

ICTR-99-54-T
30-03-2011
(102388-102383)

102388
Mwamba



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: 30 March 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON PROSECUTION MOTION REQUESTING
A COOPERATION ORDER DIRECTED TO FRANCE**

Office of the Prosecutor

Mr. Wallace Kapaya
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Mr. William Egbe
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Mr. Michael Kalisa
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Defence Counsel

Mr. Peter Herbert
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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 "Prosecutor's Extremely Urgent Motion for an Order Requesting Cooperation from French Authorities Pursuant to Article 28 of the Statute of the Tribunal and Rules 73(A) and 54 of the Rules of Procedure and Evidence", filed confidentially on 19 January 2011 (the "Prosecution Motion");

CGNSIDERING:

- (a) The "Defence Response to Prosecutor's Extremely Urgent Motion for an Order Requesting Cooperation from French Authorities Pursuant to Article 28 of the Statute of the Tribunal and Rules 73(A) and 54 of the Rules of Procedure and Evidence and Counter Motion on Disclosure of the Said Immigration Records", filed confidentially on 24 January 2011 (the "Defence Response"); and
- (b) The "Prosecutor's Reply to Defence Response to Prosecutor's Extremely Urgent Motion for an Order Requesting Cooperation from French Authorities Pursuant to Article 28 of the Statute of the Tribunal and Rules 73(A) and 54 of the Rules of Procedure and Evidence and Response to Counter Motion on Disclosure of the Said Immigration Records", filed strictly confidentially¹ on 28 January 2011 (the "Prosecution Reply");

RECALLING the Chamber's Decision on Defence Urgent Motion Requesting an Order Directed to France Pursuant to Article 28 of the Statute of 4 December 2009;

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.

SUBMISSIONS OF THE PARTIES

Prosecution Motion

1. The Prosecution moves the Chamber to issue an order directed to France to provide the Prosecution with immigration records and other documents related to eight Defence

¹ The Chamber recalls that while the Prosecution Reply was originally filed publicly, the Court Management Section of the Tribunal (CMS) had advised the Chamber and the Parties via email that the classification level thereof was "Strictly Confidential". The replacement CMS form was circulated to the Chamber and the Parties via email on 15 February 2011.



witnesses said to be resident in France, namely, DWAN-29, DWAN-32, DWAN-38, DWAN-40, DWAN-90, DWAN-146, DWAN-150, and DWAN-154.²

2. The Prosecution asserts that the information contained in the requested documents is relevant, has probative value, and will assist in the cross-examination of Defence witnesses.³

3. The Prosecution submitted a request for judicial cooperation on 28 October 2010 to the French government for the same documents sought through the present Motion. This request is annexed to the Prosecution Motion.⁴

4. The Prosecution avers that it was advised by the French government on 7 January 2011 to obtain an Order from the Tribunal in this regard.⁵

Defence Response and Counter-Motion

5. The Defence does not oppose the Prosecution Motion, provided that the Prosecution can produce evidence of having received a response to the request for judicial cooperation it sent to the French government. The Defence highlights that the Prosecution does not attach any document substantiating its submission that the French government advised the Prosecution on 7 January 2011 to obtain an Order from the Tribunal.⁶

6. The Defence concludes that the Prosecution has not met the threshold laid down by Article 28 of the Statute, requiring a demonstration that efforts to obtain evidence from the target State have been unsuccessful, or that the State refused to cooperate without an Order from the Trial Chamber. The Defence notifies the Chamber and the Prosecution that it will no longer call DWAN-90, one of the aforementioned eight Defence witnesses.⁷

7. The Defence likewise files a Counter-Motion requesting that it be furnished copies of any immigration records and other documents that the Prosecution receives from the French government should the Prosecution Motion be granted ("Defence Counter-Motion"). The Defence submits that this falls within the Prosecution's disclosure obligations under Rule 66(B) of the Rules.⁸

² Prosecution Motion, paras 1, 6, Annex A. The Chamber notes that there is a variance between the spelling of the surname of DWAN-150 in Annex A and in his will-say statement. See Defence Motion to Declare Written Statements Admissible and for Leave for Certification of these Written Statements by a Presiding Officer (Article 92 *bis* of the Rules of Procedure and Evidence), 15 September 2010, Annex 3(h).

³ Prosecution Motion, para. 4.

⁴ *Id.*, para. 2, Annex A.

⁵ *Id.*, para. 3.

⁶ Defence Response, paras. 4, 7.

⁷ *Id.*, paras. 9, 13.

⁸ *Id.*, paras. 10-12.



Prosecution Reply and Response to Defence Counter-Motion

8. By way of Reply to the Defence Response, the Prosecutor submits "his word" that the French authorities requested him to provide an Order from the Tribunal, reasoning that the Prosecution Motion is sufficient proof thereof.⁹

9. As for the Defence Counter-Motion, the Prosecution responds that the Defence has no legal basis to seek disclosure of material regarding the latter's own witnesses. The Prosecution explains that the documents sought from the French government are required for purposes of impeaching the credibility of Defence witnesses. The Prosecution submits that it only needs to disclose impeachment material if it actually uses it for this purpose, and the obligation of disclosure of such material arises only during the interval between the end of the examination-in-chief and the commencement of cross-examination.¹⁰

10. The Prosecution reiterates its call to the Defence to immediately identify the witnesses it intends to call.¹¹

DELIBERATIONS

11. 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; [and] (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

12. In accordance with the Tribunal's jurisprudence, a party seeking an Order under Article 28 of the Tribunal's Statute for State cooperation regarding the production of evidence must:

- (i) Specifically identify, to the extent possible, the evidence sought;
- (ii) Articulate the evidence's relevance to the trial; and

⁹ Prosecution Reply, para. 3. The Chamber notes that the Prosecution does not provide any citation to support its statement that "[t]he Trial Chamber has ruled that a cross-examining party is obliged to disclose impeachment material during the interval between closure of examination-in-chief and commencement of cross-examination of a witness to whom the material relates." *Id.*, para. 8.

¹⁰ *Id.*, paras. 7-10.

¹¹ *Id.*, paras. 4-6.

¹² Decision on Defence Motion Requesting an Order Directed at the Republic of Senegal (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; *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

(iii) Show that its efforts to obtain the evidence have been unsuccessful.¹³

13. The Chamber notes that the Defence does not appear to dispute that the Prosecution has fulfilled the first two of these prongs.¹⁴

14. The Chamber considers that the Prosecution has specifically identified the evidence sought: the immigration and other records of eight Defence witnesses.

15. The Chamber is of the view that the Prosecution has articulated the relevance of the immigration and other records of the Defence witnesses to the trial. The Chamber notes from the Defence Response, however, that one of these Defence witnesses, DWAN-90, will no longer be called.¹⁵ Moreover, DWAN-146 has also been dropped as a witness by the Defence, as indicated by the Amended Pre-Defence Brief.¹⁶ The Chamber therefore considers that the immigration and other records of DWAN-90 and DWAN-146 are no longer relevant to the Prosecution.

16. The Chamber finds that the Prosecution has shown that its efforts to obtain the immigration and other documents from the French government have been unsuccessful. The Chamber notes that the Prosecution's request for judicial cooperation of 28 October 2010 is annexed to the Prosecution Motion. The apparent lack of a written response from the French government should not prejudice the Prosecution's ability to secure the documents it requires to conduct an effective cross-examination of Defence witnesses.¹⁷

17. In support of its Counter-Motion, the Defence cites a *Bagosora et al.* Appeals Decision, along with some Trial Decisions.¹⁸ The Chamber notes that all these cases pertain to the application of Rule 66(B), which mandates the Prosecution, upon the request of the Defence, to disclose materials in its custody or control "which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused."¹⁹ While the Defence Counter-Motion does not indicate whether the immigration and other records fall under any of the

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. Bicomupaka's Request for Order for Cooperation of the Kingdom of Belgium (TC), 12 September 2007, para. 3.

¹⁴ See Defence Response, para. 4 ("The Defence . . . sees no reason to object to this Request, providing the Prosecution can produce evidence of having received a response from the French Government . . .").

¹⁵ Defence Response, para. 13.

¹⁶ See generally Amended Pre-Defence Brief, 4 March 2011.

¹⁷ Prosecution Motion, para. 3; Prosecution Reply, paras. 1-3.

¹⁸ Defence Reply, para. 11, citing *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence (AC), 25 September 2006, para. 10; *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicomupaka Motion to Inspect Documents Pursuant to Rule 66(B) of the Rules of Procedure and Evidence (TC), 5 November 2007, paras. 4-6; *The Prosecutor v. Bicomupaka et al.*, Case No. ICTR-99-50-T, Decision on Defendant Bicomupaka's Motion for Reconsideration of Oral Decision Regarding Violation of Prosecutor's Obligations Pursuant to Rule 66(B) of the Rules of Procedure and Evidence, Dated 11 October 2007 (TC), 7 February 2008, para. 5.

¹⁹ Rule 66(B).

categories laid down in Rule 66(B), the Chamber considers that these documents are *prima facie* material to the preparation of the Defence. Accordingly, the Chamber orders the Prosecution to disclose any immigration and other records obtained from the French government. The Chamber observes, however, that had the documents sought to be disclosed been intended solely for use in cross-examination, a different procedure may have applied which provides for timely disclosure before the commencement of cross-examination.

18. Finally, the Chamber reminds the Parties of their obligation to strictly observe the protective measures in place for potential witnesses, even if they will no longer be called to testify, and to be more circumspect in determining the classification level of their filings.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion;

GRANTS the Defence Counter-Motion;

RESPECTFULLY REQUESTS the Republic of France to provide the Prosecution with access to the immigration and other records of six Defence witnesses, namely, DWAN-29, DWAN-32, DWAN-38, DWAN-40, DWAN-150, and DWAN-154;

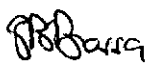
DIRECTS the Prosecution to disclose all immigration and other records obtained from the French authorities; and

DIRECTS the Registry to translate this Decision into French and transmit the same to the relevant authorities of the Republic of France.

Arusha, 30 March 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge




Mparany Rajohnson
Judge