



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(5922-5915)

5922
AM

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 9 March 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS ARCHIVE
2011 MAR 29 14:11:15

2011 MAR 29 14:11:15

**DECISION ON DEFENCE URGENT MOTION TO HEAR TESTIMONY OF
EXPERT WITNESS DR. SUSAN THOMSON VIA VIDEO-LINK**
Rules 54 & 71 (D) of the Rules of Procedure and Evidence

Office of the Prosecution
Paul Ng'arua
Memory Maposa
Simba Mawere
Diana Karanja
Marie Ka

Defence Counsel for Callixte Nzabonimana
Vincent Courcelle-Labrousse
Philippe Larochelle

88

INTRODUCTION

1. On 24 February 2011, the Defence filed a Motion requesting that proposed expert witness, Dr. Susan Thomson, be permitted to testify via video-link from Hampshire College in the USA or from The Hague in the Netherlands.¹
2. On 28 February 2011, the Prosecution filed a response to the Defence Motion stating that it does not oppose the Defence request.²

SUBMISSIONS OF THE PARTIES

Defence Motion

3. According to the Defence, Dr. Thomson is unwilling to testify at the seat of the Tribunal in Arusha, Tanzania. The Defence submits that while she initially expressed willingness to testify in person before the Trial Chamber, she has now “categorically refused to set foot on Tanzanian soil or appear at the ICTR. Her reluctance to do so stems from threats she and her colleagues have received when it was learnt that she would be appearing before this Tribunal as a Defence witness.”³ The Defence further submits that the witness’ testimony “is of crucial importance to this trial.”⁴

Threats to the witness

4. The Defence has attached to its Motion a signed statement by Dr. Thomson in which she states that she has been harassed, intimidated and has received death threats since 2006. She believes the intimidation has escalated as a result of articles she has written critical of the Rwandan electoral process in 2010.⁵
5. Dr. Thomson cites a number of incidents of intimidation by the Rwandan authorities which took place in 2006 when she was conducting research in Rwanda. Specifically, the Rwandan authorities rescinded her research permit and required that she undergo a

¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D, Defence Urgent Motion for Video-Link Testimony of Expert Witness Dr. Susan Thomson, 24 February 2011 (“Motion”).

² *Prosecutor v. Nzabonimana*, ICTR-98-44D, Prosecutor’s Response to Defence Urgent Motion for Video-Link Testimony of Expert Witness Dr. Susan Thomson, 28 February 2011 (“Response”).

³ Motion, para. 12

⁴ Motion, para. 6.

⁵ Motion, Annex A, para. 11.

government-run re-education program as a condition for remaining in Rwanda, confiscated her passport, and put her under house arrest.⁶

6. The witness then focuses on incidents that took place after her departure from Rwanda. Following a presentation she made regarding post-genocide Rwanda in Canada in 2007, she was contacted by a certain Edwin Mukiza, "a known member of the RPF". He told her that if she did not stop spreading lies she would suffer the "worst fate possible." A man she believed to be Mukiza repeatedly phoned her residence although the number was unlisted, and sent three letters to her at Dalhousie University in Canada. According to Dr. Thomson, the "case was [then] turned over" to university campus security.⁷
7. In March 2009, a note was given to the Dr. Thomson's nine-year-old son by an "African looking man" at his school in Canada in which the writer complained about the witness' "bad attitude designed to divide Rwandans."⁸
8. In December 2010, at an event held in Rhode Island, USA, Dr. Thomson was approached by the Rwandan Ambassador to the United States, James Kimonyo. Showing her a picture of herself at a friend's home, he advised her that "we know where you are and what you are up to." After conducting an investigation, university campus security identified the individual who had taken the picture, and sent a note to the Rwandan Embassy in Washington asking it to cease and desist from such intimidation.⁹
9. On 28 December 2010, the witness received a phone call from an unidentified Rwandan who told the witness that he knew she would be in Arusha and that her security could not be guaranteed.¹⁰ More recently, research assistants working for the witness in Kenya were approached by "men who were not Kenyans" asking when the witness was scheduled to come to Kenya and about the dates of her testimony before the Tribunal. The witness assumes the men were Rwandan military agents working in Nairobi.¹¹

⁶ Motion, Annex A, paras. 6-8.

⁷ Motion, Annex A, para. 12.

⁸ Motion, Annex A, para. 13.

⁹ Motion, Annex A, para. 14.

¹⁰ Motion, Annex A, para. 15.

¹¹ Motion, Annex A, para. 16.

10. Dr. Thomson concludes that “I have expressed these concerns to the UN, who has [sic] been unresponsive to my concerns, and for this reason I am unwilling to travel to Arusha”.¹² While indicating that “I am still willing to testify before this court”, she stresses that “in light of the threats detailed above....I am only willing to testify from secure video-link from my College in the United States or from the ICTY in The Hague”¹³

The significance of the witness to the Defence case

11. The Defence argues that Dr. Thomson is a key witness. She will establish that the Accused has been unfairly victimised, and prosecuted based partly on the Defendant’s Hutu ethnicity and membership in the 1994 interim government.¹⁴ Dr. Thomson will illustrate that the current Rwandan government, while ostensibly pursuing a “unification policy”, is actually marginalising Hutus from the “socio-political scenery” of Rwanda by manipulating the 1994 genocide and the history of the country.¹⁵ She will also demonstrate that the Rwandan government manipulates witnesses and encourages witnesses to fabricate evidence and give false testimony, meaning that prosecution witnesses are neither credible nor reliable.¹⁶

Prosecution Response

12. The Prosecution does not oppose the Motion, but reserves its right to object to Dr. Thomson’s qualification as an expert once it has received her report pursuant to Rule 94 bis.¹⁷

DELIBERATIONS

Applicable Law

13. Rule 90 (A) of the Rules of Procedure and Evidence (“Rules”) stipulates that “[w]itnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.”

¹² Motion, Annex A, para. 17.

¹³ Motion, Annex A, paras. 17 and 20.

¹⁴ Motion paras. 6-7.

¹⁵ Motion, para. 8.

¹⁶ Motion, para. 9.

¹⁷ Response, Paras. 2-3.

14. Rule 71 states:

- (A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial [...]
- (D) The deposition may also be given by means of a video-conference [...]

15. Rule 54 further states that

[a]t the request of either party or *proprio motu*, a judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrant and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

16. The combined effect of these Rules is that Trial Chambers have the discretion to hear testimonies via video-link in lieu of physical appearance 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.¹⁸ Hearing testimony via video-link is an exceptional measure, granted only upon sound and legitimate justification based on proper documentation.¹⁹

Analysis

17. At the outset, the Trial Chamber accepts the Defence submission that the witness' testimony is important to its case. Thus, the discussion will focus on the reasons for the witness' unwillingness to testify in person.

18. The Trial Chamber considers the security of witnesses to be of paramount importance to the sanctity of trial proceedings. At the same time, it is mindful of Rules 71, 90 (A), and the jurisprudence of the tribunal, which have established that hearing witnesses via

¹⁸ *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.

¹⁹ *Prosecutor v. Nindiliyimana 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.

video-link is an exceptional measure. The Chamber would be reluctant, unless convinced by solid proof, to set a precedent which could fundamentally alter the manner in which testimony is heard at the Tribunal.

19. The Trial Chamber notes that despite the fact that many of the allegations presently advanced by Dr. Thomson date back several years, the Defence has never requested that protective measures be accorded to her and has now opted to address issues related to her security in the instant Motion. The Chamber further observes that although the Defence initially filed Dr. Thompson's report confidentially it has now opted to file it publicly. In addition, the Trial Chamber observes that the Defence did not file the instant motion until less than a month before the witness' scheduled date of appearance, although the witness alleges that she has been subject to threats and intimidation since 2006, and she has long appeared on the Defence list of witnesses.
20. The witness alleges that following a talk she gave on post-genocide Rwanda in 2007, she was threatened on a number of occasions in Canada by a man she believes was affiliated with the RPF ("first incident"). In 2009, she was again threatened in Canada in a manner suggesting that the threat was connected to her work on Rwanda, by an unnamed person via her 9 year old son ("second incident"). In December 2010, in the United States, the witness was threatened by the Rwandan Ambassador to the United States ("third incident"). Later that month, she received an anonymous phone call referring to her prospective testimony in a threatening manner. It is not clear where the witness was when she received this phone call ("fourth incident"). Finally, non-Kenyan individuals approached members of the witness' staff in Kenya asking questions about the witness' intended dates of testimony before the Tribunal ("fifth incident").
21. The Trial Chamber considers each of the allegations advanced by Dr. Thomson in her statement to be extremely serious. Nonetheless, it has a number of concerns. First, the Chamber notes that all of incidents reported took place outside of Tanzania, and many occurred in North America. Recalling that the Defence has not requested any protective measures for Dr. Thomson, her video-link testimony would be given in open session, and consequently available to the public. Thus, it is not entirely clear, given Dr. Thomson's assertions that she has been repeatedly harassed by Rwandan operatives throughout North America, why she believes she would be safer testifying from the United States or the Netherlands than in Arusha.

22. Second, the witness furnished no documentation whatsoever supporting her allegations, and yet her statement refers to: 1) three letters sent by one Edwin Mukiza in the course of the first incident, and subsequent involvement by Campus Security at Dalhousie University; 2) a threatening letter given to her son while attending school in the second incident; 3) threats made by an ambassador that resulted in correspondence between Campus Security at the witness' university and the Rwandan Embassy to the United States in the third incident; and 4) vaguely-defined communications with "the UN" regarding her security concerns.
23. By her own account, the witness is well-educated and has traveled widely. In addition, as a former human rights officer, she is certainly familiar with the various law enforcement departments of the countries in which she was threatened, yet, she makes no mention of having contacted local or national law enforcement agencies.
24. In addition, while the witness related the five incidents noted above, as well as incidents against her while working in Rwanda, with a degree of specificity, with respect to her contact with the United Nations she only stated that "I have made these concerns to the UN who [sic] has been unresponsive to my concerns." In the absence of further detail about her communication with "the UN", an institution for which the witness worked for two years, the Trial Chamber is not satisfied that she did adequately raise her fears with the organisation.
25. In conclusion and based on the submissions before it, the Trial Chamber is not satisfied that the witness' circumstances are exceptional and warrant hearing her testimony via video-link. Neither is it convinced that the concerns of Dr. Susan Thomson are well-founded and documented, or that alleged threats to her security have been properly referred to competent law-enforcement authorities.


5915

**FOR THESE REASONS, THE TRIAL CHAMBER
DENIES the Defence Motion.**

Arusha, 9 March 2011, done in English.

SABoss

Solomy Balungi Bossa
Presiding Judge



Bakhtiyar Tozmuhammadov
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

