



UNITED NATIONS  
NATIONS UNIES

**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Lee Gacuiga Muthoga, *Presiding*  
Seon Ki Park  
Robert Fremr

**Registrar:** Adama Dieng

**Date:** 6 June 2011

**THE PROSECUTOR**

**v.**

**Ildéphonse NIZEYIMANA**

***CASE NO. ICTR-00-55C-T***

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**DECISION ON EXTREMELY URGENT MOTION FOR RECONSIDERATION OF  
THE TRIAL CHAMBER 18 APRIL 2011 DECISION ON DEFENCE MOTION FOR  
A HEARING BY VIDEO-LINK OF WITNESS BEJ01 AND COOPERATION  
PURSUANT TO ARTICLE 28 OF THE STATUTE**

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## INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on Friday, 25 February 2011, after having called 38 witnesses. The Defence case commenced on 9 May 2011.

2. On 30 March 2011, the Defence team of the Accused, Ildéphonse Nizeyimana (“the Defence” and “the Accused” respectively) filed a motion requesting that the Trial Chamber permit Witness BEJ01, presently residing in Belgium under state supervision due to a criminal conviction, to give evidence via video-link from the Hague (“Defence Motion for Video-Link”).<sup>1</sup>

3. On 4 April 2011, the Office of the Prosecutor (“Prosecution”) filed a response to the Defence Motion for Video-Link, opposing the Defence request.<sup>2</sup> The Prosecution submitted, *inter alia*, that the Defence did not provide sufficient justification to allow Witness BEJ01 to testify via video-link, and instead should testify in person at the Tribunal.<sup>3</sup>

4. On 18 April 2011, the Chamber handed down its ‘Decision on Defence Motion for a Hearing by Video-link for Witness BEJ01’ (“Impugned Decision”), denying the Defence Motion on the basis that (1) the Defence did not show that the Belgian authorities are unwilling or unable to transfer Witness BEJ01 to Arusha; (2) restrictions on the Witness’s movement due to his sentence do not preclude the Defence from requesting the Witness’s transfer to Arusha; and (3) the Tribunal’s jurisprudence favours live testimony by witnesses.<sup>4</sup>

5. On 26 April 2011, the Defence filed the ‘Motion to Reconsider the Decision on Defense Motion for a Hearing by Video-Link for Witness BEJ01’ (“First Motion for Reconsideration”), urging the Chamber to reconsider the Impugned Decision, because the Defence failed to include in Witness BEJ01’s affidavit, attached to the First Defence Motion, the Witness’s unwillingness to travel to Africa out of fear for his own safety.<sup>5</sup> The Defence further submitted that the denial

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<sup>1</sup> Defence Motion for a Hearing by Video-Link for Witness BEJ01, 30 March 2011.

<sup>2</sup> Prosecutor’s Response to Defence Motion for a Hearing by Video-Link for Witness BEJ01 (“Prosecution Response to Defence Motion for Video-Link”), 4 April 2011.

<sup>3</sup> Prosecution Response to Defence Motion for Video-Link, paras. 34-38.

<sup>4</sup> Impugned Decision, paras. 8-9.

<sup>5</sup> First Motion for Reconsideration, paras. 17-18, 26-27, 29.

of the video-link request, and the subsequent refusal by Witness BEJ01 to testify in person, causes prejudice to the Accused.<sup>6</sup>

6. On 29 April 2011, the Prosecution filed its response to the Defence Motion for Reconsideration.<sup>7</sup> The Prosecution submitted that Witness BEJ01's fear of traveling to Africa does not constitute a "new critical fact" and was implied in the First Defence Motion.<sup>8</sup>

7. On 6 May 2011, the Chamber issued its Decision on the Defence Motion for Reconsideration.<sup>9</sup> The Chamber denied the Defence Motion for Reconsideration, on the basis that the Witness's fear of testifying in Arusha, did not constitute a new fact that would justify a reconsideration of the prior decision.<sup>10</sup>

8. On 18 May 2011, the Defence filed a motion requesting judicial cooperation from the Kingdom of Belgium.<sup>11</sup> The Defence requested that the Trial Chamber ask the Kingdom of Belgium to cooperate with the Tribunal in the event the Witness is "eventually heard by video-link or transferred under Rule 90bis, under subpoena or not".<sup>12</sup> The Defence requested the Chamber to rule on the motion when the response from the Belgian authorities has been filed before it.<sup>13</sup>

9. On 19 May 2011, the Prosecution responded to the Defence Motion for Cooperation.<sup>14</sup> While the Prosecution did not take a position with respect to the potential request for a subpoena, it opposed the request for video-link on the basis that this issue has been the subject of two prior

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<sup>6</sup> Defence Motion for Reconsideration, paras. 17, 29, p. 9.

<sup>7</sup> Prosecutor's Response to Defence Motion to Reconsider the Decision on Defence Motion for a Hearing by Video-Link for Witness BEJ01 ("Response to First Motion for Reconsideration"), 29 April 2011.

<sup>8</sup> Response to First Motion for Reconsideration, para. 7.

<sup>9</sup> Decision on Defence Motion to Reconsider the Decision on Defence Motion for a Hearing by Video-Link for Witness BEJ01 ("Decision on First Motion for Reconsideration"), 6 May 2011.

<sup>10</sup> Decision on Motion for Reconsideration, para. 8.

<sup>11</sup> Nizeyimana Defence Extremely Urgent Motion for Judicial Cooperation from the Kingdom of Belgium and Video-Link or Alternatively Subpoena ("Third Defence Motion"), 18 May 2011.

<sup>12</sup> Third Defence Motion, para. 7.

<sup>13</sup> Third Defence Motion, para. 27.

<sup>14</sup> Prosecutor's Response to Defence Extremely Urgent Motion for Judicial Cooperation from the Kingdom of Belgium and Video-Link or Alternatively Subpoena ("Prosecution Response to Third Defence Motion"), 19 May 2011.

decisions.<sup>15</sup> The Prosecution submitted that the Chamber should “not consider the Motion insofar as it concerns the application for Witness BEJ01 to testify via video-link”.<sup>16</sup>

10. On 31 May 2011, the Defence filed its reply, reiterating its original arguments supporting the Defence Motion for Video-Link.<sup>17</sup>

11. On 1 June 2011, the Defence filed a second motion for reconsideration of the Impugned Decision.<sup>18</sup> The Defence submits that communications received from the Belgian government, preventing Witness Higaniro from traveling to Arusha for purposes of his testimony, constitutes a “new fact” warranting reconsideration of the Impugned Decision.<sup>19</sup> The Defence further notes that it wishes to “withdraw” the Third Defence Motion.<sup>20</sup>

12. On 2 June 2011, the Chamber dismissed the Third Defence Motion as moot.<sup>21</sup>

13. On 3 June 2011, the Prosecution filed its response.<sup>22</sup> The Prosecution submits, *inter alia*, that the conditions for a reconsideration of the First Decision have not been met,<sup>23</sup> and the excessive filing of motions on matters already ruled upon constitutes an abuse of the process.<sup>24</sup>

14. The Defence did not file a reply.

## DELIBERATIONS

15. The Chamber notes at the outset that the question regarding Witness Higaniro’s testimony via video-link has been the subject of no less than four motions,<sup>25</sup> and two decisions.<sup>26</sup>

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<sup>15</sup> Prosecution Response to Third Defence Motion, para. 12.

<sup>16</sup> Prosecution Response to Third Defence Motion, para. 14.

<sup>17</sup> Defence Reply Prosecutor’s Response to Defence Extremely Urgent Motion for Judicial Cooperation from the Kingdom of Belgium and Video-Link or Alternatively Subpoena, 31 May 2011.

<sup>18</sup> Extremely Urgent Motion for Reconsideration of the Trial Chamber 18 April 2011 Decision on Defence Motion for a Hearing by Video-Link of Witness BEJ01 and Cooperation Pursuant to Article 28 of the Statute (“Second Motion for Reconsideration”), 1 June 2011.

<sup>19</sup> Second Motion for Reconsideration, para. 11.

<sup>20</sup> Second Motion for Reconsideration, para. 4.

<sup>21</sup> T. 3 June 2011.

<sup>22</sup> Prosecution Response to Extremely Urgent Motion for Reconsideration of the Trial Chamber 18 April 2011 Decision on Defence Motion for a Hearing by Video-Link of Witness BEJ01 and Cooperation Pursuant to Article 28 of the Statute (“Prosecution Response”), 3 June 2011.

<sup>23</sup> Prosecution Response, paras. 22-26.

<sup>24</sup> Prosecution Response, para. 27.

<sup>25</sup> See Defence Motion for Video-Link, Motion for Reconsideration; Defence Motion and Second Defence Motion for Reconsideration.

The Third Defence Motion appeared to be an unsubstantiated attempt to circumvent two prior decisions rendered by the Chamber, denying the request to hear Witness Higaniro via video-link. The Chamber has warned the Defence in prior decisions to refrain from re-litigating matters already adjudicated and resulting in a waste of valuable court time<sup>27</sup> and strongly suggests it heads the Chamber's words.

16. The Chamber recalls that, “[w]itnesses shall, in principle, be heard directly by the Chamber”.<sup>28</sup> A Chamber may, however, order testimony via video-link where it is “necessary to safeguard the witness’s security”<sup>29</sup> or if it is in the interests of justice.<sup>30</sup>

17. The Chamber recalls that the Tribunal’s jurisprudence provides that a Trial Chamber may exercise its discretion to reconsider a decision when one of the following criteria has been met: “(i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.”<sup>31</sup> The party seeking reconsideration bears the burden of demonstrating the existence of the enumerated circumstances.<sup>32</sup>

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<sup>26</sup> See First Decision and Decision on Motion for Reconsideration.

<sup>27</sup> Defence Urgent Motion for Protective Measures for Defence Witness, 18 April 2011, para. 12; Defence Extremely Urgent Motion for Protective Measures for Defence Witnesses Re Witnesses CKN 18, CKN20 and CKN22, 26 April 2011, para.11.

<sup>28</sup> Rule 90(A).

<sup>29</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC) , 8 October 2004 (“BT Decision”), para. 8.

<sup>30</sup> *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; BT Decision, paras. 5-7.

<sup>31</sup> *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Defence Motion for Reconsideration of the Chamber’s 13 January 2010 Decision on Video-Link Testimony (TC), 29 January 2010, para. 5; *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration of Decision on Joseph Nzirorera’s Motion for Inspection: Michel Bagaragaza (TC) (“Karemera Decision of 29 September 2008”), 29 September 2008, para. 4. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.14, Decision on Mathieu Ndirumpatse’s Appeal from the Trial Chamber Decision of 17 September 2008 (AC), 30 January 2009, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E)” (TC), 15 June 2004, paras. 8-9.

<sup>32</sup> See e.g., *Prosecutor v. Nindiliyimana*, Case No. ICTR-00-56-T, Decision on Prosecution’s Motion for Reconsideration of the Chamber’s Decision Dated 18 February 2009 (TC), 19 March 2009, para. 2; Karemera Decision of 29 September 2008, para. 4.

18. The Chamber recalls that Witness BEJ01 is expected to testify to the events described in paragraph 28 of the Second Amended Indictment (“Indictment”).<sup>33</sup> The Defence submitted that Witness BEJ01 is a key witness to the Defence case, because he is specifically mentioned in paragraph 28 of the Indictment and will deny the facts alleged therein.<sup>34</sup> Witness BEJ01 is further expected to provide testimony as to the whereabouts of the Accused towards the end of April 1994.<sup>35</sup> The Chamber notes that it determined on the basis of the summary of Witness BEJ01’s anticipated testimony that the Witness’s testimony could be important for the Defence’s case.<sup>36</sup>

19. The Chamber notes the efforts made by the Defence to seek assistance from the Belgian government to have the Witness transferred to Arusha for purposes of hearing his testimony. The Chamber further notes that the Defence annexed a letter from the Belgian authorities indicating their inability to transfer Witness BEJ01 to Arusha to accommodate his testimony before the Tribunal due to restrictions imposed upon BEJ01 following a conviction in Belgium.<sup>37</sup> The Belgium government did, however, note that it would assist the Defence with a hearing by video-link from Belgium.<sup>38</sup>

20. The Chamber is satisfied that the communication by the Belgian authorities regarding their refusal to allow Witness BEJ01 to travel to Arusha to constitutes a “new fact”, justifying reconsideration of the Chamber’s Impugned Decision. On this basis, the Chamber considers it in the interest of justice to allow Witness BEJ01 to testify via video-link from Belgium.

**FOR THESE REASONS, THE CHAMBER**

**GRANTS** the Motion;

**RECONSIDERS** the Impugned Decision;

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<sup>33</sup> Second Amended Indictment, filed 17 December 2010; Defence Motion for Video-Link, para. 16.

<sup>34</sup> Defence Motion for Video-Link, paras. 17, 21.

<sup>35</sup> Defence Motion for Video-Link, para. 19.

<sup>36</sup> Impugned Decision, para. 7.

<sup>37</sup> Second Motion for Reconsideration, para. 9, Annex 1, p. 1.

<sup>38</sup> *Ibid.*

**ORDERS** that the testimony of Witnesses BEJ01 be taken by video-link from Belgium, and that the Defence notify the Chamber of the date and precise location for his testimony by 8 June 2011; and

**INSTRUCTS** the Registrar, in consultation with the parties, to make all necessary arrangements with respect to the video-link transmission of the testimony of Witness BEJ01, and to maintain a video record of the testimony for possible future use by the Chamber.

Arusha, 6 June 2011, done in English.

Lee Gacuiga Muthoga  
Presiding Judge

Seon Ki Park  
Judge

Robert Fremr  
Judge

[Seal of the Tribunal]