



ICTR-99-54-T
01 - 02 - 2012
(106707 - 106704)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

106707
Mwama

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 1 February 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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DECISION ON DEFENCE MOTION REQUESTING A COOPERATION ORDER
DIRECTED AT THE TOGOLESE REPUBLIC

Office of the Prosecutor

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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 the Trial Chamber to Issue an Order Directed at the Republic of Togo", filed confidentially on 26 January 2012 (the "Defence Motion");

NOTING that the Prosecution indicated in court on 30 January 2012 that it did not object to the Defence 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.

INTRODUCTION

1. On 23 November 2010 and on 14 September 2011, the Chamber respectfully requested the Togolese Republic to provide any relevant assistance in facilitating a meeting between the Defence and DWAN-112.¹
2. On 24 and 25 January 2011, according to the Defence, it met with DWAN-112, who agreed to testify as a Defence witness. The Defence reports that at the end of this meeting, however, it was informed by a colonel, who was the *Directeur de Cabinet* of the Ministry of Defence of the Togolese Republic and who was acting as a representative of the Minister of Defence, that DWAN-112 would testify only if the Tribunal issues an Order to that effect.²

SUBMISSIONS

3. The Defence moves the Chamber to request the Togolese Republic's cooperation and to order the Togolese government to authorize Defence Witness DWAN-112 to travel to Arusha no later than 6 February 2012. The Defence also indicates that it expects DWAN-112 to testify between 6 February and 10 February 2012.³
4. The Defence submits that DWAN-112 is a crucial witness, and that he possesses objective information concerning the events in Gisenyi from January to April 1994. In the

¹ Decision on Defence Motion Requesting an Order Directed at the Togolese Republic (TC), 23 November 2010 ("Decision of 23 November 2010"), p. 4; Decision on Defence Motion Asking the Trial Chamber to Request the President to Report the Matter of the Republic of Togo's Refusal to Cooperate to the Security Council (TC), 14 September 2011, p. 6.

² See Defence Motion, paras. 2-3.

³ *Id.*, paras. 20, 25-27.

Defence's view, his recollection about these events is essential to challenge allegations brought by various Prosecution witnesses.⁴

5. The Defence further submits that its conversation with the representative of the Minister of Defence of the Togolese Republic does not indicate that Togo has refused to cooperate. Instead, according to the Defence, it merely appears that an Order from the Tribunal is necessary for DWAN-112 to receive official permission to travel to Arusha.⁵

DELIBERATIONS

6. 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.⁶

7. In accordance with the Tribunal's jurisprudence, a party seeking an Order under Article 28 of the Tribunal's Statute for State cooperation 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

8. The Chamber considers that the Defence has identified, in as much detail as possible, the evidence it seeks. Specifically, it requests the presence of Defence Witness DWAN-112 in Arusha no later than 6 February 2012.⁸

⁴ *Id.*, paras. 14-18, 25. See also *id.*, para. 19.

⁵ *Id.*, paras. 4, 20-22, 24-25. See also *id.*, para. 23.

⁶ Decision on Defence Motion Requesting a Cooperation Order Directed at the Kingdom of Belgium (TC), 23 August 2011 ("Decision of 23 August 2011"), para. 7, citing Decision of 23 November 2010, para. 4; Decision on Defence Motion Requesting an Order Directed at the Republic of Senegal (TC), 28 April 2010 ("Senegal Decision of 28 April 2010"), para. 5; *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 23 August 2011, para. 8, citing Decision of 23 November 2010, para. 5; Senegal Decision of 28 April 2010, para. 6; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T ("Bizimungu et al."), *Décision Relative à la Requête de Bicomumpaka Tendant à Faire Solliciter la Coopération du Royaume de Belgique* (TC), 12 September 2007 ("Bizimungu et al. Decision of 12 September 2007"), para. 3; *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; see also *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("Bagosora et al."), Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute (TC), 31 October 2005, para. 2.

⁸ See Defence Motion, paras. 20, 26-27.

9. As for the second prong, the Chamber considers that the Defence has established the relevance of his anticipated testimony.⁹ Because his testimony will be heard in Arusha, the Chamber also considers that it is important that DWAN-112 be authorized to travel here.

10. Finally, the Defence has demonstrated that it has made diligent efforts to obtain the evidence it seeks, and that the Togolese authorities have indicated that an order from this Chamber is required to secure DWAN-112's testimony.¹⁰ In such circumstances, the Tribunal's jurisprudence holds that the Defence need not show efforts to obtain the sought evidence have been unsuccessful.¹¹

FOR THE ABOVE REASONS, THE CHAMBER


GRANTS the Defence Motion;

RESPECTFULLY REQUESTS the Togolese Republic to authorize, if required, Defence Witness DWAN-112 to travel to Arusha in time for his testimony, noting that his testimony is currently anticipated to commence in the week of 6 February 2012;


RESPECTFULLY REQUESTS the Togolese Republic to render all possible assistance in this regard; and

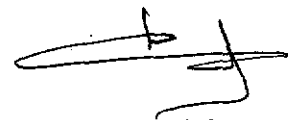
DIRECTS the Registry to translate and transmit this Decision to the relevant authorities of the Togolese Republic.

Arusha, 1 February 2012


William H. Sekule
Presiding Judge




Solomy Balungi Bossa
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

⁹ See *id.*, paras. 14-18.

¹⁰ See, for example, *id.*, para. 3. In light of the exceptional urgency of this request, and given that the Defence team is composed of officers of the court, the Chamber considers it to be in the interests of justice to accept the Defence submissions on this point as complete and accurate. In this regard, the Chamber also notes the Defence's statement that the colonel was representing the Minister of Defence of the Togolese Republic when he indicated that an Order was required to secure Defence Witness DWAN-112's testimony.

¹¹ Decision on Defence Motion for an Order Directed at Switzerland (TC), 28 April 2010, para. 9; Decision on Defence Motion for an Order Directed at Belgium (TC), 28 April 2010, para. 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; *Bizimungu et al.* Decision of 12 September 2007, para. 4; *Bagosora et al.*, Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute (TC), 21 April 2006, para. 4