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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

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

Registrar: Mr Adama Dieng

Date: 16 November 2006

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THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

DECISION ON THE PROSECUTION JOINT MOTION FOR RE-OPENING ITS
CASE AND FOR RECONSIDERATION OF THE 31 JANUARY 2006 DECISION ON
THE HEARING OF WITNESS MICHEL BAGARAGAZA VIA VIDEO-LINK

Rules 54, 73, 73 Bis(E), and 85 of the Rules of Procedure and Evidence

For the Office of the Prosecutor:
Mr Wallace Kapaya
Ms Charity Kagwi-Ndungu
Mr Sylver Ntukamazina
Ms Gina Butler
Mr Iskandar Ismail
Ms Janc Mukangira

Defence Counsel:
Mr John Philpot
Mr Peter Zaduk

[Signature]

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the "Prosecutor's Joint Motion for Re-opening of the Prosecution Case (made under Rules 54, 73 and 85 of the Rules of Procedure and Evidence and Appeals Chamber Decision dated 30 October 2006) and Requests for Reconsideration of the Trial Chamber Decision dated 31 January 2006 on the Hearing of Witness Michel Bagaragaza via Video Conference (made pursuant to Rule 73 bis(E) of the Rules of Procedure and Evidence)", filed on 6 November 2006 ("Motions", or "Motion for the Re-opening of the Prosecution Case" and "Motion for Reconsideration of the Decision of 31 January 2006", respectively);

CONSIDERING the Defence "Response to Prosecutor's Joint Motion for Re-opening of the Prosecution Case (made under Rules 54, 73 and 85 of the Rules of Procedure and Evidence and Appeals Chamber Decision dated 30 October 2006) and Requests for Reconsideration of the Trial Chamber Decision dated 31 January 2006 on the Hearing of Witness Michel Bagaragaza via Video Conference (made pursuant to Rule 73 bis(E) of the Rules of Procedure and Evidence) and Motion to Continue Trial", filed on 7 November 2006 (the "Response");

RECALLING the events leading to the present applications and the Chamber's previous Decisions in respect of Mr. Bagaragaza:

1. Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006 ("Decision of 31 January 2006");
2. Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE, 5 June 2006 ("Decision of 5 June 2006");
3. Oral Decision on Protais Zigaranyirazo's Application for Certification to Appeal the Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE ("Oral Decision on Application for Certification to Appeal");¹

CONSIDERING the Decision on Interlocutory Appeal of the Appeals Chamber, 30 October 2006 ("Appeals Chamber Decision");

CONSIDERING Article 20(4)(d) of the Statute of the Tribunal (the "Statute") and Rules 54, 73, 73 bis(E) and 85 of the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter based solely on the briefs of the Parties pursuant to Rule 73(A) of the Rules.

BACKGROUND

1. On 30 October 2006 the Appeals Chamber excluded the testimony of Mr. Bagaragaza in its entirety. The Appeals Chamber held that the Statute affords the Accused with the minimum guarantee of the right to be tried in his presence; fulfillment of this right required the "physical presence" of the Accused in proceedings against him.² In so stating, the Appeals Chamber held that the Chamber had erred in hearing Mr.

¹ T. 13 June 2006 pp. 53-54.

² See generally Appeals Chamber Decision.

Bagaragaza's testimony in the Netherlands with the Accused and his lead counsel participating from Arusha via video-link. His "attendance" via video-link was insufficient to constitute the presence guaranteed by the Statute. In excluding the testimony of Mr. Bagaragaza, the Appeals Chamber affirmed that the Trial Chamber remains free to have the witness recalled to testify "in a manner consistent with the Appellant's fair trial rights."³

2. The Prosecution closed its case on 28 June 2006 and the Defence commenced the presentation of its case on 30 October 2006. On 31 October 2006, in the course of hearing the second defence witness, the parties, having seen the ruling of the Appeals Chamber moved for an adjournment in order that they may have time to consider the import of the Appeals Chamber Decision on their respective cases and to consider the appropriate action in consequence of it.

SUBMISSIONS

The Prosecution Motions

3. The Prosecution submits that, in light of the importance of the testimony of Mr. Bagaragaza, serious prejudice will be caused if the Prosecution is not allowed to re-open its case to receive the testimony. The Prosecution therefore prays that the Chamber allow the re-opening of its case so that Mr. Bagaragaza can be called to testify.
4. Should the Chamber be inclined to grant the Motion for the Re-opening of the Prosecution Case the Prosecution moves, secondly, for the Chamber to reconsider its Decision of 31 January 2006 and allow the Mr. Bagaragaza to be heard via video-link.
5. The Prosecution contends that the criteria for reconsideration are met in the instant situation.⁴ The Prosecution argues that the Appeals Chamber's finding of error on the part of the Chamber, and the resultant exclusion of Mr. Bagaragaza's testimony, meet the "high criteria set for the Trial Chamber to reconsider their decision."
6. The Prosecution urges the Chamber to reconsider its reservations on hearing Mr. Bagaragaza via video-link, and raises many of the arguments in favour of video-link that it raised in its original motion. Specifically, the Prosecution argues that (i) Mr. Bagaragaza is important to the Prosecution case and severe prejudice will result if the Chamber does not re-hear his testimony; (ii) his security concerns remain unchanged, and (iii) the Accused will suffer no prejudice as a result of hearing

³ The Chamber notes that the present application by the Prosecutor stems from the Appeals Chamber's holding that the exclusion of witness Michel Bagaragaza's testimony pursuant to Rule 95 "does not prevent the Trial Chamber from exercising its discretion and allowing [the witness] to testify again in a manner consistent with the Appellant's fair trial rights." Appeals Chamber Decision, para. 24. In its footnote to this statement, the Appeal Chamber notes that the Defence acknowledged "that the Prosecution could seek to re-open its case in the interests of justice pursuant to Rule 85 or alternatively that the Trial Chamber could call the witness *proprio motu* under Rule 98." Appeals Chamber Decision, para. 24, fn 65.

⁴ Motions, para. 17. According to the Prosecution, a Trial Chamber may reconsider its own prior decision (i) when a fact has been discovered that was not previously known to the Chamber; (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision; or, (iii) where a party shows an error of law or the Chamber abused its discretion, and an injustice has been occasioned.

Mr. Bagaragaza's testimony via video-link. The Prosecution also argues that whereas the use of video-link testimony was previously considered to be less weighty than in-court testimony, technological developments have improved the quality of video-link testimony, allowing judges to assess credibility without impairment. Moreover, video-link testimony is a permissible exception under Rule 75, and it has been utilized and considered adequate in the jurisprudence of both the *ad hoc* Tribunals, even for important and sensitive witnesses.⁵

7. Finally, the Prosecution adds that the "security and legal impediments and concerns of the witness and his counsel are currently being reviewed" and it undertakes to inform the Chamber of any new developments which may entail a change in the modalities surrounding Mr. Bagaragaza's anticipated testimony in this case.

The Defence Response

8. The Defence opposes the reopening of the Prosecution's case and the request for the taking of the testimony of Mr. Bagaragaza by video-link. The Defence argues that the relevant test to determine if a case should be re-opened depends upon the availability of the material sought to be introduced. If the material, through due diligence, could have been obtained, then the case should not be re-opened. If the evidence could not have been obtained through due diligence, then the Chamber must consider: (i) the stage of the trial at the time the application is made; (ii) the delay likely to be caused by re-opening the case; (iii) the probative value of the evidence must be such that it outweighs prejudice to the Accused; and (iv) the effect of re-opening on any co-accused.⁶
9. According to the Defence, the requirements for the Chamber to reconsider a decision have not been met.⁷
10. The Defence submits that the Prosecution has not met the four-part test for authorizing video-link testimony. Although the Defence agrees that the testimony of Mr. Bagaragaza is sufficiently important, it does not agree that taking the evidence by video-link is in the interests of justice; that Mr. Bagaragaza has given sufficient justification for his inability to come to the Tribunal; or that the rights of the Accused will not be prejudiced.
11. The Defence argues that the rights of the Accused will be severely prejudiced by the re-opening of the Prosecution case and the taking of Mr. Bagaragaza's testimony by video-link. The Defence has already (i) presented the testimony of two witnesses, one of whom commented on Mr. Bagaragaza's original evidence; and (ii) filed its pre-trial brief, witness list, and numerous witness statements. Allowing the Prosecution to lead a key witness after the Defence has revealed so much of its case is unfair and prejudicial to the Accused. Moreover, the Prosecution Motions should be denied due to the potentially lengthy delay it may cause in the case.⁸

⁵ Motions, paras. 22, 26.

⁶ Response, paras. 6-9.

⁷ Response, para. 17.

⁸ Response, paras. 40-43.

DELIBERATIONS

Motion for the Re-opening of the Prosecution Case

12. The Chamber notes that neither the Statute nor the Rules of this Tribunal or of the International Criminal Tribunal for the former Yugoslavia ("ICTY") provide for the re-opening of a case by either party. Rule 85, which governs the order of presentation of evidence in trial proceedings does not envisage the re-opening of a case by either party to the proceedings and is therefore silent as to a relevant procedure.⁹
13. While an application for the re-opening of the Prosecution's case has never been brought before a Trial Chamber at this Tribunal, under the jurisprudence of the ICTY a Trial Chamber may grant leave to the Prosecution to re-open its case "in order to present new evidence not previously available to it".¹⁰ This view has recently been adopted by a Trial Chamber of the Special Court for Sierra Leone (SCSL).¹¹
14. In their submissions, the Defence and the Prosecution implicitly accept that in a proper case a Trial Chamber would have jurisdiction to permit a party to re-open its case in the interests of justice.
15. The jurisprudence of both the ICTY and the SCSL require the Prosecution to meet a high threshold should it seek to present new evidence after its case is closed. In the Milošević case, the Trial Chamber held that:

Trial Chambers retain a general discretion under Rule 89(D) to deny re-opening if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial. With respect to this weighing exercise, the Tribunal's jurisprudence clearly establishes that "it is only in exceptional circumstances where the justice of the case so demands" that a Trial Chamber should exercise its discretion to allow the

⁹ Rule 85 on the Presentation of Evidence reads as follows:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution;
- (ii) Evidence for the defence;
- (iii) Prosecution evidence in rebuttal;
- (iv) Defence evidence in rejoinder;
- (v) Evidence ordered by the Trial Chamber pursuant to Rule 98.
- (vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

(C) The accused may, if he so desires, appear as a witness in his own defence.

¹⁰ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, para. 26 ("Celebici Trial Decision"); see also *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 279 ("Celebici Appeal Judgement"); *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 bis in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose, 13 September 2004, para. 7 ("Blagojević and Jokić Trial Decision").

¹¹ *Prosecutor v. Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006, at para. 17.

Prosecution to adduce ‘fresh’ evidence after the parties to a criminal trial have closed their case. [Footnotes Omitted]¹²

16. Guided by the *Celebici* Trial Decision and *Celebici* Appeal Judgement, three factors have been identified as being “highly relevant to the fairness to the accused of admission of fresh evidence”:¹³
 - (1) the stage of the trial at which the evidence is sought to be adduced;
 - (2) the potential delay in the trial that admission of the evidence could cause, including the appropriateness of a possible adjournment in the overall context of the trial; and
 - (3) the effect of bringing new evidence against one accused in a multi-defendant case.
17. The Chamber notes that in this case, only the first two factors apply. With regard to the first factor, the tendency has been that “the later in the trial that the application is made the less likely the Trial Chamber is to accede to the request”.¹⁴
18. Having reviewed the relevant jurisprudence, the Chamber finds the instant situation distinguishable on the facts. Whereas the jurisprudence refers to “new evidence not previously available” to the calling party, the Chamber is here confronted with a situation of evidence previously available, but excluded to avoid any “damage [to the] integrity of the proceedings”.¹⁵ Protecting the integrity of the proceedings means ensuring fairness in the conduct of the case as far as *both* Parties are concerned. While the Chamber must be diligent in ensuring that the Accused is not deprived of his rights, the Prosecution must also not be unduly hampered in the presentation of its case.
19. The Chamber acknowledges that the discretion to re-open a case is to be exercised only in the interest of justice. Re-opening must never be used as an opportunity for one party to take an unfair advantage over its opponent. Where re-opening is permitted, a Trial Chamber should conduct the proceedings in a manner that ensures that the opposing party is not unfairly prejudiced. In the instant case the Chamber notes that the Defence has already served its Pre-Defence Brief, and a number of defence witness statements and that two witnesses have already testified; thus providing the Prosecution with information it ought not to have before it closes its case. The Chamber will be mindful of this during the taking of the evidence of Mr. Bagaragaza, and in its assessment of his testimony at the conclusion of the case. Given the putative importance of Mr. Bagaragaza’s evidence to the Prosecution’s case, the circumstances in which his testimony was excluded and the Chamber’s ability to ensure that the Accused is not unduly prejudiced, the Chamber finds that

¹² *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 12.

¹³ See *Celebici* Trial Decision, para. 27; *Celebici* Appeal Judgement, para. 290; *Blagojević and Jokić* Trial Decision, paras. 10–11.

¹⁴ See *Celebici* Trial Decision, para. 27; quoted in *Celebici* Appeal Judgement, para. 280; *Blagojević and Jokić* Trial Decision, para. 10; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Decision on the Prosecution’s Application to Re-Open Its Case, 1 June 2005, para. 45.

¹⁵ Appeals Chamber Decision, at para. 24.

this application is in the interests of justice and therefore grants the Motion for the Re-opening of the Prosecution Case.

Motion for Reconsideration of the Decision of 31 January 2006

20. Having granted the Prosecution's application to re-open its case, the Chamber must now consider the Prosecution's request that the Chamber *reconsider* its Decision of 31 January 2006, which denied the Prosecution's original motion to hear Mr. Bagaragaza's testimony by video-link.
21. According to the jurisprudence of the Tribunal, a Chamber can reconsider its own Decision (i) when a new fact has been discovered that was not previously known to the Chamber; (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision; or (iii) where a party has successfully shown an error of law or that the Chamber has abused its discretion, and this led to an injustice.¹⁶
22. In its Decision of 31 January 2006, the Chamber stated that it wished to hear Mr. Bagaragaza "uninterrupted and in person." The Chamber expressed concern as to its ability to effectively and accurately assess the testimony and demeanour of a witness via video-link.
23. The Prosecution suggests that the Appeals Chamber Decision is either a new fact or a new circumstance authorizing reconsideration. The Chamber disagrees. Even if the Appeals Chamber Decision excluding Mr. Bagaragaza's testimony could be considered a new fact or circumstance for the purpose of reconsideration, nothing in the Prosecution's submissions has persuaded the Chamber to re-examine its position. Moreover, the Appeals Chamber Decision does not question the Chamber's exercise of discretion denying the original motion to hear Mr. Bagaragaza via video-link. To the contrary, the following excerpts from the Appeals Chamber Decision acknowledge the legitimacy of the Chamber's concerns:
 17. The Appeals Chamber agrees that the objectives advanced by the Trial Chamber are of general importance: witness protection, the proper assessment of an important prosecution witness, and the need to ensure a reasonably expeditious trial...
 19. Secondly, the Appeals Chamber also accepts that the Trial Chamber's general concern over its ability to assess the credibility of a key witness is an important interest.¹⁷
24. Mindful of the general preference that witnesses testify before the Tribunal in Arusha,¹⁸ the Trial Chamber requested the Registrar to submit on whether additional

¹⁶ See, e.g., Decision on the Prosecutor's Motion for Reconsideration of the Oral Decision Excluding Evidence on the Meeting of 22 November 1992, or for Certification to Appeal the Same, 31 January 2006, para. 5; *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8; *Prosecutor v. Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8.

¹⁷ Appeals Chamber Decision, paras. 17, 19.

¹⁸ See, e.g., *Prosecutor v. Nahimana et al.*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 36.

security measures might allow Mr. Bagaragaza to testify in Arusha.¹⁹ Having reviewed the security threat to Mr. Bagaragaza, the Registrar has submitted that it will be possible to provide a sufficiently high level of security to ensure his safety in Arusha.²⁰ Based on the Registrar's Confidential and *Ex Parte* Submissions, the Chamber is satisfied that Mr. Bagaragaza's presence in Arusha could be adequately secured so that it is feasible to bring him to Arusha to testify.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
GRANTS the Prosecution Motion for the Re-opening of the Prosecution case for the re-call of Mr. Bagaragaza;
DENIES the Motion for Reconsideration of the Decision of 31 January 2006 for Mr. Bagaragaza to be heard by video-link and **DIRECTS** that the witness be heard in Arusha;
ORDERS the transfer of Mr. Bagaragaza from the Detention Centre in The Hague to the Detention Facility in Arusha for hearings at the Tribunal the week beginning 27 November 2006;
REQUESTS the Governments of The Netherlands and of the United-Republic of Tanzania, to cooperate with the Prosecutor and the Registrar and the Witnesses and Victims Support Section of the Tribunal, to take the necessary measures to implement the present decision.
ADJOURNS the proceedings until 27 November 2006.

Arusha, 16 November 2006, done in English.

Inés Mónica Weinberg de Roca
Presiding Judge

Khalida Rachid Khan
Judge

Lee Gacuiga Muthoga
Judge

[Seal of the Tribunal]

¹⁹ Request for Submissions Pursuant to Rule 33(B), 9 November 2006.

²⁰ "The Registrar's [Confidential and *Ex Parte*] Submissions in Respect of Trial Chamber III's 'Request for Submissions Pursuant to Rule 33(B)"', filed 14 November 2006 ("Registrar's Confidential and *Ex Parte* Submissions").