

ICTR-00-55B-T  
7-4-2009  
(1498 - 1493)  
TRIAL CHAMBER III

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**Before Judges:** Arlette Ramarosan, presiding  
Taghrid Hikmet  
Joseph Masanche

**Registrar:** Adama Dieng

**Date:** 7 April 2009

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**THE PROSECUTOR**

v.

**ILDEPHONSE HATEGEKIMANA**

**Case No. ICTR-00-55B-T**

**DECISION ON PROSECUTION'S CONFIDENTIAL MOTION FOR LEAVE TO VARY THE WITNESS LIST, FOR PROTECTIVE MEASURES FOR WITNESS BRW AND FOR THE TESTIMONY OF WITNESS BRW VIA CLOSED-VIDEO LINK**

*Rules 54, 71, 73 75 and 90 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

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Guilain Disengi Mugeyo  
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**Defence Counsel:**

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## INTRODUCTION

1. The trial in this case commenced on 16 March 2006. On the same day, the Prosecution filed a confidential motion in which it requested leave to vary the witness list by adding Witness BRW and deleting Witnesses RA and QCM.<sup>1</sup>
2. In the 16 March Motion, The Prosecution further requested that proposed Witness BRW be granted protective measures and be allowed to testify via closed-video link<sup>2</sup>
3. On 24 March 2009, the Defence filed a Motion requesting translations of several Prosecution Motions, including the afore-mentioned, and for extension of the deadlines to respond to these Motions.
4. On 2 April 2009, the Chamber denied the Defence Motion for translation of all the specified Prosecution Motions, but in the interests of justice, extended the deadline to respond to the Prosecution Motions until 10.00 a. m. on 6 April 2009.
5. The Defence has not filed a response to the above-mentioned Prosecution Motion of 16 March 2009.

## DISCUSSION

### *Prosecution's Request to Vary its Witness List*

6. Rule 73bis (E) of the Rules of Procedure and Evidence ("Rules") states that "[a]fter [the] commencement of [the] Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called." Pursuant to established jurisprudence, this Rule provides that the Prosecution's list of witnesses may be varied, if considered by the Chamber to be in the interests of justice.<sup>3</sup>
7. In exercising its discretion under Rule 73bis (E), the Trial Chamber should balance the Prosecution's duty to present available evidence to prove its case and the right of an accused to have adequate time and facilities to prepare a defence and to be tried without undue delay.
8. The Trial Chamber may grant a Motion, pursuant to Rule 73bis (E), where it considers that the interests of justice would be served and where good cause for

<sup>1</sup> Prosecutor's Motion for Leave to Vary the Witness List and to Have Prosecution Witness BRW Testify by Closed-Video Link Pursuant to Rules 54, 73, 73 BIS (E) and 71 (D), 75, 90, of the Rules of Procedure and Evidence ("Rules"), filed confidentially on 16 March 2009 ("Motion"), paras. 1, 32. An Annex was filed on 1 April 2009.

<sup>2</sup> Motion, paras. 1, 32 (The Prosecution requested that Witness BRW be granted the same protective measures as those granted to other Prosecution witnesses in the Decision on Prosecution Extremely Urgent Motion for Protective Measures issued on 16 January 2009.).

<sup>3</sup> *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses (TC), 20 April 1999, paras. 4, 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis(E) (TC), 26 June 2003, para. 13.

amending the witness list has been shown. In so doing, the Chamber should consider factors such as the materiality of the testimony and the complexity of the case. The Chamber should also consider any prejudice to the Defence, including elements of surprise, on-going investigations, the stage of the trial proceedings, as well as replacement witnesses and corroboration of evidence.<sup>4</sup>

9. The Trial Chamber notes that the proposed testimony of Witness BRW concerns events alleged in the Indictment, and is expected to include “direct evidence pertaining to the activities of the [A]ccused.”<sup>5</sup> The testimony of Witness BRW is proposed to replace the evidence of Witness RA, who is deceased, and Witness QCM, who is no longer willing to testify.<sup>6</sup> In light of the above, the Trial Chamber concludes that the proposed testimony of Witness BRW is *prima facie* relevant and of probative value to the Prosecution’s case.<sup>7</sup>

10. The Prosecution has submitted that Witness BRW was not included on the short list of 24 witnesses filed on 12 January 2009 because the witness had relocated to another country and because “the Prosecution had not been able to confirm the witness’s availability or the witness’ statement.”<sup>8</sup> Witness BRW was contacted by the Prosecution on 21 February 2009. After an initial refusal, the witness has now shown willingness to testify.<sup>9</sup>

11. The Prosecution has asserted that the statement of Witness BRW was disclosed to the Defence in sufficient time prior to the date of this Motion, and in accordance with the Prosecution’s obligations under Rule 66.<sup>10</sup> Furthermore, the Prosecution has requested that Witness BRW be scheduled as the last witness to testify in its case.<sup>11</sup>

12. The Trial Chamber is of the view that the material importance of the testimony of Witness BRW to the Prosecution case, the difficulties in locating the witness, and the refusal of Witness QCM to testify, taken together, establish that the Prosecution has shown good cause to amend its list of witnesses.

13. Considering the current stage of the proceedings, the date of initial disclosure of the substance of Witness BRW’s testimony to the Defence and the proposal that Witness BRW be the final Prosecution witness to testify, the Trial Chamber concludes that the

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<sup>4</sup> *The Prosecutor v. Nsengimana*, ICTR-2001-69-T, Decision on Prosecution Motion for Varying the Witness List, 4 February 2008, paras. 3-4; *The Prosecutor v. Nindiliyimana*, Case No. ICTR-2000-56-T, Decision on Prosecution Motion to Vary its List of Witnesses, 11 February 2005, paras. 20-23; *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, ICTR-98-42-T, Decision on Prosecutor’s Motion for Leave to Add a Handwriting Expert to His Witness List, 14 October 2004, paras. 11-18; *Prosecutor v. Nahimana*, ICTR-99-52, Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 19-20.

<sup>5</sup> Motion, paras. 14, 16-17.

<sup>6</sup> *Id.*, paras. 1, 18.

<sup>7</sup> *Id.*, paras. 4, 14, 16-22.

<sup>8</sup> *Id.*, para. 1.

<sup>9</sup> *Id.*, para. 1.

<sup>10</sup> *Id.*, paras. 3, 15.

<sup>11</sup> *Id.*, para. 31.

addition of Witness BRW to the list of witnesses to be called by the Prosecution will not prejudice the rights of the Accused.

14. Furthermore, the Trial Chamber holds that the replacement of Witness BRW for Witnesses RA and QCM will reduce the overall number of witnesses to be called by the Prosecution and will not result in any delay in the trial proceedings.

*Prosecution's Request for Protective Measures for Witness BRW*

15. Rule 75 (A) provides that a Judge or a Chamber may order measures to safeguard the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

16. Measures for the protection of witnesses are granted on a case-by-case basis. In the exercise of its discretion to grant protective measures, the Chamber has a duty to strike a fair and proper balance between the rights of the accused to a fair and public trial and the protection of the witness for whom the protective measures are sought. To ensure a proper balance between these two interests, the jurisprudence of this Tribunal requires that witnesses for whom protective measures are sought have a real fear for their safety or that of their families, and that there is an objective justification for this fear. Subjective fears of potential witnesses are not *per se* sufficient.<sup>12</sup>

17. According to the Prosecution, Witness BRW "has recently overcome her reluctance to testify for reasons of security and ... obligations, by agreeing to do so under special protective measures and only through video link."<sup>13</sup>

18. Having reviewed the confidential submissions of the Prosecution, and mindful of the rights of the Accused, the Chamber notes that no supporting material has been presented to objectively justify Witness BRW's fear that disclosure of her participation in the proceedings before this Tribunal could be a security threat. However, in the interest of judicial economy and in view of the fact that the Prosecution's case is projected to close in mid April 2009, the Chamber considers that caution is prudent in regard to the witness' safety. Therefore, the Chamber grants the requested protective measures to Witness BRW at this stage in the proceedings, should the witness decide to travel to Arusha to testify. The Chamber reserves its right to modify the protective measures, in light of information received from the witness about security concerns, if and when the witness comes to the Tribunal.

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<sup>12</sup> *Prosecutor v. Hategekimana*, Case No. ICTR-00-55-I, Decision on Prosecution Extremely Urgent Motion for Protective Measures (TC), 16 January 2009, paras. 3-4; *Prosecutor v. Kalimanzira*, Case No. ICTR-2005-88-I, Decision on Prosecution Motion for Protective Measures (TC), 8 November 2007, para. 3; *Prosecutor v. Setako*, Case No. ICTR-04-81-I, Decision on Prosecution Motion for Protective Measures (TC), 18 September 2007, para. 4; *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-PT, Decision on Motions for Protective Measures for Prosecution Witnesses (TC), 26 July 2006, paras. 4-5.

<sup>13</sup> Motion, paras. 1, 14, 25-26.

*Prosecution's Request for Video Link Testimony for Witness BRW*

19. Rule 90(A) provides that that “[w]itnesses shall [...] be heard directly by the Chambers.” Nonetheless, the Chambers have discretion to hear testimonies via video-link in lieu of physical appearance of witnesses for purposes of witness protection pursuant to Rule 75, or where it is in the interests of justice to do so. The jurisprudence of this Tribunal has identified criteria to guide the Chambers’ in determining whether hearing the testimony of witnesses via video link is in the interests of justice. Such criteria include an assessment of (a) the importance of the evidence; (b) the inability or unwillingness of the witness to travel to Arusha; and (c) whether a good reason has been adduced for that inability and unwillingness.<sup>14</sup> The party making the request bears the burden of proof to demonstrate that the conditions set out above have been met.<sup>15</sup>

20. The Trial Chamber notes that, according to the Prosecution, Witness BRW refuses to travel to the seat of the Tribunal because of present obligations and security concerns.<sup>16</sup>

21. The Chamber observes that the Prosecution has presented no objective basis, such as an affidavit or other legal document, to justify the representation of Witness BRW’s unwillingness or unavailability to come to the Tribunal to testify in the present case. Without such justification, the Chamber concludes that the testimony of the witness should be heard directly before the court and in the presence of the accused.

22. Accordingly, in light of all relevant considerations, the Trial Chamber finds that it is not in the interests of justice for Witness BRW to testify via video-link.

<sup>14</sup> *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on the Prosecutor’s Urgent Motion for Witnesses BPA, BLR and BLN to give Testimony Via Video Link (TC), 14 February 2007; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Request for Witness Romeo Dallaire to Give Testimony by Video-Link (TC), 15 September 2006, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference (TC), 29 August 2006, para. 3; *Prosecutor v. Nsabimana 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 (TC), 17 August 2006, para. 8.

<sup>15</sup> *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on the Prosecutor’s Urgent Motion for Witnesses BPA, BLR and BLN to give Testimony Via VideoLink (TC), 14 February 2007; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-00-56-T, Decision on the Prosecution Request for Witness Romeo Dallaire to Give Testimony by Video-Link (TC), 15 September 2006, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference (TC), 29 August 2006, para. 3; *Prosecutor v. Nsabimana 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 (TC), 17 August 2006, para. 8.

<sup>16</sup> Motion, para. 24.

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**FOR THE ABOVE REASONS, THE CHAMBER**

- I. **GRANTS** the Prosecution's request to add Witness BRW to its list of witnesses, and to delete Witness RA and Witness QCM from its list of witnesses;
- II. **DENIES** the Prosecution's request for Witness BRW to testify via video-link;
- III. **GRANTS** the Prosecution's request to afford protective measures to Witness BRW, in the event that the witness comes to Arusha to testify.

7 April 2009



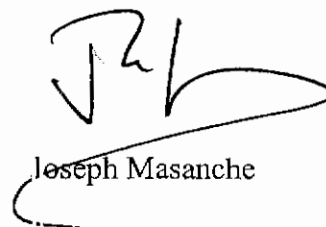
Arlette Ramaroson

Presiding Judge



Taghrid Hikmet

Judge



Joseph Masanche

Judge

