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(5832-5827)

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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: 31 March 2010

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
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**DECISION ON DEFENCE MOTION REQUESTING AN ORDER DIRECTED TO
THE HOLY SEE**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. William Egbe
Mr. Patrick Gabaake
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 "Chamber");

BEING SEIZED of the "Defence Urgent Motion Requesting an Order Directed to the Holy See (pursuant to Article 28 of the Statute and Resolution 955 of the United Nations Security Council)" filed confidentially on 4 February 2010 (the "Motion");

CONSIDERING:

1. The Prosecutor's "Response to Defence Urgent Motion Requesting an Order Directed to the Holy See (pursuant to Article 28 of the Statute and Resolution 955 of the United Nations Security Council)" filed confidentially on 8 February 2010 (the "Response");
2. The Defence "Reply to Prosecutor's Response to Defence Urgent Motion Requesting an Order Directed at the Holy See (pursuant to Article 28 of the Statute and Resolution 955 of the United Nations Security Council)" filed on 10 February 2010 (the "Reply");

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

NOW DECIDES the Motion pursuant to Rule 73 of the Rules.

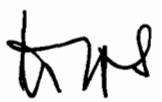
INTRODUCTION

1. By communication dated 3 September 2009, the Defence requested the Holy See to transmit a questionnaire (the "Questionnaire") to Monsignor Giuseppe Bertello the Papal Nuncio in Rwanda in 1994¹. The Questionnaire, a copy of which is attached hereto as Annex I, contained 18 questions, relating to the incidence, extent and nature of meetings and conversations between Mr. Ngirabatware and Monsignor Bertello during certain periods material to the events described in the Indictment.

2. By a letter dated 12 October 2009, Monsignor Bertello confirmed that he had meetings and discussions with Mr. Ngirabatware during the period he was in Rwanda.² He stated that he no longer recalled many of the details, but that he did, however, remember having a heated discussion with Mr. Ngirabatware regarding the killing of a group of priests and nuns in the neighbourhood of Remera. This brief, one-page letter, a copy of which is attached hereto as Annex II, comprised Monsignor Bertello's response to the Questionnaire.

¹ Motion, para. 2, Annex 1, *Note Verbale* from the Registrar dated 3 September 2009.

² *Id.*, para. 4, Annex 3, Response of Monsignor Guiseppe Bertello dated 12 October 2009.



3. In response, the Defence dispatched to the Holy See a second communication dated 28 October 2009. This time, the Defence requested the Holy See to facilitate a meeting between Monsignor Bertello and a member of the Defence team.³

4. On 8 December 2009, having received no response from the Holy See, the Defence further requested the assistance of the Registrar of the Tribunal to contact the Holy See.⁴ On 17 December 2009, the Registrar addressed a Note Verbale to the Holy See as a reminder stressing the urgency of the Defence request in view of the near resumption of the trial.⁵

5. On 5 January 2010, the Defence received Monsignor Bertello's answer dated 23 December 2009, in which he declared that he had nothing to add to his previous response.⁶

SUBMISSIONS OF THE PARTIES

Defence

6. The Defence moves the Chamber to issue an order or, alternatively, a request to the Holy See, per Article 28 of the Statute and Security Council Resolutions 955 (1994) and 1165 (1998), to facilitate meetings between Monsignor Bertello and a member of the Defence team.⁷

7. The Defence submits that its request meets the criteria under Article 28 of the Statute as defined in the jurisprudence of the ICTR, in that it sets forth with particularity the information sought, its relevance to the trial, the efforts that have been made to obtain the information, and the type of assistance sought.⁸

³ *Id.*, para. 5, Annex 4, *Note Verbale* from the Registrar dated 3 September 2009.

⁴ *Id.*, para. 6, Annex 5, Email from the Defence to ERSPTS dated 8 December 2009.

⁵ *Id.*, para. 7, Annex 6, *Note Verbale* from the Registrar dated 17 December 2009.

⁶ *Id.*, para. 8, Annex 7, Letter from the Apostolic Nunciature in Tanzania dated 5 January 2010 including the response of Mr. Guiseo Bertello, dated 23 December 2009.

⁷ *Id.*, paras. 1, 74-79.

⁸ *Id.*, para. 55, citing *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T. ("*Bagosora et al.*"), Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4; *Bagosora et al.*, *Décision relative à la demande d'assistance adressée à la République togolaise en vertu de l'Article 28 du Statut*, 31 October 2005, para.2; *The Prosecutor v. Augustin Nindiliyimana et al.*, Case No. ICTR-00-56-T, *Décision relative à la requête de Nzuwonemeye intitulée Motion Requesting the Cooperation from the Government of Ghana Pursuant Article 28 of the Statute (TC)*, 13 February 2006, para.6; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T ("*Bizimungu et al.*"), Decision on Casimir Bizimungu's Request for Disclosure of the Bruguière Report and the Cooperation of France (TC), 25 September 2006 ("*Bizimungu et al.* Decision of 25 September 2006"), para. 25; *Bizimungu et al.*, Case No. ICTR-99-50-T, *Décision relative à la Requête de Bicumumpaka tendant à faire solliciter la coopération de la République française*, 26 September 2007, para. 3; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-PT, *Décision sur la Requête Urgente de Callixte Nzabonimana Demandant à la Chambre d'Ordonner à la France Coopération et Assistance (TC)*, 2 July 2009, para. 5; *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-98-PT, Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute (TC), 16 September 2009, para. 9; *The Prosecutor v. Callixte Nzabonimana*, Case No.

8. Specifically, the Defence asserts that Monsignor Bertello's evidence will be crucial to support Mr. Ngirabatware's plea of alibi, as well as the defence against the misappropriation of funds.⁹

9. The Defence claims that it has used the utmost diligence to obtain a meeting with Monsignor Bertello, but to no avail.¹⁰

10. The Defence affirms that the Holy See is bound by Security Council Resolution 955 and by Article 28 of the Statute exactly on the same basis as Member States of the UN, and therefore has the duty to cooperate with the Tribunal.¹¹

11. The Holy See is considered a State by the international community. This is demonstrated by its membership to numerous International Organizations and various international treaties, as well as the fact that it holds diplomatic relations with more than 177 countries.¹² Moreover, the Holy See is recognized as a State by the UN.¹³ The Defence contends furthermore that the status of the Holy See as a State is undisputed before the Tribunal.¹⁴ Finally, the Holy See has the right to vote during the elections of the judges of the Tribunal and to present nominated judges.¹⁵

12. The Holy See has attained the status of a *de facto* or quasi Member State of the United Nations, and therefore has rights which should be balanced with the resulting duties in accordance with the aims and objectives of the United Nations.¹⁶ Should the Holy See not be considered a *de facto* Member State of the United Nations, it would still be bound by Article 28 and Resolution 955, as the two texts impose an obligation to cooperate beyond the mere membership to the United Nations.¹⁷ This is confirmed by the *Rukundo* Decision, in which a request was made to Switzerland, which at the time was not a Member State to the United Nations.¹⁸

ICTR-98-44D-T, Decision on Nzabonimana's Motion Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council (TC), 19 October 2009.

⁹ Motion, paras. 63-68.

¹⁰ *Id.*, paras. 69-72.

¹¹ *Id.*, para. 27; the Defence also identifies Security Council Resolution 1165 as relevant to the Holy See's duty. See *id.*, para. 31.

¹² Reply, para. 10, citing various international organizations and treaties as well as the Official Website of the Secretariat of State of the Holy See regarding the diplomatic relations of the Holy See with other States.

¹³ Reply, para. 12.

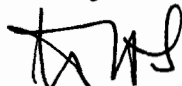
¹⁴ *Id.*, para. 6, citing *Bagosora et al*, Decision on Defence Motion to Obtain Cooperation from the Vatican pursuant to Article 28 (TC), 13 May 2004.

¹⁵ Reply, para. 15.

¹⁶ Motion, paras. 10-26.

¹⁷ *Id.*, paras. 28-53; Reply, para. 17, citing *The Prosecutor v. Juvénal Kajelijeli*, Decision on Kajelijeli's motion for Extension of Judicial Cooperation to Certain States Pursuant to Article 28 of the Statute of the Tribunal (TC), 9 May 2002.

¹⁸ Motion, paras. 45-49, 53; Reply paras. 18-19, citing *The Prosecutor v. Emmanuel Rukundo*, request to the Government of Switzerland for Arrest (TC), 12 July 2001.



Prosecution

13. The Prosecution submits that while the Holy See is undisputedly a subject of international law and has a certain degree of international personality, the Holy See cannot be considered a State,¹⁹ as it does not meet the criteria of statehood, as enshrined for instance in the Montevideo Convention on the Rights and Duties of States.²⁰ As government of the Roman Catholic Church, the Holy See can have neither a permanent population nor a permanent territory as required by the convention.²¹

14. As it is not a State, let alone a *de facto* Member State, it cannot be bound by Article 28 of the Statute and resolution 955.²² The Prosecution considers that the Holy See is an entity *sui generis*,²³ whose status may come closest to that of an international organization.²⁴ The cooperation of non-members of the UN and non-state entities such as international organizations is merely “desirable”.²⁵

15. The comparison to Switzerland cannot hold up, as the Holy See’s enjoys a unique non-member status determined in General Assembly Resolution 58/314 of 2004,²⁶ thereby substantially differing from Switzerland status before it became a member in 2002.²⁷

16. The Prosecution therefore requests the Chamber to deny the Defence’s prayer to order the Holy See to cooperate. The Prosecution makes no submissions regarding the relief sought of a request for cooperation on a voluntary basis.²⁸

DELIBERATIONS

17. 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.

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

¹⁹ Response, para. 6-8.

²⁰ *Id.*, para. 12.

²¹ *Id.*, para. 13-14.

²² *Id.*, para. 19.

²³ *Id.*, para. 7.

²⁴ *Id.*, para. 21.

²⁵ *Id.*, para. 22.

²⁶ *Id.*, para. 26, citing A/RES/58/314, Resolution adopted by the General Assembly, 16 July 2004.

²⁷ Response, paras. 24-28.

²⁸ *Id.*, para. 29.

- (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.²⁹

19. The Chamber considers that the Defence has properly identified, and in as much detail as possible, the evidence sought: precisions to the Questionnaire by Monsignor Bertello, particularly on the dates and content of the meetings mentioned in his answer. The Defence has also demonstrated that it has made diligent efforts to obtain the evidence it seeks.³⁰

20. The Chamber considers the desired evidence may be relevant, as the Accused is alleged to have been at Gisenyi between 6 and 12 April 1994, and the evidence sought might help to rebut this allegation.

21. However, the Chamber considers that the Motion does not adequately reflect the answers made by Monsignor Bertello to the Defence request. The Defence states that its efforts to obtain evidence from him have been unsuccessful, as he refused to provide further information and details requested.³¹ However, Monsignor Bertello merely stated that after 15 years, it would be impossible for him to answer to all the questions in the questionnaire sent to him by the Defence.³²

22. The Chamber recalls that the Defence sent a list of questions to be put to Monsignor Bertello. He replied to these questions in a letter dated 12 October 2009.³³ However, the Chamber notes that this response did not address several of the questions submitted by the Defence.³⁴ It is the view of the Chamber that the communication between Monsignor Bertello and the Defence should continue with the immediate goal of possibly securing answers to the Questionnaire.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion;

RESPECTFULLY ENCOURAGES the authorities of the Holy See and the Defence to resume communication in order to expedite this matter regarding the meeting with Monsignor Bertello and the list of questions to be put to him, bearing in mind the

²⁹ See *Bizimungu et al.* Decision of 25 September 2006, para. 25; see *Bizimungu et al.*, Decision on Mr. Bicomumpaka's Request for Order for Cooperation of the Kingdom of Belgium (TC), 12 September 2007, para. 3.

³⁰ Motion, Annexes 1-7.

³¹ *Id.*, paras. 56, 72.

³² *Id.*, Annex 3.

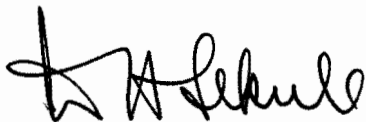
³³ *Id.*

³⁴ *Id.*, Annex 1.

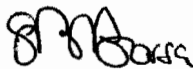
imperative to grant the Accused a fair and expeditious trial, and to treat this matter as an urgent one;

DIRECTS the Registry to translate and transmit this Decision to the relevant authorities of the Holy See.

Arusha, 31 March 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

