



UNITED NATIONS
INTERNATIONAL

ICTR-01-70-T
01-03-2007
(2778-2775)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2778
D

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 1 March 2007

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-PT

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JUDICIAL RECORDS ARCHIVED
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**DECISION ON THE PROSECUTOR'S URGENT MOTION FOR WITNESSES BPA
AND BLR TO GIVE TESTIMONY VIA VIDEO-LINK**

Office of the Prosecutor:

Mr William T. Egbé
Mr Sulaiman Khan
Mrs Veronic Wright
Mr Patrick Gabaake
Mr Disengi Mugeyo
Ms Amina Ibrahim

Counsel for the Defence:

Ms Aïcha Condé
Ms Annie Olivier

INTRODUCTION

1. The trial in this case resumed on 12 February 2007 for the Prosecution to present the remainder of its case. On 14 February 2007, the Chamber denied a Prosecution Motion for video-link for Witnesses BPA, BLR and BLN for lack of supporting material.¹ On 22 February 2007, the Prosecution filed the present Motion requesting the Chamber to allow Witnesses BPA and BLR to testify via video-link.² In support of its Motion, the Prosecution annexed three "affidavits" and a medical certificate issued by the King Faisal Hospital in Kigali.

2. On 12 February 2007, the Defence filed a Response opposing the Prosecution request.³

SUBMISSIONS BY THE PARTIES

The Prosecution

3. The Prosecution submits that the testimonies of both witnesses are sufficiently unique and important to make it unfair to proceed without them, and that the evidence they will adduce cannot be established by any other witness.

4. The Prosecution further submits that Witness BPA's medical condition is such that his movements are greatly restricted and that he is prevented from traveling too far from either King Faisal Hospital or his doctor for extended periods of time, thus making his testimony by way of video-link the only feasible option. The Prosecution argues that this amounts to "exceptional circumstances" pursuant to Rule 71(A) of the Rules of Procedure and Evidence and in accordance with relevant jurisprudence.

5. The Prosecution also submits that Witness BLR has previously testified in person before this Tribunal as a result of which he was subjected to victimization. Based on his past experience, Witness BLR has expressed fear that if he were to travel to Arusha to testify again, he could be subjected to further reprisal by supporters of the Accused. In the circumstances, the Prosecution submits that testimony via video-link from Kigali is the only viable means of receiving Witness BLR's evidence.

6. The Prosecution submits that the Defence would have the right to be present during the deposition and to cross-examine both witnesses which will therefore cause no prejudice to the Defence.

The Defence

7. The Defence opposes the Motion and contends that the reasons advanced by the Prosecution with respect to Witnesses BPA and BLR do not amount to exceptional circumstances so as to justify their testimonies being heard via video-link. The Defence also

¹ Decision on the Prosecutor's Urgent Motion for Witnesses BPA, BLR and BLN to Give Testimony via Video Link", 14 February 2007.

² "Prosecutor's Urgent Confidential Motion for Witnesses BPA, BLR to give testimony via Video Link from Kigali Rwanda (made under Rules 71, 73, 75, 90, 54 of the Rules of Evidence and Procedure[sic.])", 22 February 2007.

³ *The Prosecutor v. Emmanuel Rukundo*, "Conclusions en réplique à la requête urgente et confidentielle du Procureur aux fins les témoins BPA et BLR à déposer par voie de vidéoconférence à partir de Kigali.", 27 February 2007.



submits that neither of the proposed testimonies would be unique and that the factual content of both BPA and BLR's testimony has already been covered by previous witnesses.⁴

8. The Defence does not contest the ill health of Witness BPA, but submits that the Prosecution could replace Witness BPA by Witnesses CCC and CCO under Rule 66 of the Rules.

9. With regard to Witness BLR, the Defence submits that six other colleagues of the witness have already testified in this case and none of them experienced any reprisals from their respective colleagues or superiors. The Defence therefore maintains that Witness BLR's security concerns are subjective and without merit.

10. The Defence therefore contends that there is no justification for hearing either Witness BPA or BLR via video-link, and that if this Chamber still wishes to hear both testimonies, the Chamber should allow all parties to travel to Rwanda to hear the witnesses in person.

DELIBERATIONS

11. The Chamber recalls the general principle articulated in Rule 90(A), that "witnesses shall [...] be heard directly by the Chamber." Nonetheless, the Chamber has the discretion to grant the hearing of testimony by video-conference in lieu of physical appearance for purposes of witness protection under Rule 75, or where it is in the interests of justice. In determining the interests of justice, the Chamber has to assess: i) the importance of the testimony; ii) the inability or unwillingness of the witness to travel to Arusha; and iii) whether a good reason has been adduced for that inability and unwillingness.⁵ The burden of proof lies with the Party making the request.⁶

12. With regard to the first criterion, the Chamber finds that both witnesses' testimonies are important as they cover events which are directly relevant to counts in the Indictment and could therefore be probative of those counts; consequently, it would serve the interests of justice for each of them to be heard.

13. With regard to the second and third criteria mentioned above, the Chamber is satisfied that the medical condition of Witness BPA, as evidenced in the medical certificate attached to the Motion, prohibits him from traveling to Arusha to testify in person before the Chamber.

14. With regard to Witness BLR, the Chamber notes the Defence argument that other colleagues of Witness BLR have testified before this Tribunal and have not experienced any reprisals. Nevertheless, it is the Chamber's view that Witness BLR's subjective fears cannot be disregarded purely by comparison to the experiences of other witnesses. Having reviewed

⁴ *The Prosecutor v. Emmanuel Rukundo*, "Conclusions en réplique à la requête urgent et confidentielle du Procureur aux fins les témoins BPA et BLR à déposer par voie de videoconference à partir de Kigali", 27 February 2007, p. 3, 4, 5.

⁵ *The Prosecutor v. Emmanuel Rukundo*, Decision on the Prosecutor's Urgent Motion for Witnesses BPA, BLR and BLN to Give Testimony via Video Link", 14 February 2007; *Prosecutor v. Bagosara et al.* ICTR-98-41-T, Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference, 29 August 2006, Para. 3; Decision on Prosecution Request for Testimony of Witness BJ via Video-Link, 8 October 2004, para.6; *Prosecutor v. Nyiramasuhuko et al.*, 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, 17 August 2006, para. 8; 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; *Prosecutor v. Aloys Simba*, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, Case No. ICTR-01-76-T, 4 February 2005, para. 4.

⁶ *Ibid.*



the contents of the investigator's affidavit, the Chamber is satisfied that there are objective bases for Witness BLR's security concerns. This constitutes a good reason for allowing the Witness to testify via video-link.

15. The Chamber has considered the Defence prayer that if it is disposed to grant the motion, the Chamber should allow *all* Parties to travel to Kigali to hear the witnesses testify in person. The Chamber is not convinced that such a course of action is necessary in order to safeguard the right of the Accused to confront witnesses against him, or for the preparation of cross-examination. In the Chamber's view the right of the Accused to a fair trial will be adequately preserved by allowing each of the Parties to send a representative to the venue of the video-link proceedings to look after their respective interests. However, all the examinations of the witness will be conducted from the courtroom in Arusha.

16. Finally, the Chamber must state in the strongest terms its dissatisfaction with the Prosecution's pleading and filing of documents. On at least two previous occasions the Chamber has denied Prosecution motions for lack of appropriate supporting material. Furthermore, the Prosecution initially filed signed statements of the witnesses in support of this motion, without any jurat to show that they were properly sworn affidavits. A few days later the Prosecution sought to remedy this deficiency by filing affidavits sworn before an officer of the Tribunal. This manner of proceeding leaves a lot to be desired. In addition, the Chamber is astonished at the glaring inconsistency in the Prosecution's submission that Witness BPA is unable to travel to Arusha due to health reasons, yet in the investigator's affidavit, it is stated that the same witness is unwilling to travel to Arusha because of concerns for his security. In the absence of the medical report annexed to the Motion, this inconsistency would have been a sufficient reason to deny the Prosecution Motion. The Chamber cannot overstate the need for the Prosecution to be more diligent in its method of pleading and filing documents.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion;

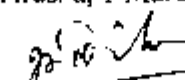
ORDERS that the testimony of Witnesses BPA and BLR shall be heard by way of secure video-link from the premises of the Tribunal in Kigali on Wednesday 7 and Thursday 8 March 2007;

ORDERS that the Parties shall make available to the Registry all exhibits they intend to use during the testimony of Witnesses BPA and BLR not later than close of business on Monday 5 March 2007;


DENIES the Defence request to transfer *all* Parties to Rwanda for the purpose of the video-link testimony; instead, each Party shall be entitled to send *one* representative to Kigali to look after its interests during the course of the video-link proceedings;

FURTHER DIRECTS the Registry to co-operate with the Parties in the implementation of this Decision.

Arusha, 1 March 2007.


Afok De Silva
Presiding Judge


Taghi Hikmet
Judge



Seon Ki Park
Judge



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input checked="" type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
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From:	<input checked="" type="checkbox"/> Chamber Bruno Zehnder (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. E. Rukundo			Case Number: ICTR-2001-70-PT
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TRIM Document Type:	<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities			

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

☒ Filing Party hereby submits only the original, and will **not** submit any translated version.

☐ Reference material is provided in annex to facilitate translation.

Target Language(s):

☐ English ☐ French ☐ Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party hereby submits **BOTH** the original and the translated version for filing, as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

☐ Filing Party will be submitting the translated version(s) in due course in the following language(s):

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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: