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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: 16 September 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-PT

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**DECISION ON DEFENCE URGENT MOTION FOR AN ORDER DIRECTED AT
THE KINGDOM OF BELGIUM PURSUANT TO ARTICLE 28 OF THE
STATUTE**

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 the “Defence Urgent Motion for an Order Directed at the Kingdom of Belgium”, filed confidentially on 4 September 2009 (the “Motion”);

NOTING that the Prosecution did not respond to the Motion;

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

NOW DECIDES the Motion pursuant to Article 28 of the Statute and Rule 73 of the Rules.

INTRODUCTION

1. The Defence is seeking to meet with three Belgian citizens to facilitate the preparation of its defence.¹ The Defence further seeks a variety of documentary evidence related to the three Belgians specified, the Accused, and interactions between the Accused and the Kingdom of Belgium, as set forth below.

2. From the Kingdom of Belgium and the first Belgian, the Defence requests:

- Documentary evidence of official visits by the Accused to the Kingdom of Belgium between 1993 and 1994;
- Documentary evidence of official meetings between the first Belgian and the Accused in 1993 and 1994;
- Documentary evidence of the first Belgian’s presence in Rwanda in February and March 1994;
- Any documentary evidence of the Accused’s attitude towards ethnic problems and the political crises in Rwanda between 1990 and 1994;
- A copy of the Protocol, if applicable, setting forth the procedure to be followed, and any control by the Accused regarding, any Belgian funding of development projects in Rwanda at the relevant time.²

3. From the Kingdom of Belgium and the second Belgian, the Defence requests:

¹ Motion, para. 10. The named Belgians’ confidential information is disclosed in the confidential motion only.

² Motion, para. 11.



- Documentary evidence regarding funds granted by the Kingdom of Belgium to Rwanda during the relevant period, any support by the Kingdom of Belgium for the balance of payment or other emergency support;
 - The second Belgian's presentation before the *Commission d'enquête parlementaire de Belgique sur les événements du Rwanda* on 16 May 1997.³
4. From the Kingdom of Belgium and the third Belgian, the Defence requests:
- Documentary evidence of any official travel by the Accused to Belgium between 1990 and 1993;
 - Documentary evidence of any meetings between the third Belgian and the Accused in Rwanda and in Belgium;
 - Documentary evidence of the third Belgian's presence in Rwanda between 1990 and 1993;
 - Any documentary evidence of the Accused's attitude towards ethnic problems and the political crises in Rwanda between 1990 and 1994, as requested from the Kingdom of Belgium and the first Belgian;
 - The Protocol, if applicable, governing Belgian funding of development projects in Rwanda at the relevant time, as requested from the Kingdom of Belgium and the first Belgian.⁴
5. The Defence submits that it must meet with the three Belgians to determine (1) whether to call them as witnesses; (2) whether to submit a notice of alibi; (3) whether the Belgians named have access to or possession of documents which would assist the Defence in cross-examining Prosecution witnesses; and (4) whether it is necessary to ensure the three Belgians' presence in Arusha before the commencement of the Prosecution case.⁵ The information it seeks relates to the allegation of diversion of funds; a possible alibi defence; and the character of the Accused.⁶
6. The Defence submits that it contacted the three named Belgians by mail on 4 August 2009, but has received no response.⁷ Consequently, it contacted the External Relations section of the Tribunal on 27 August 2009, which contacted the Kingdom of Belgium on the Defence's behalf.⁸

³ Motion, para. 11.

⁴ Motion, para. 11.

⁵ Motion, para. 12.

⁶ Motion, paras. 14, 17-18.

⁷ Motion, paras. 20-21.

⁸ Motion, paras. 22-23.

7. The Defence asks that the Chamber request the cooperation of the Kingdom of Belgium, under Article 28 of the Statute, in facilitating Defence meetings with the three named Belgians and production of the specified documents.⁹

DELIBERATIONS

8. Pursuant to Article 28(2) of the Statute, States shall “comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to: (a) The identification and location of persons; (b) The taking of testimony and the production of evidence[.]” Moreover, the Chamber recalls United Nations resolutions 955 (1994) and 1165 (1998), urging States to cooperate fully with the Tribunal.¹⁰

9. In accordance with the Tribunal’s jurisprudence, the party seeking an Article 28 order for State cooperation regarding the production of evidence or service of documents must:

- (i) Specifically identify, to the extent possible, the evidence sought;
- (ii) Articulate the evidence’s relevance to the trial; and
- (iii) Show that its efforts to obtain the evidence have been unsuccessful.¹¹

10. The Chamber considers that the Defence has identified the evidence sought: meetings with the three named Belgians and the documents listed above. However, the Chamber does not consider that the Defence has set forth its request for documents related to the Accused’s attitude towards the ethnic tensions and political unrest in Rwanda between 1990 and 1994 with adequate specificity. With regards to the evidence’s relevance to the trial, the Chamber notes that the Defence offers two primary arguments: that the sought evidence is relevant to the allegation of diversion of funds, and it might be used in support of an alibi defence.¹² By virtue of the annexes to the Motion, the Defence has further demonstrated that it has made efforts to obtain the sought evidence.¹³ Moreover, the Belgian government has informed the Defence that it will not cooperate in the absence of an order from this Chamber. In such circumstances,

⁹ Motion, paras. 24-27.

¹⁰ See *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on the Defence Motion Seeking Cooperation from a Certain State and the UNHCR Pursuant to Article 28 of the Statute and Resolutions 955 (1994) and 1165 (1998) of the Security Council, 25 August 2004, pg. 2.

¹¹ See *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu’s Requests for Disclosure of the Brugiere Report and the Cooperation of France (TC), 25 September 2006, para. 25; see also Decision on Mr Bicomumpaka’s Request for Order for Cooperation of the Kingdom of Belgium, 12 September 2007, para. 3.

¹² Motion, paras. 17-18. While the Defence argues that the information sought will help it develop the character of the Accused, para. 14, the Defence does not specifically cast that argument in terms of the relevance of the sought evidence.

¹³ Motion, Annexes 4-10.

the Tribunal's jurisprudence holds that the Defence need not show efforts to obtain the sought evidence have been unsuccessful.¹⁴

11. The Chamber further considers that the Defence has established that access to the named Belgians might be useful in deciding whether to call the named Belgians as alibi witnesses or to rebut testimony regarding the allegation of diversion of funds. Thus, the evidence may be relevant. However, the Chamber does not consider that the Defence needs to contact the named Belgians to determine whether to file a notice of alibi, as information about where the Accused was at the times specified in the Indictment should be within the personal knowledge of the Accused. In addition, the Chamber does not consider that the Defence has made a showing that there is any likelihood that the Defence would require the named Belgians' presence in Arusha during the Prosecution case in order to conduct an adequate defence. The Chamber notes that the Defence does not generally require its witnesses to be present in Arusha during the Prosecution case.

12. With respect to the identification of the documents sought the Chamber considers that the Defence has properly set forth the documentary evidence sought in as much detail as possible, with the exception of documents related to the Accused's attitude towards the ethnic tensions and political unrest in Rwanda between 1990 and 1994. Accordingly, the Chamber grants the Motion with the exception of this request.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the Motion as set forth above;

RESPECTFULLY REQUESTS the Kingdom of Belgium to provide any relevant assistance in facilitating meetings between the Defence for Mr. Ndirabatware and the named Belgians;

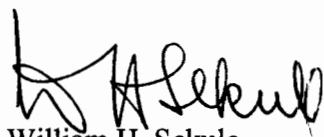
RESPECTFULLY REQUESTS the Kingdom of Belgium to provide the Defence with access to any of the documents listed in paragraph 11 of the Motion and summarized in paragraphs 2-4 of this Decision which may be in its possession, with the exception of alleged documents relating to the Accused's attitude towards the ethnic tensions and political unrest in Rwanda between 1990 and 1994;

DIRECTS the Registry to transmit this Decision to the relevant authorities of the Kingdom of Belgium.

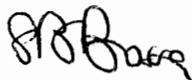
Arusha, 16 September 2009

¹⁴ Motion, para. 9; see *The Prosecutor v. Bagosora et al.*, Case No. 98-41-T, Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute (TC), 21 April 2006, para. 4; Decision on Mr. Bicomupaka's Request for Order for Cooperation of the Kingdom of Belgium, *supra*, para. 4.

The Prosecutor v. Augustin Ngirabatware, Case No. ICTR-99-54-PT



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

