

ICR-99-54-T  
22-02-10  
(5033-5029)

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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: 22 February 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS SECTION  
2010 FEB 22 1 P 3:44  
FILED

**DECISION ON THE PROSECUTOR'S URGENT REQUEST FOR AN ORDER  
TRANSFERRING DETAINED WITNESSES PURSUANT TO RULE 90bis**

**Office of the Prosecutor**

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

**Defence Counsel**

Mr. Peter Herbert O.B.E.  
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 the “Prosecutor’s Urgent Request for an Order transferring Detained Witnesses Pursuant to Rule 90bis of the Rules of Procedure and Evidence” (the “Motion”);

**CONSIDERING**

1. The ‘Defence’s Response to the Prosecutor’s Urgent Request for an Order transferring Detained Witnesses Pursuant to Rule 90bis of the Rules of Procedure and Evidence (the “Response”);
2. The letter of the Rwandan Ministry of Justice filed confidentially on 9 February 2010;

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

**NOW DECIDES** the request pursuant to Rules 73 and 90bis of the Rules.

### INTRODUCTION

1. The trial commenced on 23 September 2009. Between 23 September and 22 October 2009, the Chamber heard six Prosecution witnesses. On 22 October 2009, the case was adjourned until 25 January 2010 for the resumption of the Prosecution’s case.
2. On 28 January 2010, the Chamber granted the Prosecution’s Motion for Leave to vary its witness list, dropping three witnesses from the witness list and adding five, including ANAR, and ANAT.<sup>1</sup>
3. On 2 February 2010, the Prosecution filed its Motion requesting the Trial Chamber to issue an order for the transfer of Witness ANAR and ANAT from the Republic of Rwanda to the detention facilities of the ICTR in Arusha no later than 22 February 2010.<sup>2</sup>

### SUBMISSIONS OF THE PARTIES

#### *Prosecution Motion*

4. The Prosecution requests the Trial Chamber to issue an order for the transfer of Witnesses ANAR and ANAT no later than 22 February 2010 to give oral evidence as

<sup>1</sup> Decision on Prosecution Motion for Leave to Vary its Witness list, 28 January 2010.

<sup>2</sup> Motion, para.1.

Prosecution witnesses before the Trial Chamber in the present case.<sup>3</sup> These witnesses were sentenced to imprisonment and sent to Gisenyi prison in Rwanda to serve their respective sentences.

5. The Prosecution submits that, pursuant to Rule 90*bis* (B)(i), it has taken the necessary steps to ensure that the presence of the witnesses in question is not required for any criminal proceedings in progress in the Republic of Rwanda during the period in which they are required to appear before the Tribunal.<sup>4</sup> It also contends that, pursuant to Rule 90*bis* (B)(ii), it has taken steps to ensure that the transfer of witnesses will not extend beyond the period of detention foreseen by the Republic of Rwanda.<sup>5</sup> To this effect, the Prosecution submits a letter sent to the Minister of Justice of Rwanda, requesting confirmation that the presence of the witnesses is not required in Rwanda and that the transfer of the witnesses to Arusha will not extend beyond their period of detention;<sup>6</sup>

6. The Prosecution argues that in similar situations, the transfer of detained witnesses was ordered and effected by the Trial Chamber.<sup>7</sup> The Prosecution therefore requests that, the transfer of the aforementioned witnesses for the purpose of testifying in the current trial be ordered in the interest of judicial consistency;<sup>8</sup>

### ***Defence Response***

7. The Defence argues that the Prosecution does not comply with the demand formulated in Article 90*bis* of the Rules, since it has not yet received the response from the Republic of Rwanda regarding the availability of the witness.<sup>9</sup>

8. According to the Defence, the Tribunal's jurisprudence clearly establishes that Article 90*bis* is to be interpreted as requiring that the moving party provide verification before the Chamber grants a request for an order of transfer.<sup>10</sup> In particular, the Defence cites the Chamber's instructions to the parties of 2 February 2010, in which the Chamber reiterated that motions for transfer of detained witnesses will be decided after receipt of the letter of the Rwandan authorities pursuant to Rule 90*bis* (B).<sup>11</sup>

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

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

<sup>5</sup> Ibid.

<sup>6</sup> Motion, para.5, Annex A.

<sup>7</sup> Motion, para.6.

<sup>8</sup> Motion, para.7.

<sup>9</sup> Response, para. 13-14.

<sup>10</sup> Response, para.16, citing 'Decision on Prosecutor's Urgent Request for an Order Transferring Detained Witnesses ANAQ and ANAI pursuant Rule 90*bis*, 2 October 2009, at para. 9; 'Prosecutor v. Bagosora et al, Case n. ICTR-98-41-T, 'Decision on Motion to Order Rwanda to Transfer Witness DO', 3 May 2005; The Prosecutor v. Bizimungu, Case n. ICTR-99-50-T, 'Decision on motion of Jerome-Clement Bicamumpaka for the transfer of detained Defence witnesses LD-1 from Rwanda', 23 January 2008, para.7; The Prosecutor v. Nzabonimana, Case n. ICTR-98-44D-PT, 'Decision on Motion for Transfer of Witnesses and other Issues relating to the Preparation of the trial', 24 August 2009, para.7.

<sup>11</sup> Response, para.17.

9. The Defence therefore asserts that the order cannot be granted before the said verifications have been provided,<sup>12</sup> and that it is entitled to receive a copy of the letter of the Minister of Justice of the Republic of Rwanda providing the required confirmation pursuant to Rule 90*bis* (B) as soon as the Prosecutor receives it.<sup>13</sup>

10. The Defence thus requests the Chamber to deny the Motion and direct the Prosecution to disclose the letter of the Minister of Justice of Rwanda to the Defence as soon as it receives it.<sup>14</sup>

### DELIBERATIONS

11. 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.

12. The Chamber notes that the Prosecution has provided the Chamber with a letter from the Rwandan Ministry of Justice dated 9 February 2010, which confirms that Witnesses ANAR and ANAT 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 Motion;

**ORDERS**, pursuant to Rule 90*bis*, that Prosecution Witnesses ANAR and ANAT be transferred to Arusha, as soon as possible, and 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;

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<sup>12</sup> Response, para.18.

<sup>13</sup> Response, para. 19, citing T. 5 October 2009, p. 2, stressing that the Defence is entitled to a copy of the letter and instructing for it to be disclosed to all parties.

<sup>14</sup> Response, relief, p.5.

- 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, 22 February 2010



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]

