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Number



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-97-29-0412

OR: ENG

TRIAL CHAMBER II

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

**Registrar:** Mr Adama Dieng

**Date:** 17 August 2006

JUDICIAL RECORDS ARCHIVES  
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The PROSECUTOR

v.

Sylvain NSABIMANA et. al.  
Case No. ICTR-97-29-T  
Joint Case No. ICTR-98-42-T

**DECISION ON SYLVAIN NSABIMANA'S EXTREMELY URGENT- STRICTLY  
CONFIDENTIAL- UNDER SEAL- MOTION TO HAVE WITNESS AGWA TESTIFY  
VIA VIDEO-LINK**

**Office of the Prosecutor**

Ms Silvana Arbia, Senior Trial Attorney  
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Mr Gregory Townsend, Trial Attorney  
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**Defence Counsel for Nsabimana**

Ms Josette Kadji, Lead Counsel

WMS

**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 Sylvain Nsabimana pour faire témoigner AGWA par vidéo conférence, Articles 54, 73 et 71 du Règlement de Preuve et de Procédure (Strictement confidentiel et sous scellés)*”, filed on 27 July 2006 (the “Motion”), annexed to which is a medical certificate of Witness AGWA of 18 July 2006 (the “Annex”);

**CONSIDERING :**

- i. The “Prosecutor’s Response to the “*Requête en extrême urgence de Sylvain Nsabimana pour faire témoigner AGWA par vidéo conférence strictement confidentiel et sous scellés (Art. 73 (A) et 71 (A))*”, filed on 31 July 2006 (the “Prosecutor’s Response”);
- ii. The “*Observations de Sylvain Nsabimana sur la réponse du Procureur à sa « Requête en extrême urgence de Sylvain Nsabimana pour faire témoigner AGWA par vidéo conférence », Articles 54, 73 et 71 du Règlement de Preuve et de Procédure (strictement confidentiel et sous scellés)*”, filed on 3 August 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) of the Rules;

**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 AGWA to testify from Belgium “or any other appropriate place” during the first week of September 2006 by means of a video-conference, pursuant to Rule 71 (D) of the Rules.<sup>1</sup> The Defence submits that this is necessary due to medical reasons which make it impossible for the witness to travel to Arusha.<sup>2</sup>
2. The Defence submits that pursuant to Rules 90 (A) and 71 of the Rules, while the principle is for witnesses to give oral testimony before the Chamber, a Chamber may, in exceptional circumstances and in the interests of justice, order a deposition by way of a video-conference.<sup>3</sup> The Defence relies on this Chamber’s jurisprudence according to which the granting of video conference depends on the assessment of (i) the importance of the testimony; (ii) the inability or unwillingness of the witness to attend; and (iii)

<sup>1</sup> The Motion, paras. 8, 23, 25.

<sup>2</sup> The Motion, para. 19; see also Annex.

<sup>3</sup> The Motion, paras. 9-11.

whether a good reason can be adduced for that inability or unwillingness.<sup>4</sup> According to the Defence, these conditions are fulfilled.

3. The Defence argues that the importance of Witness AGWA's expected testimony to Nsabimana's case has been noted by the Chamber, which held that it "contains relevant and probative evidence which the Chamber should hear in the interests of justice".<sup>5</sup> The Defence submits that the first criterion is therefore met.<sup>6</sup>
4. The Defence also states that Witness AGWA cannot travel to Arusha for medical reasons, as is borne out by the Annex. The Defence relies on the Tribunal's and the International Criminal Tribunal for the Former Yugoslavia's jurisprudence to submit that health problems have been held to be exceptional circumstances which justify testimony by video conference.<sup>7</sup>

### ***The Prosecution***

5. The Prosecution submits that it is entirely within the Chamber's discretion to grant a video conference in this matter.<sup>8</sup> However, it argues that the Defence has not shown the nature or seriousness of the witness' medical concerns and has thus failed to provide the Chamber with sufficient information on the basis of which to decide whether a video conference should be granted.<sup>9</sup> Further, the Prosecution submits that because of the importance attributed to the proposed testimony of Witness AGWA, it would be in the interests of justice that he be heard in Arusha. Finally, the Prosecution submits that the Defence has not shown any reason for the witness' unwillingness to come to Arusha, other than a generalized claim that he is unwell.<sup>10</sup>

### ***The Defence Reply***

6. The Defence submits that it is not authorised to indicate in detail the medical concerns of Witness AGWA because of medical confidentiality.<sup>11</sup> However, it submits that since the Witness has been advised not to travel during his treatment, this has been done for good reasons. Besides, it is not for the Prosecution or other Parties to the proceedings to assess the existence of valid medical reasons that might cause a witness' inability to travel, but for members of the medical profession alone.<sup>12</sup> The Defence indicates, however, that the

<sup>4</sup> The Motion, para. 14, quotes *Prosecutor v. Nyiramasuhuko et al.*, Decision on Arsène 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, 15 February 2006, para. 8.

<sup>5</sup> The Motion, paras. 15-16, quotes *Prosecutor v. Nyiramasuhuko et al.*, Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses, 14 July 2006, para. 8.

<sup>6</sup> The Motion, para. 18.

<sup>7</sup> The Motion, paras. 19-21, quotes *Prosecutor v. Bagosora et al.*, Decision on Testimony By Video Conference, 20 December 2004, para. 5; *Prosecutor v. Milosevic, Ordonnance relative a la requête de l'accusation aux fins d'entendre le témoignage de NOJKO Marinovic par voie de vidéo conférence*, 19 February 2003.

<sup>8</sup> Prosecutor's Reply, para. 7.

<sup>9</sup> Prosecutor's Reply, para. 2.

<sup>10</sup> Prosecutor's Reply, paras. 3, 5.

<sup>11</sup> Defence Reply, para. 4.

<sup>12</sup> Defence Reply, para. 6.

Prosecution is free to contact the medical doctor who signed the witness' medical certificate.<sup>13</sup>

7. As to the Prosecution's argument that it would be in the interests of justice to have Witness AGWA testify in Arusha, the Defence submits that a testimony via video conference does not infringe upon the Parties' rights and is not contrary to the interests of justice.<sup>14</sup> As the witness cannot come to Arusha to testify, the video conference is the only way to hear him.<sup>15</sup> Pursuant to Art. 19 (1) of the Statute, which safeguards the Accused's rights, this is what has to be done.<sup>16</sup>

#### HAVING DELIBERATED,

8. The Chamber underscores the general rule articulated in Rule 90 (A), that "witnesses shall, in principle, be heard directly by the Chamber."<sup>17</sup> 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.<sup>18</sup> The burden of proof for authorising a witness' testimony to be taken by way of video-conference lies with the Party making the request.<sup>19</sup>
9. With respect to the first criterion, after having carefully reviewed the information regarding Witness AGWA's expected testimony contained both in the Motion and in the will-say, the Chamber finds that the Defence has demonstrated that his testimony is sufficiently important to the Accused's defence. The Chamber particularly recalls that it granted the Defence's request to add Witness AGWA to its witness list because he was expected to testify "among others, on the pacification meeting convened by the Accused Nsabimana at Nyarutegia market".<sup>20</sup>
10. With respect to the second and third criteria, the Chamber has noted the medical certificate annexed to the Motion, indicating that Witness AGWA is formally advised

<sup>13</sup> Defence Reply, para. 8.

<sup>14</sup> Defence Reply, para. 10.

<sup>15</sup> Defence Reply, para. 13.

<sup>16</sup> Defence Reply, para. 14.

<sup>17</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-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, recalled in *Prosecutor v. Nyiramasuhuko et al.*, 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, 15 February 2006, para. 7.

<sup>18</sup> *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, recalled in *Prosecutor v. Nyiramasuhuko et al.*, 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, 15 February 2006, para. 8.

<sup>19</sup> *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; *Prosecutor v. Nyiramasuhuko et al.*, 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, 15 February 2006, para. 8.

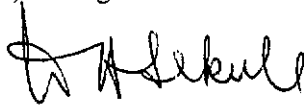
<sup>20</sup> *Prosecutor v. Nyiramasuhuko et al.*, Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses, 14 July 2006, para. 8.

against travelling because of the treatment he is receiving, but not specifying the nature or gravity of his illness. While grave health problems have repeatedly been held to constitute a sufficient reason for video conferences, the Chamber notes that such health issues were clearly set out.<sup>21</sup> In the instant case, however, the Chamber considers that the Defence has not provided sufficient information regarding the witness' state of health, given that testimony via video-conference may only be granted in exceptional circumstances. Therefore, the second and third criterion for allowing the witness to testify via video-link have not been met and thus, the Defence prayer is denied.

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DENIES** the Motion in all respects.

Arusha, 17 August 2006



William H. Sekule  
Presiding Judge



Arlette Ramarason  
Judge



Solomy Balungi Bossa  
Judge

[Seat of the Tribunal]

<sup>21</sup> *Prosecutor v. Bagosora et al.*, Decision on Testimony By Video-Conference, 20 December 2004, para. 5, quoting *Prosecutor v. Brdanin*, Order for Testimony via Video-Conference Link Pursuant to Rule 71bis, 9 September 2003; *Prosecutor v. Milosevic*, Order on Prosecution Motion for the Testimony of Nojko Marinovic via Video-Conference Link, 19 February 2003; *Prosecutor v. Kirojelac*, Order for Testimony via Video-Conference Link, 15 January 2001.