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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

**Before:** Judge William H. Sekule, Presiding  
Judge William C. Matanzima Maqutu  
Judge Arlette Ramaroson

**Registrar:** Adama Dieng

**Date:** 24 July 2001

JUDICIAL RECORDS ARCHIVES  
ICTR  
2001 JUL 24 P 12:42

The Prosecutor v.

**Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI**  
(Case No. ICTR-97-21-T),

**Sylvain NSABIMANA & Alphonse NTEZIRYAYO**  
(Case No. ICTR-97-29-T), **Joseph KANYABASHI** (Case No. ICTR-96-15-T)  
and **Élie NDAYAMBAJE** (Case No. ICTR-96-8-T)

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**DECISION ON THE PROSECUTOR'S MOTIONS FOR LEAVE TO CALL  
ADDITIONAL WITNESSES AND FOR THE TRANSFER OF DETAINED  
WITNESSES**

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**The Office of the Prosecutor:**

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AMS

24.07.2001.

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“the Tribunal”),

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge William C. Matanzima Maqutu and Judge Arlette Ramaroson, pursuant to Rule 73 of the Rules of Procedure and Evidence (the “Rules”);

**BEING** seized of the “Prosecutor’s Motion for the transfer of detained witnesses pursuant to Rule 90bis” (“the Motion”) including three annexes filed on 6 April 2001;

**CONSIDERING** that the Prosecutor filed an Ex-Parte version of Annex 3 to the Prosecutor’s Motion, disclosing the identity and the location of the detained witnesses on 9 April 2001;

**CONSIDERING** the “Réponse à la Requête du Procureur pour le transfert de témoins détenus dans les prisons rwandaises (Article 73, paragraphe D) du Règlement)” by Counsel for Kanyabashi (the “Reply by Kanyabashi”), filed on 17 April 2001;

**BEING FURTHER SEIZED** of the “Prosecutor’s Supplemental Motion for the Transfer of Detained Witnesses under Rule 90bis”, by which the Prosecutor seeks to add four detained witnesses to the list and which also replies to the objections raised by Accused Kanyabashi to her first Motion (the “Supplemental Motion”), filed on 16 May 2001;

**CONSIDERING** the “Réponse à la Requête supplémentaire du Procureur pour le transfert de personnes détenues, sous l’Article 90bis du règlement de procédure et de preuve” filed by Counsel for Nyiramasuhuko on 21 May 2001 (the “Reply by Nyiramasuhuko”); the “Réponse à la requête supplémentaire du Procureur demandant le transfert de témoins détenus aux termes de l’Article 90bis”, filed by Counsel for Kanyabashi on 21 May 2001 (the “Supplemental reply by Kanyabashi”); and the “Response to Prosecutor’s Supplemental Motion for the Transfer of Detained Witnesses under Rule 90bis” (the “Reply by Ntahobali”), filed by Counsel for Ntahobali on 22 May 2001;

**CONSIDERING** the “Prosecutor’s Reply to the Defence Responses to the Prosecutor’s Supplemental Motion for the Transfer of Detained Witnesses under Rule 90bis” filed on 24 May 2001;

**CONSIDERING** Annexes 1 to 3 to the Prosecutor’s Supplemental Motion for the Transfer of Detained Witnesses under Rule 90bis, filed on 30 May 2001;

**CONSIDERING** the said unredacted Annexes 1 to 3 filed Ex-Parte Under seal on 31 May 2001;

**CONSIDERING** that, pursuant to Rule 73 of the Rules, the instant Motions are decided on the basis of the written briefs only, as filed by the Parties;

*Handwritten signature*

**SUBMISSIONS OF THE PARTIES**

1. In her Motion, the Prosecutor prays the Chamber to order the transfer to the United Nations Detention Facilities (the "UNDF") of 24 detained witnesses FAB, FAD, FAG, FAH, FAI, FAK, FAL, FAM, FAN, FAO, FAQ, FAR, FAS, FAT, FAU, QAF, QAG, QAH, QBU, QBV, QBX, QBY, QBZ and QCB that she intends to call to testify at Trial, until such time as the Chamber is satisfied that their presence is no longer required, pursuant to Rule 90bis of the Rules.

2. The Prosecutor filed (Annex I to the Motion), a letter dated 6 April 2001 from the Minister of Justice of the Republic of Rwanda to the Deputy Prosecutor of the Tribunal, confirming that the presence of these detained witnesses is not requested in any criminal proceedings during the period in which they are required by the Tribunal, and that the transfer would not extend their detention period. The said letter responded to a correspondence (Annex II to the Motion) by the Deputy Prosecutor to the Minister of Justice dated 2 April 2001 in which the Deputy Prosecutor required, *inter alia*, the presence of the detained witnesses in Arusha "on various dates over the period of the next twelve months"(Annex III to the Motion is an *ex-parte* list disclosing identity and location of detained witnesses).

3. Counsel for Kanyabashi replied, *inter alia*, that the Prosecutor's Motion did not provide enough information as to the conditions of detention of these witnesses, the duration for which these witnesses would remain in Arusha, and if these witnesses will be allowed to communicate with each other after having given their testimony. Counsel for Kanyabashi requests that the duration of the transfer be analysed in view of these factors and that detained witnesses should be prohibited from communicating with one another.

4. The Prosecutor replied to the Defence that the issue of the lack of specificity of the duration of the transfer of detained witnesses at the UNDF, as well as any extension, is for the Trial Chamber to decide. The Prosecutor adds that it is the practice of the Registry's Witness and Victims Support Section (WVSS) "to bring a small group of detained witnesses shortly before the testimony of the first witness, and return this small group together, as practicable, and in light of the Trial recess". As to the issue of bias and undue influence over the witnesses, the Prosecutor stresses that, as the practice requires, the detained witnesses will be transferred to the UNDF, and that any issue in relation to alleged bias is irrelevant and premature at this stage of the proceedings. Finally, the Prosecutor advocated that for the "purpose of judicial economy" a single order should be issued by the Court for the transfer of all detained witnesses.

5. In her Supplemental Motion, the Prosecutor indicated that "due to an oversight", she omitted four (4) detained witnesses designated by the pseudonyms FAC, FAW, RV and TQ. Thus the total number of detained witnesses for which the order is sought would be twenty-eight (28). The Prosecution indicated that they would soon file a letter from the Republic of Rwanda with regard to the four additional witnesses to demonstrate that the conditions of Rule 90bis are satisfied. Furthermore, the Prosecutor gave notice of her

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intention to call two (2) detained witnesses, with the pseudonyms FAW and RV who do not appear on her list of intended witnesses filed on 12 April 2001, and sought to add them to the said list pursuant to Rule 73bis (E). On 30 May 2001, the Prosecutor filed a letter from the Rwandan Minister of Justice attesting that the presence of these latter detained witnesses was not requested in any criminal proceedings during the period in which they were required by the Tribunal, and that the transfer would not extend their detention period.

6. In their replies to the Supplemental Motion, Counsel for Nyiramasuhuko submitted *inter alia* that, witnesses FAW and RV do not appear in the final list of witnesses that the Prosecutor intends to call at Trial pursuant to Rule 73bis (B)(iv) of the Rules, and that the said list could not be modified *proprio motu*, by way of a "Notice". On the contrary, a proper Motion under Rule 73bis (E) should be brought to that effect, on the basis of which the Chamber will decide. Moreover, Counsel submitted that the Prosecutor has not complied with Rule 66 (A)(ii) of the Rules in respect to her disclosure obligation in relation to witness FAW according to Counsel for Nyiramasuhuko and Kanyabashi, and in relation to both witnesses FAW and RV according to Counsel for Ntahobali.

7. In her reply, Nyiramasuhuko additionally filed a Counter-Motion to obtain from the National Authorities in Rwanda, statements of detained witnesses. This separate request will be decided upon by the Trial Chamber in a subsequent Decision.

8. The Prosecutor replies to the Defence's responses that the Defence rightly stated that they had not received a copy of the statement of Witness FAW which constituted a newly discovered evidence (the statement is dated 12 April 2001), but represents that on 23 May 2001, she filed a copy of the said statement in a redacted form in light of her pending motion seeking the harmonisation of disclosure deadlines. With regard to Witness RV, the Prosecutor replies to Counsel for Ntahobali that she has complied with her disclosure obligation on 14 March 2001 and that the omission of that witness on her Witness list is a simple mistake on her part. In relation to the addition of FAW and RV to the Witness List, the Prosecutor argues that pursuant to Rule 73bis (E) of the Rules, "before the commencement of Trial, due notice of adding witnesses satisfies the requirements of the Statute and the Rules".

9. In the alternative, the Prosecutor moves before the Trial Chamber under Rules 54, 73 and 73bis of the Rules for leave to add FAW and RV to her witness list and adds that these witnesses are not to be called to testify at Trial for several months.

## DELIBERATIONS

### On the additional witnesses

10. The Chamber notes that the Prosecutor has filed the list of witnesses she intends to call at Trial in the pre-trial Brief on 11 April 2001, in accordance with Rule 73bis (B)(iv) of the Rules but notes that Witnesses QBX, FAW and RV are not included in the

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said list, and that several Defence Counsel have opposed the addition of FAW and RV to the said list.

11. The Chamber recalls that the final list of witnesses to be called at Trial is the list filed by the Prosecutor with the pre-trial brief on 11 April 2001. Nevertheless, the Chamber emphasises that Rule 73*bis* (E) of the Rules was amended during the Plenary held on 30-31 May 2001 and reads as follows: "After commencement of Trial, the Prosecutor, if he considers it to be in the interest 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." The Chamber will therefore review the Prosecutor's Alternative Motion to vary her witness list by adding witnesses FAW and RV.

12. In the "Decision on Motion by the Defendants on the Production of Evidence by the Prosecution" of 8 September 1997 (*The Prosecutor v. Delalic et al.*, Case No. IT-96-21-T), the International Criminal Tribunal for ex-Yugoslavia emphasised that "it cannot place a cut-off date on the disclosure of evidence by the Prosecution [...] This is necessarily so when the prosecution continues to discover new evidence that is relevant to its case and it must, in such circumstances, disclose such evidence, when in form of a witness statement, as soon as practicable, in accordance with Sub-rule 66(A)". The Prosecutor argues that the statement of Witness FAW is newly discovered evidence bearing a date of 12 April 2001, that is after the filing of the Witness List by the Prosecutor and that after having assessed this new evidence, the statement was disclosed to the defence on 23 May 2001 in a redacted form.

13. The Chamber accepts that the statement of Witness FAW can constitute newly discovered evidence and duly considers that, according to the Prosecutor, this witness should not be called to testify at trial before several months so that the Defence should have sufficient time to examine this piece of evidence filed on 23 May 2001. The Chamber grants the Prosecutor's request to add Witness FAW to the list of witnesses she intends to call at trial and will subsequently review the Prosecutor's request for an order of transfer pertaining to the said witness.

14. Pertaining to Witness RV, the Chamber notes that the Prosecutor acknowledges that Witness RV was inadvertently omitted from the Witness List filed on 11 April 2001 whereas statements of the said witness were disclosed to the Defence on 14 March 2001. The Chamber accepts that the Prosecutor has fulfilled in good faith her disclosure obligation and that, this being completed, the Defence should not be prejudiced by adding Witness RV to the Witness List as the witness' statement pertaining to the latter was disclosed in compliance with Rule 66(A)(ii). Having granted leave to add Witness RV to the Witness List, the Chamber will subsequently review the Prosecutor's request for an order for transfer of that witness.

15. Witness QBX is not listed in the pre-trial Brief and the Prosecutor did not file a Motion to add that witness to her list. The Chamber finds that it cannot verify if the disclosure obligation pertaining to that Witness was fulfilled in accordance with Rule 66(A)(ii) and will therefore not review the request pertaining to that witness.

### On the order for transfer of Detained Witnesses

16. Rule 90bis(B) of the Rules requires that a transfer order shall be issued only after prior verification that the following conditions are met:

“(i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) the transfer of the witness does not extend the period of his detention as foreseen by the requested State”.

17. On the basis of the official documentation from Rwandan authorities provided by the Prosecutor concerning the detained witnesses she intends to call to testify at trial, the Chamber is satisfied that the conditions have been met in the present case to order the temporary transfer of (27) detained witnesses with the pseudonyms FAB, FAC, FAD, FAG, FAH, FAI, FAK, FAL, FAM, FAN, FAO, FAQ, FAR, FAS, FAT, FAU, QAF, QAG, QAH, QBU, QBV, QBY, QBZ, QCB, TQ, FAW and RV to the seat of the Tribunal in Arusha, from the time when they are due to testify at trial and for a period not exceeding two months (See “Decision on the Prosecutor’s Motion for the transfer of Detained Witnesses pursuant to Rule 90bis”, of 23 August 2000 in *The Prosecutor v. Bagambiki et al. And Ntagerura*, Case No. ICTR-99-46-I). Mindful of the practical arrangements necessary for the organisation of the transfer of detained witnesses, the Chamber requests from the Prosecutor in co-operation with the Registry, that it be informed in advance of the dates at which these detained witnesses could in practice come to testify at trial. From this date of transfer, the Chamber decides that the detained witnesses should remain at the UNDF for a period not exceeding two months.

19. In reply to the Defence objection to the possible communication between detained witnesses transferred at the same time to the UNDF, the Chamber considers that Rule 90(G) of the Rules provides for a right to cross-examine on “matters affecting the credibility of a witness” so that Counsel for the Defence can, at Trial, test the credibility of detained witnesses like any other Prosecution witnesses if they so wish to do (See “Decision on the Prosecutor’s Motion for the transfer of Detained Witnesses pursuant to Rule 90bis”, of 23 August 2000 in *The Prosecutor v. Bagambiki et al. And Ntagerura*, Case No. ICTR-99-46-I).

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**FOR THE ABOVE REASONS, THE TRIBUNAL,**

**GRANTS** the Prosecutor's Motion for leave to add Witness FAW and RV to her Witness List;

**GRANTS** the Prosecutor's Motion and Supplemental Motion to order the transfer of 27 detained witnesses ;

**DENIES** the Prosecutor's request pertaining to Witness QBX;

**I. ORDERS**, pursuant to Rule 90bis of the Rules, that the 27 detained witnesses with the pseudonyms FAB, FAC, FAD, FAG, FAH, FAI, FAK, FAL, FAM, FAN, FAO, FAQ, FAR, FAS, FAT, FAU, QAF, QAG, QAH, QBU, QBV, QBY, QBZ, QCB, TQ, FAW and RV shall be transferred temporarily to the Tribunal's Detention Facilities in Arusha from the time when they are due to testify at trial, at a date which has to be subsequently specified by the Prosecutor, and for a period not exceeding two months;

**II. REQUESTS** the Government of Rwanda to comply with this order and to arrange for the transfer in liaison with the Registrar and the Tanzanian Government;

**III. INSTRUCTS** the Registrar to:

- A.- Transmit this order to the Governments of Rwanda and Tanzania;
- B.- Ensure the proper conduct of the transfer, including the supervision of the witnesses in the UNDF; and to
- C.- Remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention and, with the shortest delay, inform the Trial Chamber of any such change.

Arusha, 24 July 2001

William H. Sekule,  
Presiding Judge

Winston C. Matanzima Maqutu  
Judge

Arlette Ramarson  
Judge

(Seal of the Tribunal)