

ICTR-99-54-T
28-04-10
(6011-6008)

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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

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**DECISION ON DEFENCE MOTION FOR AN ORDER DIRECTED AT
SWITZERLAND**

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
Ms. Chloé Gaden-Gistucci

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 the Trial Chamber to Issue an Order to Compel Switzerland to Cooperate (pursuant to Article 28 of the Statute of the ICTR)”, filed confidentially on 31 March 2010 (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.

SUBMISSIONS

1. The Defence moves the Chamber to issue an order to Switzerland to provide, or to authorize the provision of, information and material that allegedly rebuts the diversion of funds charge.¹
2. The Defence seeks to obtain the Structural Adjustment Program contribution agreements signed by Switzerland and Rwanda between 1990 and 1994.² This evidence is relevant to challenge the allegations of diversion of funds arising out of Prosecution Witness ANAC’s report. That report, the Defence suggests, revolves around funds provided to the World Bank, including by Switzerland.³
3. The Defence requested this information from the World Bank, which replied that it could not divulge the agreements without Switzerland’s consent. After the Defence sought this consent, Switzerland responded that it would prefer to act in accordance with an order by the Chamber.⁴
4. The Defence therefore requests that the Chamber order Switzerland to disclose the requested agreements or, alternatively, to authorize the World Bank to disclose them to the Defence.⁵

¹ Motion, paras. 1, 13, 24-27.

² *Id.*, para. 12.

³ *Id.*, paras. 13-20.

⁴ *Id.*, paras. 2-9. The Chamber notes that the Motion refers to annexes which were not filed. As a result, the Chamber relies solely on the Motion in characterizing the exchanges between the Defence, the World Bank and Switzerland.

⁵ *Id.* paras. 24-27.



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: [...] (b) The taking of testimony and the production of evidence”. Moreover, the Chamber recalls Security Council Resolutions 955 (1994) and 1165 (1998), urging States to cooperate fully with the Tribunal.⁶

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
- (iii) Show that its efforts to obtain the evidence have been unsuccessful.⁷

7. The Chamber considers that the Defence has identified, in as much detail as possible, the evidence sought. Specifically, it requests the agreements signed between 1990 and 1994 by Switzerland and Rwanda concerning contributions to the Structural Adjustment Program for Rwanda.

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.⁸ The identified documents may be relevant to the Defence.

9. The Defence has demonstrated that it has made efforts to obtain the evidence it seeks, but that Switzerland has indicated that it will not cooperate in the absence of an order from this Chamber. In such circumstances, the Tribunal’s jurisprudence holds that the Defence need not show efforts to obtain the sought evidence have been unsuccessful.⁹ Accordingly, the Chamber grants the Motion.

⁶ 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, p. 2.

⁷ 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. Bicamumpaka’s Request for Order for Cooperation of the Kingdom of Belgium (TC), 12 September 2007 (“*Bizimungu et al.* Decision of 12 September 2007”), para. 3.

⁸ See Amended Indictment, filed 14 April 2009, paras. 15, 38.

⁹ Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute (TC), 4 December 2009, para. 7, citing *The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-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; *Bizimungu et al.* Decision of 12 September 2007, para. 4.



FOR THE ABOVE REASONS, THE CHAMBER**GRANTS** the Motion;**RESPECTFULLY REQUESTS** Switzerland to provide the Defence with access to the documents pertaining to the agreements between Switzerland and Rwanda for contribution to the Structural Adjustment Program for Rwanda; and**DIRECTS** the Registrar to transmit this Decision to the relevant authorities of Switzerland.

Arusha, 28 April 2010

William H. Sekule
Presiding JudgeSolomy Balungi Bossa
JudgeMparany Rajohnson
Judge

[Seal of the Tribunal]