

ICTR-99-54-T  
02-10-2009  
(3943 - 3989)

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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 Solomy Balungi Bossa  
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 2 October 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL SECTION / PROSECUTEUR  
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**DECISION ON PROSECUTOR'S URGENT REQUESTS FOR AN ORDER  
TRANSFERRING DETAINED WITNESSES ANAQ AND ANAI PURSUANT TO  
RULE 90 bis**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. Patrick Gabaake  
Mr. Brian Wallace  
Mr. Iskandar Ismail

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri

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

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Trial Chamber");

**BEING SEIZED** of (1) the "Prosecutor's Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", filed on 31 August 2009 and; (2) the "Prosecutor's Urgent Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", filed on 7 September 2009 (the "Motions");

**CONSIDERING** the (1) "Defence's Reply to the Prosecutor's Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence",<sup>1</sup> filed on 3 September 2009 and; the (2) "Defence's Reply to the Prosecutor's Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", filed on 10 September 2009 (the "Responses");

**CONSIDERING** the Letter from the Rwandan Authorities Pursuant to Rule 90 *bis*, filed by the Prosecution on 30 September 2009;

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

**NOW DECIDES** the Motions pursuant to Rule 73 of the Rules.

### INTRODUCTION

1. On 15 July 2009, the Trial Chamber ordered that the trial begin on 23 September 2009.<sup>2</sup>
2. On 31 August 2009 and 7 September 2009, the Prosecution filed its Motions requesting the Trial Chamber to issue an order for the transfer of Witness ANAQ and ANAI from the Republic of Rwanda to the detention facilities of the UN in Arusha no later than 12 October 2009.<sup>3</sup>
3. On 30 September 2009, the Prosecution filed the letter of the Rwandan authorities required by Rule 90*bis* regarding Witnesses ANAQ and ANAI.<sup>4</sup>
4. The Trial Chamber has decided to consolidate its decision regarding the two Motions in the interest of justice and judicial economy.

<sup>1</sup> The Defence filed one Reply with respect to this motion and another Prosecution motion requesting the transfer of witness ANAA, filed on 27 April 2009. The Prosecution informed the Chamber at the Pre-Trial Conference on 7 September 2009 that witness ANAA had been released from detention and that the motion concerning this witness was thus moot, Pre-Trial Conference, T. 7 September 2009, p. 12.

<sup>2</sup> Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date, 15 July 2009.

<sup>3</sup> Motion, para. 8.

<sup>4</sup> Filing of the Letter from the Rwandan Authorities Pursuant to Rule 90*bis* of the RPE, 30 September 2009.



**SUBMISSIONS**

5. The Prosecution requests the Trial Chamber to issue an order for the transfer of Witnesses ANAQ and ANAI from the Republic of Rwanda to the detention facility of the UN in Arusha no later than 12 October 2009.<sup>5</sup> It further requested that the Registrar be ordered to transmit the order of transfer to the authorities of the State of Rwanda, under whose territory, jurisdiction or control the witness is detained;<sup>6</sup> as well as an order that the witness be returned to the custody of the authorities of the requested State at a time that the Trial Chamber shall decide, unless the State, within that period, has transmitted an order of release of the witness, and any further orders that the Trial Chamber may deem fit and proper in the interests of justice.<sup>7</sup>

6. The Prosecution submits that it has taken the necessary steps to ensure that the presence of this witness is not required for any criminal proceedings in progress in Rwanda during the period that the witness is required to be present at the Tribunal, and that it has taken steps to ensure that the transfer of this witness will not extend beyond the period of detention, as foreseen by the Republic of Rwanda.<sup>8</sup> The Prosecution asserts it has written to the Minister of Justice of the Republic of Rwanda requesting confirmation that this witness will not be required in Rwanda and that his transfer will not prolong his detention, and it is awaiting the response of the Minister of Justice, which it undertakes to file as soon as it is received.<sup>9</sup>

7. In the Responses, the Defence argues that the Prosecution does not comply with the demand formulated in Article 90 *bis* of the Rules of Procedure and Evidence, since it has not yet received the response from the Republic of Rwanda regarding the availability of the witness.<sup>10</sup>

8. According to the Defence, the case law of the Tribunal requires that the moving party provide verifications before the Chamber grants a request for an order of transfer.<sup>11</sup> The Defence emphasises that the party applying for an order for transfer of witnesses bears the burden of satisfying the Trial Chamber that the conditions set forth in the rule exist.<sup>12</sup>

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<sup>5</sup> Motion, para. 8.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Motion, para. 4.

<sup>9</sup> Motion, para. 5.

<sup>10</sup> Response, paras. 7-9.

<sup>11</sup> Response para. 10, citing to *The Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T, "Decision on Motion for Jerome Clement Bicamumpaka for the transfer of detained defence witness LD-1 from Rwanda", 23 January 2009, para. 7 and *The Prosecutor v. Nzabonimana*, Case No. ICTR-98-41-PT, "Decision on motion for transfer of witnesses and other issues relating to the preparation of the trial", 24 August 2009, para. 7, in which the Chamber dismissed the Prosecution motion for lack of having received the documents from the Republic of Rwanda while giving leave to renew the application with the adequate documentation.

<sup>12</sup> Response, para. 11.

**DELIBERATIONS**

9. Rule 90 bis (A) of the Rules states that “any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal According to Rule 90 bis (B), a transfer order shall only be issued after prior verification that:

- (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) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

The Chamber notes that the Prosecution has provided the Chamber with a letter from the Rwandan Ministry of Justice dated 30 September 2009, which confirms that Witnesses ANAI and ANAQ are available to testify before the Tribunal in accordance with the requirements of Rule 90 *bis* (B).

**FOR THE ABOVE REASONS, THE TRIBUNAL**


**GRANTS** the Motions;

**ORDERS**, pursuant to Rule 90 *bis*, that Prosecution Witnesses ANAI and ANAQ be transferred to Arusha, no later than 12 October 2009, until as soon as practically possible after his testimony has ended;


**REMINDS** the Registrar of his obligations under Rule 90 *bis* (C) and (D) of the Rules to;

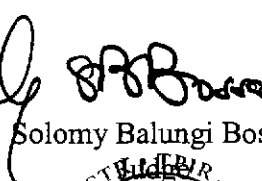
- Transmit this Decision to the Government of the Republic of Rwanda and the Government of the United Republic of Tanzania;
- Ensure the proper conduct of the transfer, including the supervision of the Witnesses in the Tribunal’s detention facilities;
- Remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State which may affect the timing of the temporary detention, and as soon as possible, inform the Chamber of any such change.


**REQUESTS** the Government of the Republic of Rwanda, in accordance with this Decision and Rule 90 *bis* (C) of the Rules, to liaise with the Government of the United Republic of Tanzania, the Registrar and the Witness and Victims Support Section, to take the necessary measures to implement the present Decision.



Arusha, 2 October 2009

  
William H. Sekule  
Presiding Judge

  
Solomy Balungi Bossa



Mparany Rajohnson  
Judge