54/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-01-73-AR73
30 October 2006
(54/H – 43/H

P.T.

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 30 October 2006

ICTR Appeals Chamber
Date: 30 October 2006
Action: PT
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Protais ZIGIRANYIRAZO

v.

The Prosecutor

Case No. ICTR-2001-73-AR73

Decision on Interlocutory Appeal

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Wallace Kapaya
Mr. Neville Weston
Ms. Charity Kagwi-Ndungu
Mr. Abdoulaye Seye

Counsel for the Defence:

Mr. John Philpot
Mr. Peter Zaduk

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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53/H

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal,[1] filed by Protais Zigiranyirazo ("Appellant"), against a decision of Trial Chamber III.[2]

BACKGROUND

2. The Appellant submits that the Trial Chamber violated his fundamental right to be tried in his presence, as guaranteed by Article 20(4)(d) of the Statute of the Tribunal. The Appellant argues that this violation resulted from the decision of the Trial Chamber to hear Michel Bagaragaza[3] testify in person in The Netherlands[4] with the Appellant participating in the proceedings only by video-link from Arusha.[5] He contends that the right to be present at trial cannot be satisfied by video-link and instead requires physical presence.[6] The Appellant requests the Appeals Chamber to quash the Trial Chamber's decision of 5 June 2006, which permitted his participation by video-link, and to strike from the record Mr. Bagaragaza's testimony of 13 through 15 June 2006.[7]

3. The present dispute has its origin in the Prosecution's request to have Mr. Bagaragaza testify in this case by video-link from The Netherlands.[8] Both the Trial Chamber and the Prosecution have described him as a key witness.[9] The Appellant opposed the Prosecution's request to hear Mr.

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[1] Protais Zigiranyirazo Appeal from the Extremely Confidential Decision on Defense Motion Concerning the Hearing of Witness ADE, 19 June 2006 ("Zigiranyirazo Appeal"). The Prosecution responded in "Prosecutor's Response to Appeal from the Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE", 29 June 2006 ("Prosecution Response"). Mr. Zigiranyirazo replied in "Reply Brief: Appeal from the Extremely Confidential Decision on Defense Motion Concerning the Hearing of Witness ADE", 6 July 2006 ("Zigiranyirazo Reply").

[2] *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE, 5 June 2006 ("Impugned Decision"). The Appeals Chamber notes that Mr. Bagaragaza is Witness ADE. Mr. Bagaragaza waived the use of a pseudonym at the outset of his testimony. *See The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, T. 13 June 2006 pp. 4-5.

[3] Mr. Bagaragaza is an accused person before this Tribunal who is detained exceptionally in the detention facility for the International Tribunal for the Former Yugoslavia ("ICTY") in The Netherlands. Impugned Decision, para. 13. *See also The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-I, Order for Special Detention Measures, 13 August 2005 (ICTR President); *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-I, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit in The Hague, The Netherlands, 17 February 2006 (ICTR President); *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-I, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit in The Hague, The Netherlands, 17 August 2006 (ICTR President).

[4] Zigiranyirazo Appeal, paras. 3, 20-26.

[5] Zigiranyirazo Appeal, paras. 3, 9, 16, 20.

[6] Zigiranyirazo Appeal, paras. 21-31.

[7] Zigiranyirazo Appeal, para. 56.

[8] Impugned Decision, para. 13. *See also The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, paras. 25-34 ("Decision on Prosecution's Request for Video-Link").

[9] Impugned Decision, paras. 6, 16; Decision on Prosecution's Request for Video-Link, paras. 26, 32.

Bagaragaza's testimony by video-link because he wished to confront this witness in person.[10] In addition, the Appellant challenged Mr. Bagaragaza's inability to travel to Arusha, in particular, by disputing the basis of his security concerns and by noting that his agreement with the Prosecution to be heard only by video-link usurped the role of the Trial Chamber in making such decisions.[11]

4. On 31 January 2006, the Trial Chamber denied the Prosecution's request to hear Mr. Bagaragaza's testimony by video-link.[12] In its decision, the Trial Chamber stated that the Appellant had a right to confront this witness in person.[13] In addition, the Trial Chamber expressed concern about its ability "to effectively and accurately assess the testimony and demeanour" of Mr. Bagaragaza if he testified by video-link.[14] The Trial Chamber recognized the potential importance of Mr. Bagaragaza's testimony.[15] In addition, the Trial Chamber accepted the Prosecution's submissions that Mr. Bagaragaza faced increased risk to his security if he travelled to Arusha.[16] Consequently, the Trial Chamber decided to hear Mr. Bagaragaza's testimony in person in The Netherlands in the presence of the parties.[17]

5. However, shortly before the anticipated trial session, the Trial Chamber was informed that the Appellant would not be permitted to enter The Netherlands in the foreseeable future.[18] The Trial Chamber does not explain the reason for this, citing only "external variables", though the Registry's submissions point to the absence of a "treaty basis" for the temporary transfer.[19] Consequently, the Trial Chamber modified its arrangements for the hearing of Mr. Bagaragaza's testimony in a Scheduling Order of 26 May 2006.[20] In that Order, the Trial Chamber decided to proceed to hear Mr. Bagaragaza's testimony in person in The Netherlands, beginning 12 June 2006, in the physical absence of the Appellant, who would participate by video-link from Arusha.[21] The Appellant challenged this decision on the grounds that it violated his right to be present at trial and to personally confront the witness.[22]

[10] Decision on Prosecution's Request for Video-Link, para. 32.
[11] Decision on Prosecution's Request for Video-Link, para. 28.
[12] Decision on Prosecution's Request for Video-Link, p. 10.
[13] Decision on Prosecution's Request for Video-Link, para. 32.
[14] Decision on Prosecution's Request for Video-Link, para. 32.
[15] Decision on Prosecution's Request for Video-Link, para. 32.
[16] Decision on Prosecution's Request for Video-Link, para. 32. These submissions, as recounted by the Trial Chamber, included Mr. Bagaragaza's fears for his safety stemming from his position as an "insider" witness, the publishing of one of his statements on the internet, the probable murder of Juvénal Uwilingiyimana, and threats to his family, which all contributed to his "sense of vulnerability". *Id.*, para. 26.
[17] Decision on Prosecution's Request for Video-Link, para. 33.
[18] Impugned Decision, paras. 2, 8, 14.
[19] Impugned decision, paras. 8, 14.
[20] *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Scheduling Order, 26 May 2006 ("Scheduling Order").
[21] Scheduling Order, pp. 2-3. *See also* Impugned Decision, para. 2.

6. On 5 June 2006, the Trial Chamber addressed this matter and, after considering various factors, decided that it was in the interests of a fair and expeditious trial to maintain the arrangement for hearing Mr. Bagaragaza's testimony as set forth in the Scheduling Order of 26 May 2006.[23] The Trial Chamber reiterated that its decision to hear Mr. Bagaragaza in person was based primarily on its concern as to its ability to effectively and accurately assess his testimony and demeanour through a video-link.[24] The Trial Chamber decided that the Appellant, however, would be able to follow the proceedings by video-link along with one of his counsel in Arusha.[25] The Trial Chamber's decision also envisioned both parties being represented by counsel in court in The Netherlands.[26] To maintain "procedural equality of arms" between the parties, the Trial Chamber decided that the examination and cross-examination of Mr. Bagaragaza by both parties would be primarily conducted from Arusha via video-link.[27] However, it noted that counsel for both the Prosecution and the Appellant, present in The Netherlands, would also be able to intervene in the proceedings.[28]

7. Following the issuance of the Impugned Decision, the Appellant sought certification to appeal, which the Trial Chamber granted immediately prior to hearing Mr. Bagaragaza's testimony.[29] The Trial Chamber, however, declined to stay the proceedings pending the outcome of the appeal.[30] Accordingly, Mr. Bagaragaza testified from 13 through 15 June 2006. The Prosecution's case closed on 28 June 2006, and the Defence case is set to begin on 30 October 2006.

DISCUSSION

8. Article 20(4)(d) of the Statute provides that an accused has a right "to be tried in his or her presence." This right has been equated with other "indispensable cornerstone[s] of justice", such as the right to counsel, the right to remain silent, the right to confront witnesses against them, and the right to a speedy trial.[31] The Trial Chamber concluded that, in the circumstances of this case, the Appellant's presence at his own trial, even during the hearing of a key witness, could be facilitated

[22] Impugned Decision, para. 3.
[23] Impugned Decision, para. 15.
[24] Impugned Decision, paras. 16, 19.
[25] Impugned Decision, paras. 15, 18.
[26] Impugned Decision, paras. 17, 18.
[27] Impugned Decision, para. 18.
[28] Impugned Decision, para. 18.
[29] *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Oral Decision, T. 13 June 2006 pp. 53-54 ("Certification Decision").
[30] Certification Decision, pp. 53-54.
[31] *Slobodan Milošević v. The Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, paras. 11, 13 ("*Milošević* Appeal Decision").

through the use of video-link technology.[32] In the present decision, the Appeals Chamber considers whether the Trial Chamber erred in adopting the procedure for hearing the testimony of Mr. Bagaragaza in person in The Netherlands while the accused, Mr. Zigiranyirazo, participated via video-link from Arusha. In the course of this analysis, the Appeals Chamber confronts three principal questions: (1) whether "presence" within the meaning of Article 20(4)(d) refers to physical presence in court before the Trial Judges; (2) if so, whether the right to be physically present in court is categorically inviolable; and (3) if the right may be limited in certain situations, whether the Trial Chamber's restrictions were justified under the present circumstances.

A. Standard of Review

9. Decisions relating to the general conduct of trial proceedings are matters within the discretion of the Trial Chamber.[33] A Trial Chamber's exercise of discretion will be reversed only if the challenged decision was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[34]

B. Article 20(4)(d) Provides for Physical Presence at Trial

10. In the Impugned Decision, the Trial Chamber did not directly consider the issue as to what was meant by the term "presence" within the meaning of Article 20(4)(d). On Appeal, the parties dispute whether the term "presence" refers to physical presence in court. The Appellant argues that this language provides him with the right to be physically present at his trial, before the court and the witnesses testifying against him.[35] The Prosecution counters that Article 20(4)(d) does not impose such a "stringent" requirement as physical presence.[36] The Prosecution urges a broader reading of the provision, suggesting that it is simply a "compendious subsection" preventing trial

[32] Impugned Decision, para. 15 ("The Chamber considers that the presence and the involvement of the Accused in the testimony of [Mr. Bagaragaza] can be facilitated via video-link, which provides an audio and visual image of the witness and the proceedings.").
[33] *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, Case No. 98-41-AR73, 25 September 2006, para. 6 ("*Bagosora* Appeal Decision"); *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5 ("*Muvunyi* Appeal Decision").
[34] *Bagosora* Appeal Decision, para 6; *Muvunyi* Appeal Decision, para. 5. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 3.
[35] Zigiranyirazo Appeal, para. 42.
[36] Prosecution Response, paras. 2, 5-10.

only where an accused is unaware that the proceedings are being conducted against him and is therefore unable to mount a defence.[37]

11. The Appeals Chamber considers that the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial. The language and practical import of Article 20(4)(d) of the Statute are clear. First, as a matter of ordinary English, the term "presence" implies physical proximity.[38] A review of the French version of the Statute leads to the same conclusion, in particular in the context of the phrase *"être présente au procès"*,[39] conveying unambiguously that Article 20(4)(d) refers to physical presence *at the trial*.[40]

12. Both the Tribunal's legal framework and practice as well as that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") further reflect that Article 20(4)(d) provides for the physical presence of an accused at trial, as opposed to his facilitated presence via video-link. Initially, the Appeals Chamber observes that such a procedure, over an accused's objection, is unprecedented before the Tribunal and before the ICTY.[41] It is not surprising, therefore, that there are no express provisions in the Statute and Rules of this Tribunal or of the ICTY for the participation of an accused by video-link in his or her own trial.[42] Indeed, Rule 65*bis* of the ICTY

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[37] Prosecution Response, paras. 2, 5-10.

[38] *See, e.g.*, The Oxford English Dictionary, Second Edition, Volume XII, p. 393 (for the definition of "presence": "The fact or condition of being present; the state of being before, in front of, or in the same place with a person or thing; being there; attendance, company, society, association. Usually with *of* or possessive indicating the person or thing that is present."), p. 395 (for the definition of "present": "An adjective of relation; expressing a local or temporal relation to a person or thing which is the point of reference [...] Being before, beside, with, or in the same place as the person to whom the word has relation; being in the place considered or mentioned; that is here (or there) [...]"); Black's Law Dictionary, Eighth Edition, (for the relevant definition of "presence": "The state or fact of being in a particular place and time [...]. Close physical proximity coupled with awareness [...]"). *See also United States v. Navarro*, 169 F.3d 228, 234-239 (5th Cir. 1999) (interpreting the plain meaning of "presence" as requiring the physical presence of a defendant in court).

[39] Emphasis added.

[40] Le Nouveau Petit Robert, p. 1768 (for the definition of "*présente*" : "*Qui est dans le lieu, le groupe se trouve la personne qui parle ou de laquelle on parle*"); Gerard Cornu, Vocabulaire Juridique, p. 664 ("*Qui se trouve ou se trouvait à un moment donné en un lieu déterminé. [...] Qui concourt en personne l'accomplissement d'un acte ou au déroulement de la procédure. [...]*").

[41] In the case of Milan Simić before the ICTY, the accused participated in his sentencing hearing towards the end of the trial process via video link because of his health condition. The Trial Chamber expressly noted, however, that during this period Mr. Simic filed a total of twenty-five waivers of his right to be present in court. *See The Prosecutor v. Milan Simić*, Sentencing Judgement, Case No. IT 95-9/2-S, 17 October 2002, para. 8.

[42] The Tribunal's Rules and jurisprudence only contemplate the use of video-link technology in order to transmit the testimony of a witness to the court, if justified in narrow circumstances for witness protection concerns, or otherwise in the interests of justice. Rule 75 provides in pertinent part (emphasis added): "(A) A Judge or a Chamber may [...] order appropriate measures to safeguard the privacy and security of victims and witness, provided that the measures are consistent with the rights of the accused. (B) A Chamber may hold an *in camera* proceeding to determine whether to order notably: (i) [...] (c) giving of testimony through [...] closed circuit television [...] (iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television." In addition to specific witness protection concerns, the Tribunal's jurisprudence also allows the hearing of a witness by video-link if it is otherwise in the interests of justice. *See, e.g., The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Testimony by Video-Conference, 20 December 2004, para. 4 ("Video-conference testimony should be ordered where it is in the interests of justice, as that standard has been elaborated in ICTR and ICTY jurisprudence.").

Rules of Procedure and Evidence illustrates very clearly that participation via video-link is not considered presence.[43] The same distinction between actual presence and constructive presence via video-link, which is evident in Rule 65*bis* of the ICTY Rules, also appears in the Statute of the International Criminal Court[44] and the Rules of Procedure and Evidence of the Special Court for Sierra Leone.[45] The Appeals Chamber further observes that other international,[46] regional,[47] and national[48] systems also share the view that the right to be present at trial implies physical presence.

The Rules of Procedure and Evidence of the ICTY authorize this explicitly in Rule 71*bis* ("At the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link.").

[43] Rule 65*bis*(C) of the ICTY Rules provides in pertinent part: "With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted: (i) in his presence, but with his counsel participating either via tele-conference or video-conference; or (ii) in Chambers in his absence, but with his participation via tele-conference if he so wishes and/or participation of his counsel via tele-conference or video-conference."

[44] *See* Statute of the International Criminal Court, Article 63 ("(1) The accused shall be present during the trial. (2) If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.").

[45] The Appeals Chamber notes that Article 17(4)(d) of the Statute of the Special Court for Sierra Leone is identical to Article 20(4)(d) of the Tribunal's Statute. Notably, similar to the International Criminal Court, Rule 80(B) of the Rules of Procedure and Evidence for the Special Court in Sierra Leone envisions an accused's participation in his or her trial by video-link only after he or she has been removed for persistently disruptive conduct. This Rule provides in pertinent part: "In the event of removal, where possible, provision should be made for the accused to follow the proceeding by video-link."

[46] *See supra* notes 44, 45 (discussing the International Criminal Court and the Special Court for Sierra Leone). The Appeals Chamber further observes that the language of Article 20(4)(d) of the Statute tracks Article 14 of the International Covenant on Civil and Political Rights. Under this provision, the Human Rights Committee has referred to an accused's personal attendance at the proceedings as a component of a fair trial. *See Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication No. 289/1988: Panama 8 April 1992, CCPR/C/44/289/1988 (Jurisprudence), para. 6.6 ("The Committee recalls that the concept of a 'fair trial' within the meaning of article 14, paragraph 1, must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings. These requirements are not respected where, as in the present case, the accused is denied the opportunity *to personally attend the proceedings*, or where he is unable to properly instruct his legal representative.") (Emphasis added).

[47] The European Convention on the Protection of Human Rights and Fundamental Freedoms refers in Article 6(3)(c) to an accused's right "to defend himself in person [...] ". For the European Court of Human Rights, this implies the personal attendance of a defendant at trial as well as in certain procedures on appeal requiring the court to have personal impression of the defendant. *See, e.g., Case of Stoichkov v. Bulgaria, Application no. 9808/02*, Judgment, 24 March 2005, para. 56 ("It may thus be considered that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial after he or she emerges – ranks as one of the essential requirements of Article 6 and is deeply entrenched in that provision."); *Case of Sejdovic v. Italy*, Application no. 56581/00, Judgment, 1 March 2006, para. 84; *Case of Michael Edward Cooke v. Austria*, Application no. 25878/94, Judgement, 8 February 2000, paras. 35, 42, 43. ("The Court recalls that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance hearing. However, the personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing."); *Case of Colozza v. Italy*, Application No. 9024/80, Judgment, 12 February 1985, para. 27 ("Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court', and it is difficult to see how he could exercise these rights without being present."). *See also* Stefan Trechsel, Human Rights in Criminal Proceedings, pp. 252-253 (2006).

[48] Presence is also equated with physical presence in criminal trials in the United States. *See, e.g.*, Federal Rule of Criminal Procedure 43(a). Federal Rules of Criminal Procedure 5 and 10 envision video-conferencing only, with the defendant's consent, at the initial appearance and arraignment. *See also Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial"); *United States v. Navarro*, 169 F.3d 228, 234-239 (5th Cir. 1999) (holding that an

13. The Appeals Chamber, therefore, confirms that an accused's right to be tried in his or her presence implies a right to be physically present at trial. Applying the foregoing to the present case leads the Appeals Chamber to conclude that by proceeding as it did, the Trial Chamber restricted the Appellant's right to be present at his trial. However, this does not end the necessary inquiry.

C. The Right To Be Physically Present at Trial Is Not Absolute

14. The parties acknowledge that an accused's right to be tried in his or her presence is not absolute.[49] The ICTY Appeals Chamber has observed as much,[50] and this Appeals Chamber agrees. An accused person can waive or forfeit the right to be present at trial. For example, Rule 80(B) of the Rules allows a Trial Chamber to remove a persistently disruptive accused. Referring to the equivalent provision in the ICTY Rules, the ICTY Appeals Chamber observed that an accused's right to be present for his or her trial can be restricted "on the basis of substantial trial disruptions".[51] In assessing a particular limitation on a statutory guarantee, the Appeals Chamber bears in mind the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is

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accused's participation in his sentencing hearing by video-conference violated his right to be present at trial); *United States v. Reynolds*, 44 M.J. 726, 729 (United States Army Court of Criminal Appeals 1996)("Consequently, the statutory and [Rules for Court Martial] provisions cited above appear to require that the military judge, accused, and counsel all to be at one location for the purpose of a court-martial. This interpretation not only comports with custom and tradition, but also is the one that best guarantees justice. For these reasons, we are satisfied that the telephonic procedures utilized in this case, when based on the meager justification of saving time and travel funds between two installations approximately 150 miles apart, did not comport with any reasonable concept of 'presence' anticipated by the [Uniform Code of Military Justice] and [Rules for Court Martial].")(internal citations omitted); *Riggins v. Nevada*, 504 U.S. 127, 142 (1992)(Kennedy, J., concurring)("It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. [...] At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights [...]") (internal citations omitted).

In addition, in England and Wales, the right of an accused to be present in court at his or her trial is a matter of common law. *See R. v. Lee Kun* (1916) 1 Kings Bench Reports 337, at 341 ("There must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity [...] of answering it. The presence of the accused means not only that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings.").

In Canada, an accused also has the right to be present in court during the trial. The Canadian Criminal Code envisions the possibility of an accused participating in his or her trial by video-link, but not for the hearing of evidence, unless he or she consents. *See* Canadian Criminal Code, Title XX, Section 650.

[49] *Ziglranyirazo* Appeal, para. 44; Prosecution Response, para. 11.

[50] *Milošević* Appeal Decision, para. 13 ("If a defendant's right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self -representation any differently.").

[51] *Milošević* Appeal Decision, para. 13.

necessary to accomplish the objective.[52] The explicit exception provided by Rule 80(B) and the ICTY Appeals Chamber's reference to "substantial trial disruptions" provide a useful measure by which to assess other restrictions on the right to be present at trial.

D. The Present Circumstances Do Not Warrant any Restriction on the Appellant's Right

15. The primary question for the Appeals Chamber is whether the Trial Chamber properly exercised its discretion in its restriction of the Appellant's right to be present at his trial. Because both parties acknowledge that this right is not absolute, the Appeals Chamber does not consider that the Trial Chamber's failure to examine the accused's right to be tried in his presence is of significant consequence. Instead, the primary question for the Appeals Chamber is whether the Trial Chamber properly exercised its discretion in its restriction of the Appellant's right to be present at his trial. The Appeals Chamber recalls that the Trial Chamber's decision was predicated on Mr. Bagaragaza's security concerns, the impact of video-link on the assessment of the witness, and logistical concerns preventing the Appellant from traveling to The Netherlands to attend the proceedings.

16. The Appellant contends that the Trial Chamber failed to apply properly the proportionality principle.[53] He disputes that security concerns in fact prevented Mr. Bagaragaza from testifying in Arusha or that the administrative concerns preventing him from traveling to The Netherlands were insurmountable.[54] The Appellant further takes issue with the procedure for hearing Mr. Bagaragaza's testimony, pointing to the inherent difficulties in following the evidence and visually interacting with the Judges.[55] As a result of these arrangements, the Appellant claims that his participation by video-link meant that neither he nor his lead counsel, who remained with him in Arusha, could observe or hear either the judges or the witness unless the camera was pointed on them.[56] In the Appellant's view, this denied them normal visual interaction with the proceedings.[57]

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[52] *Milošević* Appeal Decision, para. 17. The Appeals Chamber further notes that the situation envisioned under Rule 15*bis*, allowing *inter alia* proceedings to continue for a limited period in the absence of one of the judges, does not inform the present dispute which concerns the absence of the accused.

[53] Zigiranyirazo Appeal, para. 47.

[54] Zigiranyirazo Appeal, paras. 48, 49.

[55] *See generally* Zigiranyirazo Appeal, para. 50; Zigiranyirazo Reply, para. 25.

[56] Zigiranyirazo Appeal, para. 50; Zigiranyirazo Reply, para. 25.

[57] Zigiranyirazo Reply, para. 25. The Appellant notes that he "'saw' the proceedings through the selective eyes of a camera operated by a third party." He adds: "The experience was dizzying and could have been conducted properly if he and his lead counsel had been able to see his judges. He and his attorney could not speak directly to the judges, gauge their reactions, and adjust the arguments and tenor of pleadings as if they were in open court with the members of the bench." Further, the Appellant claims that the arrangements placed his lead counsel, who conducted the cross-examination, in the difficult position of having to choose to either remain in Arusha and receive direct instruction, or travel to the Netherlands and participate in person, but where communication with the accused would be limited to breaks during the proceedings.

The Prosecution submits that the procedure adopted by the Trial Chamber was consistent with a fair trial and that Mr. Zigiranyirazo has not demonstrated any prejudice.[58]

17. The Appeals Chamber agrees that the objectives advanced by the Trial Chamber are of general importance: witness protection, the proper assessment of an important prosecution witness, and the need to ensure a reasonably expeditious trial. Nonetheless, the Appeals Chamber is not satisfied that, in the present circumstances, the Trial Chamber properly exercised its discretion in deciding to impose limitations on the Appellant's right to be present at his trial.

18. First, the Appeals Chamber accepts that, by agreeing to cooperate with the Prosecution, Mr. Bagaragaza could be exposed to an increased risk to his security. However, the record does not reflect that the security concern, alluded to by the Trial Chamber,[59] is in fact related to the location of his testimony, or that injury could only be avoided by having Mr. Bagaragaza testify in The Netherlands.[60] In addition, the record does not show that the Trial Chamber examined the possibility that additional security measures might allay any security threat were Mr. Bagaragaza brought to Arusha to testify.

19. Second, the Appeals Chamber also accepts that the Trial Chamber's general concern over its ability to assess the credibility of a key witness is an important interest. However, the Appeals Chamber considers that if the Trial Chamber had misgivings about its ability to adequately follow the testimony of a key witness through the use of video-link then these same misgivings, if valid,

[58] Prosecution Response, paras. 2, 13-23. The Prosecution agrees that there was no visual interaction between the bench and the accused unless the camera was pointed at them, but notes that Mr. Zigiranyirazo confirmed each day that he could follow the proceedings. Prosecution Response, paras. 19, 20. Mr. Zigiranyirazo notes, however, that he complained at the beginning of the proceedings and vowed to do his best out of respect for the court. Zigiranyirazo Reply, para. 25.

[59] The Appeals Chamber notes that security concerns presented by the Prosecution to the Trial Chamber involved the witness's general feelings of insecurity due to agreeing to cooperate with the Prosecution. The Prosecution also pointed to threats made to Mr. Bagaragaza's family and the death of another individual, not in the custody of the Tribunal, who was contemplating cooperating with the Prosecution. The Prosecution explained that this led Mr. Bagaragaza to agree to cooperate if he were not brought to Arusha. *See generally* Impugned Decision, para. 13; Decision on Prosecution's Request for Video-Link, paras. 26, 30, 32. *See also The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Prosecution's Confidential Request to Allow Witness ADE to Give Testimony Via Video-Link, 21 December 2005. The Appeals Chamber observes that the agreement between Mr. Bagaragaza and the Prosecution that he not be brought to Arusha is not binding on the Trial Chamber.

[60] The Appeals Chamber considers that the Trial Chamber is best placed to make the assessment concerning the security of witnesses appearing before it. However, in making a determination that impacts a fundamental right of an accused, a Trial Chamber must do more than simply accept the averments of Prosecution counsel. Rather it must, in accord with Rule 75, undertake an independent inquiry, at a minimum for example by conferring with the relevant sections of the Registry concerned with security and protection of witnesses. The Trial Chamber does not appear to have done this. Moreover, the Appeals Chamber notes that reliance on the President's decision to extraordinarily detain Mr. Bagaragaza *in The Hague also does not satisfy this duty. Indeed, there is a significant difference in protecting Mr. Bagaragaza, as an* accused, during a lengthy period of pre-trial detention and in ensuring his security when he appears as a witness during three days of testimony before the Tribunal.

must apply with equal force to the ability of the accused and his counsel to follow the evidence and proceedings.

20. Third, the Appeals Chamber further observes that none of the "external variables,"[61] alluded to by the Trial Chamber, preventing the Appellant's personal attendance at his own trial, resulted from any action on his part. In addition, there is no indication that the Trial Chamber explored an alternative venue for hearing the testimony, other than The Netherlands. A careful consideration of the feasibility of moving the trial to The Netherlands at the earliest opportunity might have identified the logistical barriers that prevented the Appellant from attending his trial in The Netherlands and allowed the Trial Chamber either to overcome the obstacles or to explore alternative venues or solutions, avoiding the present situation.[62]

21. The Appeals Chamber notes that the Trial Chamber endeavored to ensure that the Appellant had legal representation physically present during the proceedings in The Netherlands. In addition, in an effort to give effect to the principle of equality of arms, the Trial Chamber ordered that the Prosecution also to examine the witness from Arusha. However, the Trial Chamber's attempts to give full respect to both the right to counsel and the principle of equality of arms do not compensate for the failure to accord the accused what is a separate and distinct minimum guarantee: the right to be present at his own trial. Although one of the Appellant's counsel was in the courtroom with the Judges and the witness, the Appellant himself was thousands of kilometres away, connected to the proceedings only by means of audio-visual equipment. The Appellant's sense of being wronged in such circumstances is well-understandable. As the Prosecution and Trial Chamber noted, Mr. Bagaragaza's testimony does not cover simply background information or a matter other than the acts and conduct of the accused. According to the Prosecution's own statement and the Trial Chamber's consideration, Mr. Bagaragaza was a key Prosecution witness against the Appellant.[63]

22. Based on the foregoing, the Trial Chamber's restrictions on the Appellant's fair trial rights were unwarranted and excessive in the circumstances and thus fail the test of proportionality. Accordingly, the Trial Chamber committed a discernible error.

[61] Impugned Decision, paras. 8, 14.
[62] The Appeals Chamber observes that other accused persons have previously attended Tribunal proceedings in The Netherlands in connection with appellate proceedings. *See, e.g., Jean De Dieu Kamuhanda v. The Prosecutor*, Case No. 99-54A-A, Variation of a Scheduling Order, 19 August 2005, p. 2.
[63] Impugned Decision, paras. 6, 16; Decision on Prosecution's Request for Video-Link, paras. 26, 32.

E. Conclusion

23. After a careful consideration of the circumstances under consideration in this appeal and giving due regard to the accused's right to be present at his or her trial, the Appeals Chamber finds that the Trial Chamber erred in law in holding that the Appellant's right to be present at his trial during the testimony of an apparently key witness against him could be met by video-link. The Appeals Chamber observes that, after certifying its decision for appeal, the Trial Chamber decided not to stay the proceedings and instead proceeded to hear Mr. Bagaragaza's testimony.[64]

24. The precise consequences of the Trial Chamber's error cannot be determined at this stage. However, it cannot be held that the violation of the Appellant's right to be present constitutes harmless error given the length and purported significance of the testimony to the charges against him. Prejudice therefore can only be presumed, as any attempt to prove or disprove actual prejudice from the record in an ongoing trial before any factual findings have been made would be purely speculative. In the view of the Appeals Chamber, allowing the testimony of Mr. Bagaragaza to remain on the record would seriously damage the integrity of the proceedings. In such circumstances, Rule 95 of the Rules plainly requires the exclusion of such testimony. This, however, does not prevent the Trial Chamber from exercising its discretion and allowing Mr. Bagaragaza to testify again in a manner consistent with the Appellant's fair trial rights.[65]

DISPOSITION

25. For the foregoing reasons, the Trial Chamber's decision to hear Mr. Bagaragaza's testimony in person in The Netherlands while Mr. Zigiranyirazo participated by video-link from Arusha is **REVERSED** and the testimony of Mr. Bagaragaza given in such a manner is **EXCLUDED**.

Done in English and French, the English version being authoritative.

Done this 30th day of October 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar,
Presiding

[Seal of the Tribunal]

[64] Certification Decision, pp. 53-54.
[65] The Appellant acknowledges that the Prosecution could seek to reopen its case in the interests of justice pursuant to Rule 85 or alternatively that the Trial Chamber could call the witness *proprio motu* under Rule 98. *See Zigiranyirazo* Reply, paras. 26-27.

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APPEALS CHAMBER – PROOF OF SERVICE
CHAMBRE D'APPEL - PREUVE DE NOTIFICATION

Date: 30 October 2006	Case Name / *Affaire:* Protais Zigiranyirazo Case No / *No. de l'affaire:* ~~ICTR-01-73-AR73~~	THE PROSECUTOR v. Protais Zigiranyirazo

To: *A:*	**OTP, Trial Attorney in charge of case** ☐ In The Hague ✖ **In Arusha** ☐ In Kigali **APPEALS UNIT** ✖ Ms Félicité Talon, **APPEALS CHAMBER** ✖ Judge / Juge Fausto Pocar, Presiding ✖ Judge / Juge Mohamed Shahabuddeen ✖ Judge / Juge Mehmet Güney ✖ Judge / Juge Liu Daqun ✖ Judge / Juge Theodor Meron ✖ Ms Catherine Marchi-Uhel ✖ Mr Roman Boed ✖ Concerned Associate Legal Officers ✖ Mr Charles Zama **DEFENSE** ✖ Accused / *accusé* : Mr. Protais Zigiranyirazo (complete CMS4 Form) ✖ Lead Counsel / *Conseil Principal*: Mr. John Philpot *(name / nom)* ✖ In Arusha (complete CMS 2) ☐ Fax Number: 1 514 844 4937 ✖ E-mail: jphilpot@bpjbp.qc.ca ✖ Co-Counsel / *Conseil Adjoint*: Mr. Peter Zaduk *(name / nom)* ✖ In Arusha *(complete CMS 2)* ☐ Fax Number: 1 416-599-1307 ✖ E-mail:
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