged importance of the witness' testimony, it would be more appropriate to hear the witness in court. The Chamber therefore also denies the Defence request in that respect.
15. The Chamber urges the Defence to liaise with WVSS to have Witness NMBMP testify as soon as possible.


FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 02 March 2006


 William H. Sekule
 Presiding Judge


 Arlette Ramarason
 Judge ICTR • TPIR


 Solomy Balungi Bossa
 Judge



¹⁸ *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T, Decision on Nyiramasuhuko's Strictly Confidential - Ex-Parte-Under Seal- Motion for Additional protective Measures for Some Defence Witnesses. 1 March 2005, para. 26.