



UNITED NATIONS
NATIONS UNIES

ICTR-2001-73-T
27-3-2006
(4754-4750)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Inés Mónica Weinberg de Roca, presiding
Khalida Rachid Khan
Lee Gacuiga Muthoga

Registrar: Adama Dieng

Date: 27 March 2006

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

27-03-2006

**DECISION ON THE PROSECUTION MOTION FOR
WITNESS BPP TO TESTIFY BY VIDEO-LINK**

Office of the Prosecutor:

Wallace Kapaya
Gina Butler
Iskandar Ismail
Jane Mukangira

Defence Counsel:

John Philpot
Peter Zaduk

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan, and Lee Gacuga Muthoga;

BEING SEIZED of the Prosecutor's Urgent Video-Link and Other Reliefs Motion for Witness BPP, filed on 15 March 2006;

CONSIDERING the Interlocutory Defence Response and Interlocutory Defence Motion to Temporarily Suspend the Prosecution Motion, filed on 20 March 2006; the Prosecution Response to the Defence Interlocutory Motion, filed on the same date; the Amended Defence Response and Interlocutory Motion, filed on 21 March 2006; and the Prosecution Reply, filed on 22 March 2006;

RECALLING the Decision of the Chamber allowing the Prosecution to withdraw witnesses and to add Witness BPP to its witness list;¹

NOW DECIDES the Motion on the basis of the written briefs of the parties pursuant to Rule 73(A).

INTRODUCTION

1. The trial of Protais Zigiranyirazo began on 3 October 2005. In the two sessions of the Prosecution case,² the Chamber heard 19 Prosecution witnesses, including one expert witness. The next and final session for the Prosecution case is scheduled for 5 June 2006.³ On 19 January 2006, the Chamber granted leave for the Prosecution to amend its witness list to add Witness BPP and to remove other witnesses. The Prosecution now requests the Chamber to authorize that the testimony of Witness BPP be taken via video-link from some locations in Belgium and to seek the cooperation of the Belgian authorities to compel Witness BPP to provide such testimony. Alternatively, the Prosecution requests the Chamber to admit into evidence the written statement of Witness BPP in lieu of her oral testimony pursuant to Rule 92*bis*.

2. In response, the Defence requests a stay of proceedings with regard to the Motion maintaining that the Prosecution failed to disclose confidential annexes which are required in order to be fully respond to the arguments. The Prosecution replies that the annexes were sent to the Defence by fax and attaches the proof of service. The Defence subsequently acknowledges receipt of the annexes but maintains that the Prosecution has not substantiated its assertion that the witness is not willing to testify in Arusha. The Defence therefore reiterates its counter-motion for a stay of proceedings until such time as the Prosecution provides further evidence.

3. Accordingly, the Chamber will first consider the Defence Counter-Motion and will then address the Prosecution Motion.

¹ Decision on the Prosecutor's Motion to Vary his Witness List (TC), 19 January 2006.

² The first session started on 3 October 2005 and ended on 20 October 2005. The second session lasted from 23 January to 7 March 2006.

³ T. 7 March 2006 (closed session), p. 14.

A. Counter-Motion for a Stay of Proceedings

4. The Defence requests that the Prosecution provide proof of Witness BPP's refusal to testify in Arusha. The Defence also requests disclosure of the *procès verbal* to which the Prosecution referred during the closed session on 7 March 2006. In its reply, the Prosecution states that the *procès verbal* is the *pro justitia* statement, dated 17 February 2006, which has been already disclosed to the Defence.

5. The Chamber recalls that counsel appearing in court are under ethical duties, giving rise to a presumption that counsel to perform and to represent matters truthfully. The Chamber also recalls that Witness BPP, in the Statement, dated 25 November 2005, indicated unwillingness to testify in Arusha. The Prosecution asserts that it has unsuccessfully attempted to secure Witness BPP's testimony in Arusha because of the witness' security concerns over the recent death of a Prosecution witness in Belgium. Under these circumstances, the Chamber will rely on the Prosecution's representation, unless evidence to the contrary is provided. The Counter-Motion therefore falls to be denied, and the Chamber will consider the two alternative forms of relief requested by the Prosecution.

B. Testimony by Video-link

6. The Prosecution submits that the testimony of the witness be heard via video-link, as an exceptional measure under Rule 75(A). According to the Prosecution, the expected evidence of Witness BPP is that, on 7 April 1994, early in the morning, she was in the Presidential residence in Kanombe, known as Kanombe State House, at the same time that the Accused was also present.

7. The Prosecution also asserts that the witness will testify by video-link from Belgium if she is ordered to do so by the Belgian authorities. The Prosecution accordingly submits that, pursuant to Article 28(2) of the Statute and Rule 58, read in conjunction with United Nations Security Council Resolution 955 (1994), and Belgian law, the Tribunal has the authority to request the Belgian government to assist the Tribunal in the taking of testimony and the production of evidence, by summoning the witness to appear for the video-link testimony.

8. The Defence has not responded to this argument because it claims not to have information regarding the witness' refusal to testify in Arusha.

9. According to established jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and of this Tribunal, protective measures for video-link testimony must be based on the importance of the witness's expected testimony, the inability or the unwillingness of the witness to testify at the courtroom site, and the equitable balance between the interests of justice and the lack of prejudice to the Accused. In *Tadic* Decision of 25 June 1996, the Trial Chamber recalled the general rule providing for a witness to appear in person, and stated that video-link testimony will be granted only under exceptional circumstances when certain criteria are met.⁴ In *Delalic et al.* Decision of 28 May 1997,

⁴ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996. "19. It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal. The Trial Chamber will, therefore, only allow video-link testimony if certain criteria are

another Trial Chamber has adopted the same reason adding the interest of justice and the absence of prejudice to the Accused.⁵ This jurisprudence has been followed in Decisions of the Tribunal in several cases.⁶

10. In the present case, testimony about the alleged presence of the Accused at Kanombe State House represents important evidence in the case, which is directly related to allegations pleaded in the Indictment. The unwillingness of the witness to testify in Arusha has also been reported by the Prosecution.

11. Considering the allegation that the Accused was present at the Kanombe State House and the Accused's possible alibi defence, it is in the interests of justice that the witness be heard in relation to these events. It is the Chamber's view that this testimony will not prejudice the rights of the Accused because he will have the opportunity to cross-examine the witness and to challenge the evidence.

met, namely that 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. [...]"

⁵ *Prosecutor v. Delalić et al.*, Decision to allow Witnesses K, L and M to give their testimony by means of video-link conference (TC), 28 May 1997. "15. It is important to re-emphasise the general rule requiring the physical presence of the witness. This is intended to ensure confrontation between the witness and the accused and to enable the Judges to observe the demeanour of the witness when giving evidence. It is, however, well known that video-conferences not only allow the Chambers to hear the testimony of a witness who is unable or unwilling to present their evidence before the Trial Chamber at The Hague, but also allows the Judges to observe the demeanour of the witness whilst giving evidence. Furthermore, and importantly, counsel for the accused can cross-examine the witness and the Judges can put questions to clarify evidence given during testimony. Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that testimony given by video-link conferencing is a violation of the right of the accused to confront the witness. Article 21(4)(e) is in no sense violated." "17. Testimony by video-link conference is an exception to the general rule. Accordingly, the Trial Chamber will protect against abuse of the grant of the expedient. The Trial Chamber (composed of Judge McDonald, Presiding, with Judges Stephen and Vohrah) has, in the *Tadic* Decision, stated that testimony by video-link will be allowed only if (a) the testimony of the witness is shown to be sufficiently important to make it unfair to proceed without it, and (b) the witness is unable or unwilling for good reasons to come to the International Tribunal at The Hague (at para. 19). The present Trial Chamber agrees with the findings of that decision and reiterates the position that, because of the particular circumstances of the International Tribunal, 'it is in the interest of justice for the Trial Chamber to be flexible and endeavour to provide the Parties with the opportunity to give evidence by video-link.' (*Tadic Decision*, at para. 18) The Trial Chamber considers it appropriate to add the additional condition, (c) that the accused will not thereby be prejudiced in the exercise of his right to confront the witness."

⁶ See: *The Prosecutor v. Ferdinand Nahimana et al.*, Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures (TC), 14 September 2001 (Para. 35. "It follows from case law, with which the Chamber agrees, that certain conditions must be fulfilled for the video solution to be utilized in the present case. 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." See also: *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-42?, 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; Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003; Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004; and Decision on Testimony by Video-Conference (TC), 20 December 2004; *The Prosecutor v. Aloys Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2004.

12. Consequently, the Chamber finds that the Motion for a video-link testimony should be granted. And, accordingly, the Chamber will request the cooperation of the Belgian authorities in securing the appearance of the witness and in providing any technical assistance for a video-link testimony from their country.

C. Admission of Statement of Witness BPP, Pursuant to Rule 92bis

13. The Prosecution, relying on the Appeals Chamber decision in the *Galić* case, submits that Witness BPP's written statement: (i) does not go to proving the acts and conduct of the Accused, as charged in the Indictment; (ii) is relevant under Rule 89(C), as it relates to crimes charged in the Indictment; and (iii) provides critical evidence in relation to the acts and conduct of others at a particular period which is relevant to establishing the state of mind of the Accused. The Prosecution states that the written statement also provides evidence against the anticipated alibi of the Accused in relation to the events at Kanombe State House. The Prosecution further submits that not only does a written statement save judicial time and resources, notably when the witness is not required to appear for cross-examination, but that it causes less disruption to the witness' life than oral testimony.

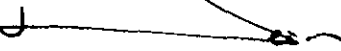
14. The Defence objects to the admission of the written statement of Witness BPP and claims that the testimony relates directly to the acts of the Accused.

15. Having found that the video-link request should be granted, the Chamber is of the view that there is no need to deliberate on the admission of the written statement.

FOR THE ABOVE REASONS, THE CHAMBER

- I. **DENIES** the Counter-Motion for stay of proceedings;
- II. **GRANTS** the Motion for Witness BPP to testify by video-link from Belgium;
- III. **REQUESTS** the cooperation of the Belgian authorities in the appearance of Witness BPP by video-link from Belgium;
- IV. **REQUESTS** the Registrar (i) to serve this Decision on the Belgian authorities, (ii) to cooperate with the Belgium authorities in its implementation of this Decision, taking into account the overall scheduling for the next and final session of the Prosecution case, and (iii) make the appropriate arrangements for the video-link testimony to be taken at a convenient time during the next trial session.

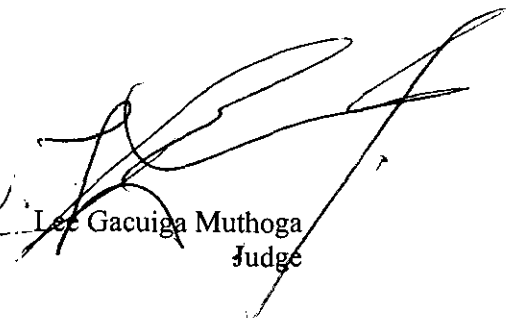
Arusha, 27 March 2006.



Inés Mónica Weinberg de Roca
Presiding Judge



Khalida Rachid Khan
Judge



Lee Gacuiga Muthoga
Judge

[Seal of the International Criminal Tribunal for Rwanda]

