

ICTR-99-54-T  
28-04-10  
(6026-6012)

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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: 28 April 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 AT  
THE REPUBLIC OF SENEGAL**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. William Egbe  
Mr. Patrick Gabaake  
Mr. Iskandar Ismail  
Ms. Faria Rekkas

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri  
Mr. Deogratias Sebureze  
Ms. Anne-Gaëlle Denier

**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 Extremely Urgent Motion Requesting an Order Directed at the Republic of Senegal (pursuant to Article 28 of the Statute)”, filed confidentially on 19 March 2010 (the “Motion”);

**CONSIDERING** the “Supplementary Defence Information Relating to the Extremely Urgent Motion Requesting the Trial Chamber to Issue an Order Directed at the Republic of Senegal”, filed confidentially on 20 April 2010 (the “Supplementary Information”);

**NOTING** that the Prosecution did not respond to the Motion;

**CONSIDERING** also 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 moves the Chamber to issue an order directed to the Republic of Senegal to deliver a questionnaire to two Senegalese nationals, and to facilitate a meeting between them and the Defence.<sup>1</sup>
2. It also moves for an order directed to the Republic of Senegal to disclose the following documents:
  - (a) Any documentary evidence pertaining to an official visit of Augustin Ndirabatware to Dakar, Senegal, in 1994;
  - (b) A copy of the official message conveyed by Augustin Ndirabatware and addressed to President Abdou Diouf;
  - (c) The list of visiting persons from Rwanda to the Ministry of Foreign Affairs of Senegal from April to July 1994;
  - (d) Any documentary evidence pertaining to the presence of the first named Senegalese national in Cairo between May and July 1993, and in New York between August and October 1993, as well as any documentary evidence pertaining to his discussions with Mr. Ndirabatware at those time;

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<sup>1</sup> Motion, paras. 1, 10, 13, 38-41, 43, Annexes 9-10. The identifying information of the first and second named Senegalese nationals can be located, respectively, in Annexes 1 and 2 of this Decision.



- (e) Any protocol with regard to the procedure to be followed and the role of the Ministry of Planning when Rwanda was benefiting from a UNDP-supported project; and
- (f) Any official document or documentary evidence pertaining to the meetings and cooperation between Augustin Ngirabatware and the second named Senegalese national or his assistant in 1993 and 1994 in Rwanda and in Senegal.<sup>2</sup>

3. The Defence submits that these documents are relevant to rebut the charge that the Accused unlawfully diverted external development funds. For the same reason, the Defence seeks to secure the solicited answers from, and meeting with, the second named Senegalese national. As for the first named Senegalese national, the Defence contends that his questionnaire responses and its requested meeting are relevant to establishing the Accused's views on the ethnic problems facing Rwanda from 1990 through 1994.<sup>3</sup>

4. The Defence affirms that it has made numerous attempts to secure the cooperation of the Republic of Senegal. It has arranged for the Office of the Registrar to transmit two sets of *Notes Verbales* and to contact the Ministry of Foreign Affairs of Senegal by telephone. Furthermore, the Defence has called the Ministry on nine occasions. Although the Defence received an unofficial promise for communication on 9 February 2010, and despite the Registrar's communication with the Senegalese Minister of Justice on 13 April 2010, the Defence has yet to obtain the assistance it seeks.<sup>4</sup>

#### DELIBERATIONS

5. 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; [and] (c) The service of documents". Moreover, the Chamber recalls Security Council Resolutions 955 (1994) and 1165 (1998), urging States to cooperate fully with the Tribunal.<sup>5</sup>

6. In accordance with the Tribunal's jurisprudence, a 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

<sup>2</sup> *Id.*, paras. 1, 14, 38, 42-43. For the name of this assistant, see *id.*, para. 14.

<sup>3</sup> *Id.*, paras. 15-29.

<sup>4</sup> *Id.*, paras. 2-7, 30-36, Annexes 1-8; Supplementary Information, paras. 2, 5, 8, 12-13, 15-16.

<sup>5</sup> Decision on Defence Urgent Motion Requesting an Order Directed to France Pursuant to Article 28 of the Statute (TC), 4 December 2009 ("Decision of 4 December 2009"), para. 7, citing *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on the Defence Motion Seeking a Request for Cooperation and Judicial Assistance 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 (TC), 25 August 2004, pg. 2.

(iii) Show that its efforts to obtain the evidence have been unsuccessful.<sup>6</sup>

7. The Chamber considers that the Defence has identified, in as much detail as possible, the evidence it seeks. Specifically, it requests evidence pertaining to: the visit of Mr. Ngirabatware and other persons from Rwanda to Senegal; the first named Senegalese national's presence in Cairo and New York during specific months; meetings between Mr. Ngirabatware and the second named Senegalese national or his assistant in 1993 and 1994; and the role and procedures of the Ministry of Planning during the time that Rwanda benefited from UNDP-supported projects. Furthermore, the Defence seeks the two named Senegalese nationals' responses to its questionnaires, as well as a meeting with them.

8. As for the evidence's relevance to the trial, the Chamber recalls that the Accused is alleged to have diverted development funds to finance the *Interahamwe*, and to have been responsible for such diversion by his subordinates.<sup>7</sup>

9. Furthermore, to prove its allegation of genocide, the Prosecution must establish that Mr. Ngirabatware possessed the requisite *mens rea*, including the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

10. The identified evidence may tend to rebut these charges, and a meeting with the named individuals might be useful in deciding whether to call them as witnesses. Therefore, this evidence and the desired meetings may be relevant to the trial.

11. The Defence has also demonstrated that it has made diligent efforts to obtain the evidence it seeks, and that these efforts have been unsuccessful.<sup>8</sup>

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Motion;

**RESPECTFULLY REQUESTS** the Republic of Senegal to disclose to the Defence any of the documents listed in paragraph 2 of this Decision, which may be in its possession;

**RESPECTFULLY REQUESTS** the Republic of Senegal to deliver the confidential questionnaires, attached to this Decision as Annexes 1 and 2, to the first and second named Senegalese nationals, respectively;

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<sup>6</sup> Decision of 4 December 2009, para. 8, citing *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T ("*Bizimungu et al.*"), Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France (TC), 25 September 2006, para. 25; *Bizimungu et al.*, Decision on Mr. Bicomupaka's Request for Order for Cooperation of the Kingdom of Belgium (TC), 12 September 2007, para. 3.

<sup>7</sup> See Amended Indictment, filed 14 April 2009, paras. 15, 38.

<sup>8</sup> Motion, Annexes 1-6; Supplementary Information, paras. 2, 8.



**RESPECTFULLY REQUESTS** the Republic of Senegal to provide any relevant assistance in facilitating meetings between the Defence and these two named Senegalese nationals; and

**DIRECTS** the Registry to translate and transmit this Decision to the relevant authorities of the Republic of Senegal.

Arusha, 28 April 2010



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]