

ICTR-99-54-T
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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 May 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 THE
KINGDOM OF BELGIUM REGARDING WITNESS ANAV**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Iskander 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 “Ngirabatware Defence’s Confidential and Extremely Urgent Motion Requesting an Order Directed to the Kingdom of Belgium Regarding Witness ANAV”, filed confidentially on 3 May 2010 (the “Motion”);

CONSIDERING:

- (a) The “Prosecutor’s Response to Defence Confidential and Extremely Urgent Motion Requesting an Order Directing the Kingdom of Belgium Regarding Witness ANAV (Article 28 of the Statute)”, filed on 12 May 2010; and
- (b) The “Defence Reply to the Prosecutor’s Response to Defence Confidential and Extremely Urgent Motion Requesting an Order Directing the Kingdom of Belgium Regarding Witness ANAV”, filed confidentially on 14 May 2010;

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. On 29 April 2010, the Prosecution moved the Chamber for leave to vary its witness list. The Prosecution sought to add three witnesses, including Witness ANAV.¹
2. The Defence indicates that it submitted a request for cooperation from the Kingdom of Belgium regarding documents pertaining to Witness ANAV on 30 April 2010. Anticipating a negative response from Belgium, the Defence filed the present Motion on 3 May 2010.²
3. On 10 May 2010, the Prosecution indicated that it sought to withdraw its motion of 29 April 2010, in part, because it had reason to believe that Witness ANAV’s written statements may suffice in place of his testimony.³

¹ Prosecutor’s Extremely Urgent Motion for Leave to Vary the List of Witnesses To Be Called and Extension of Witness Protection Orders [made pursuant to Rules 73bis (E), 54, 69, 75 of the Rules of Procedure and Evidence, Article 21 of the Statute of the Tribunal and the Inherent Criminal Jurisdiction of the Tribunal], 29 April 2010, para. 57.

² Motion, paras. 2, 10, Attachment 1.

³ Prosecutor’s Extremely Urgent Motion for Leave to Vacate the Scheduled Trial Date and Extend the Date for Commencement of Third Phase of Prosecution Case [made pursuant to Rule 73bis (A) and 54 of the Rules of Procedure and Evidence, and the Inherent Criminal Jurisdiction of the Tribunal], 10 May 2010, paras. 2, 42, 49.

4. On 24 May 2010, the Chamber noted and granted the Prosecution's withdrawal of its motion of 29 April 2010, which had sought the addition of Witness ANAV to its list.⁴

SUBMISSIONS OF THE PARTIES

Defence Motion

5. The Defence seeks to obtain Witness ANAV's statements to Belgian authorities, his statements to the Prosecution, transcripts of his trial testimony in Belgium, and files related to his immigration and refugee status.⁵ This evidence is relevant to challenge Witness ANAV's anticipated testimony about the Accused's alibi defence.⁶

6. The Defence submits that it requested that ERSPS solicit this information from Belgium. According to the Defence, Belgium has demonstrated its inability to provide assistance absent a request by the Chamber. The Defence relies on Belgium law, a Belgian Royal decree, and past communications between the Defence and the Belgian Ministry of Justice to show the necessity of obtaining a formal request by the Chamber.⁷

7. The Defence therefore prays that the Chamber request the Kingdom of Belgium to provide access to the requested documents.⁸

Prosecution Response

8. The Prosecution submits that because it has decided not to call Witness ANAV to testify, the Defence no longer needs the requested documents to prepare for his cross-examination. Regardless, the Prosecution would disclose certain documents concerning Witness ANAV by 19 May 2010.⁹

9. The Prosecution recognizes that its Response was filed after the deadline of 7 May 2010. It explains that it decided to withdraw Witness ANAV after this deadline had passed, and the Prosecution requests that the Chamber accept its Response in the interest of justice.¹⁰

⁴ Decision on Prosecution Motion to Vacate the Trial Date (TC), 24 May 2010, p. 9.

⁵ Motion, para. 14. As part of this request, the Defence identifies a specific trial in which Witness ANAV is thought to have testified, which appears to have taken place in Belgium. See *id.*; Defence Response to the Prosecutor's Extremely Urgent Motion to Vary the Witnesses To Be Called and Extension of Witness Protection Orders, 4 May 2010, paras. 50-51. Due to witness protection concerns, the Chamber will not name this trial.

⁶ Motion, para. 15.

⁷ *Id.*, paras. 2-11, 17, Attachment 1. The Chamber observes that the Defence did not attach the requested *Note Verbale* to its Motion.

⁸ *Id.* p. 7.

⁹ Response, paras. 6-10, Annex A.

¹⁰ *Id.*, paras. 4-5, 10.



Defence Reply

10. The Defence reiterates its prayer for relief, which is not moot because the Prosecution's request to withdraw Witness ANAV is still under consideration by the Chamber. Furthermore, the Defence contends that it must be prepared in case the Prosecution changes its mind again and seeks to call Witness ANAV. Finally, the documents promised by the Prosecution do not satisfy fully the Defence request.¹¹

DELIBERATIONS

11. As a preliminary matter, the Chamber notes that the Prosecution did not respond to this Motion in the time allocated to do so, but instead filed the Response two days after it indicated its wish to withdraw Witness ANAV. Under these specific circumstances, and in the interest of justice, the Chamber will consider the Prosecution Response while assessing the Defence Motion.

12. 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.¹²

13. 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.¹³

14. The Chamber considers that the Defence has identified, in as much detail as possible, the evidence sought. Specifically, it requests any statements made by Witness ANAV to Belgian authorities and to the Prosecution, transcripts of his testimony in Belgium, and files pertaining to his immigration and refugee status.

15. As for the evidence's relevance to the trial, the Defence claims that the documents are needed to prepare for Witness ANAV's cross-examination and to challenge his

¹¹ Reply, paras. 5, 8-12.

¹² Decision on Defence Motion for an Order Directed at the Kingdom of Belgium (TC), 28 April 2010 ("Decision of 28 April 2010"), para. 5, citing 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.

¹³ Decision of 28 April 2010, para. 6, citing Decision of 4 December 2009, para. 8; *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, para. 3.



15. As for the evidence's relevance to the trial, the Defence claims that the documents are needed to prepare for Witness ANAV's cross-examination and to challenge his allegations.¹⁴ The Chamber recalls that, on 24 May 2010, it noted and granted the Prosecution's withdrawal of its motion to add Witness ANAV.

16. Because Witness ANAV is not scheduled to testify in this case, the Chamber considers that the Defence has not articulated the relevancy of the documents it requests. The Defence claim that these documents are necessary, in case the Prosecution moves to add Witness ANAV to its list in the future, is at this stage speculative. Accordingly, the Chamber denies the Motion.

17. Under these circumstances, the Chamber need not consider whether the Defence has shown that its efforts to obtain the requested documents have been unsuccessful.

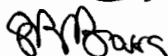
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 28 May 2010



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

¹⁴ Motion, para. 15.