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NATIONS UNIES

ICTR-01-68-T
25-02-2011
(2711-2704)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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XQ

OR: ENG

TRIAL CHAMBER III

Before Judges: Florence Rita Arrey, Presiding
Bakhtiyar Tuzmukhamedov
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 25 February 2011

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THE PROSECUTOR

v.

GREGOIRE NDAHIMANA

Case No. ICTR-2001-68-T

**DECISION ON DEFENCE MOTION TO HEAR THE TESTIMONY OF WITNESSES
BX7 AND FB1 VIA VIDEO LINK**

(Pursuant to Rule 54 and 71 bis of the Rules of Procedure and Evidence)

Office of the Prosecutor:

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Lansana Dumbuya, Case Manager

Counsel for the Defence

Bharat B. Chadha, Lead Counsel
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Marie-Pier Barbeau, Legal Assistant

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INTRODUCTION

1. On 27 January 2011, the Defence filed a motion, pursuant to Rules 54 and 90 of the Rules of Procedure and Evidence (“rules”), requesting that the Trial Chamber hear the testimony of witnesses BX7 and FB1 via video-link.¹ On 27 January 2011, The Trial Chamber ordered the Defence to present legible copies of the documents attached to the Motion and a medical certificate for Witness BX 7 by 9 February 2011.²
2. On 7 February 2011, the defence filed additional documents indicating that Witness BX7 is in a poor state of health (“supplementary information”).³
3. On 10 February 2011 the Prosecution filed a Response (“Response”).⁴
4. On 14 February 2011, the Defence filed a reply to the Prosecutor’s response (“Reply”) ⁵ in which it submitted that the Prosecutor’s response should not to be considered due to late filing and added that the Prosecutor failed to show good cause for the delay. ⁶

SUBMISSIONS

Defence Witness BX7

5. The Defence submits that witness BX7 is a critical alibi witness who will testify about Ndahimana’s activities on 15 April 1994.⁷ Witness BX7 is elderly, sickly, and has been advised by his Doctor not to travel to Arusha because he is suffering from a chronic backache

¹ *Prosecutor v Ndahimana*, ICTR 2001-68-T, Ndahimana’s extremely urgent confidential request for the testimony of witnesses BX7 and FB1 be heard via video-link, pursuant to Rules 54 and 71 of the Rules of Procedure and Evidence, 27 January 2011.

² T. 27 January 2011, pp. 66-67, T. 28 January 2011. p. 1.

³ *Prosecutor v Ndahimana*, ICTR 2001-68-T, Request to admit additional documents as evidence of witnesses BX7’s poor state of health, 7 February 2011.

⁴ *Prosecutor v Ndahimana*, ICTR 2001-68-T, Prosecutor’s response to Ndahimana’s extremely urgent confidential request for the testimony of witnesses BX7 and FB1 be heard via video-link, pursuant to Rules 54 and 71 of the Rules of Procedure and Evidence, 10 February 2011.

⁵ *Prosecutor v Ndahimana*, ICTR 2001-68-T, Gregoire Ndahimana’s reply to Prosecutor’s response to Ndahimana’s extremely urgent confidential request for the testimony of witnesses BX7 and FB1 be heard via video-link, pursuant to Rules 54 and 71 of the Rules of Procedure and Evidence, 14 February 2011.

⁶ Reply paras. 3-4.

⁷ Motion paras. 16, 17.

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- and will undergo an operation in March 2011.⁸ The Defence provides medical reports to demonstrate Witness BX7's poor state of health, and adds that a doctor's certificate will be submitted as soon as the Defence is able to obtain it from the witness.⁹
6. The Defence suggests that the video-link testimony should take place in Brussels, where the witness is obtaining medical assistance, and not in Yaoundé, as indicated in its motion of 27 January 2011. Witness BX7's doctor has advised him not to travel until the operation has been performed.¹⁰
7. The Prosecution submits that the Defence has "merely asserted" that the witness cannot travel to Arusha based on his doctor's advice, and notes that it is unable to interpret the X-rays of the witness provided by the Defence.¹¹ The information provided by the Defence cannot be substituted for a proper medical certificate.¹²
8. The Defence argues that it has disclosed the medical records regarding Witness BX7 available to it, and undertakes to disclose the medical certificate as soon as it is available to the Defence.¹³

Defence Witness FB1

9. According to the Defence, Witness FB1 is also an alibi witness. He will provide testimony regarding events at the Nyange church on 15, 16 and 17 April, which is crucial to the Defence of Ndahimana.¹⁴ Witness FB1 is a priest, works on a very tight schedule, and is unwilling to travel to Arusha because he fears for his safety and the safety of those relatives still living in Rwanda.¹⁵

⁸ Motion para 18.

⁹ Supplementary information paras 3-5.

¹⁰ Supplementary information para 6.

¹¹ Response para 10.

¹² Response para 11.

¹³ Reply para. 7.

¹⁴ Motion, paras. 22,-24.

¹⁵ Motion para 25-26.

10. Attached to its Motion, the Defence has appended a letter in which Witness FB1 states: 1) “...the duties I carry out in two parishes do not allow me to travel at any time”; and 2) “travelling to Arusha poses a danger for my personal safety and that of my family...”¹⁶
11. The Defence further submits that there is precedent for hearing evidence by video-link when a witness expresses fear for his/her security and/or that of his/her family.¹⁷
12. The Prosecution argues that the Defence has not demonstrated that the witness has provided sufficient information regarding his circumstances to warrant that he testifies via video-link.¹⁸ Further, that the Defence has not made the case that the safeguards established by the Trial Chamber in its decision granting protective measures to Defence witnesses are insufficient to protect Witness FB1 before, during or after his testimony.¹⁹
13. The Prosecution further states that the witness no longer lives in Rwanda and has provided no information confirming that the witness’s family still in Rwanda has been in danger following his departure from Rwanda or that they would be in danger if he testified in Arusha.²⁰
14. The Prosecution notes that Witness FB1 has testified twice before the Tribunal, and that he has provided no evidence that he or his family were targeted as a result.²¹
15. In its Reply, the Defence argues that the Prosecution’s submission lacks merit because the prevailing situation in Rwanda makes the Witness FB1’s concerns more valid than ever.²²

¹⁶ Motion, Annex 2 as translated by the Language Services of the ICTR.

¹⁷ Motion para 33.

¹⁸ Response para 12.

¹⁹ Response para 13.

²⁰ Response para 14.

²¹ Response para 15.

²² Reply paras. 5-6.

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DELIBERATIONS

Applicable Law

16. Rule 90(A) provides 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. The party making the request bears the burden of proof to demonstrate that the conditions set out above have been met.²³ Hearing testimony via video-link is an exceptional measure, granted only upon sound and legitimate justification based on proper documentation.²⁴

Preliminary Matter-Timing of Prosecution Response

17. The Trial Chamber recalls that it instructed the Defence to provide a legible copy of Witness FB1’s letter, and a medical certificate for Witness BX7, in order to enable the Prosecution to respond to the Defence Motion.²⁵ The Defence provided a legible copy of Witness FB1’s letter on 28 January 2011, and filed additional documents relating to Witness BX7’s health on 7 February 2011. The Prosecution filed its response on 10 February 2011. In light of these circumstances, the Chambers concludes that the Prosecution filed its response within the appropriate time limits.

²³ *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.

²⁴ *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Bizimungu’s Request for witness DE 4-12 to testify via Video-link (TC), 2 November 2007.

²⁵ T. 27 January 2011. p 67, T. 28 January 2011. p 1.

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Defence Witness BX7

18. The Chamber notes that the Defence was ordered to provide a medical certificate for Witness BX7 by 9 February 2011. On 7 February 2011, the Defence provided specialized medical materials including copies of X-rays to demonstrate that Witness BX7 is sick and unable to travel. The Defence further stated that it will provide a medical certificate as soon as the Defence is able to obtain it from the witness. The Defence attached a letter from the witness stating that his doctor would be unavailable to provide a medical certificate before 10 February (2011).²⁶ To date, the Trial Chamber has yet to receive a medical certificate.

19. While grave health problems have repeatedly been held to constitute a sufficient reason to hear a witness' testimony via video-link²⁷ the Chamber is unable to interpret the medical information provided by the Defence. Thus, the Trial Chamber is unable to grant the Defence request in the absence of a medical certificate.

Defence Witness FB1

20. In its Pre-Trial Brief, the Defence gave notice that Witness FB1 will challenge Prosecution allegations concerning 15 and 16 April 1994. In addition, he is expected to be both an alibi and a character witness for the Accused.²⁸ Thus, the Chamber considers that the Defence has demonstrated that Witness FB1's testimony is of significance to the Defence of the Accused.

21. Witness FB1 asks that he be allowed to testify via video-link because of his present obligations and security concerns.²⁹ Trial Chambers at this Tribunal have held that the applicable test in determining whether to allow video-link testimony on the basis of a witness' fears for his/her security is "real fear [which must be] underscored by an objective

²⁶ Supplementary information para 3. Annex 1- Email dated 3 February 2011.

²⁷ *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. Krnojelac*, Order for Testimony via Video-Conference Link, 15 January 2001.

²⁸ *Prosecutor v Ndahimana*, ICTR 2001-68-T, Grégoire Ndahimana's Pre-Defence Brief, 7 December 2010, Annex 1, p. 33.

²⁹ Motion, para. 25-26.

basis” rather than “subjective fear [which] is insufficient.”³⁰ In his letter, the witness complains that the protective measures in place at the Tribunal are inadequate. He claims that he was widely criticised following prior appearances before the Tribunal in two cases, although he was accorded protective measures in both cases. In addition, he contends that he has been the target of a politically-motivated persecution in Rwanda, and fears similar retribution if he testifies in person at the ICTR again.

22. While the Trial Chamber concedes that the witness protection system at the Tribunal is not infallible, it observes that the witness has not indicated that he was a victim of actual intimidation following his prior appearances before the Tribunal. Nor has he indicated that family members still living in Rwanda were the target of acts of retribution. The witness only refers in the vaguest terms to having been “rebuked” for having testified. With respect to the witness’ fears of a politically motivated persecution in Rwanda, the Trial Chamber notes that the witness will not be appearing in Rwanda and will not transit through Rwanda on his way to and from Tanzania. Thus, while the Trial Chamber might have accorded some degree of legitimacy to the fears expressed by the witness had he been scheduled to testify in Rwanda, it cannot do so in the context of a case being held in Tanzania. Furthermore, the witness has not suggested that those members of his family living in Rwanda will be safer if he testifies in his current country of residence rather than in Tanzania. The witness also argues that his work schedule is an impediment to travel to Arusha, but again he has provided no documentation substantiating this claim. The Chamber therefore concludes that the Defence has failed to demonstrate that there is an objective basis for the witness’ inability or unwillingness to testify in Arusha.

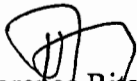
³⁰ *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T, Decision on Nyiramasuhuko’s Strictly Confidential -Ex-Parte- Under Seal- Motion for Additional protective Measures for Some Defence Witnesses. 1 March 2005, para. 26.
Prosecutor v. Bagosora et al., Decision on Video-conference Testimony of Kabiligi Witnesses YUL-39 and LAX-23 and to Hear Testimony in Closed Session (TC), 19 October 2006, para. 5.

FOR THE ABOVE REASONS, THE CHAMBER

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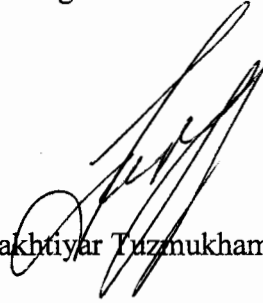
DENIES the Defence Motion in its entirety.

Arusha, 25 February 2011, done in English.



Florence Rita Arrey

Presiding Judge



Bakhtiyar Tuznukhamedov

Judge



Aydin Sefa Akay

Judge

