



ICTR-99-54-T
01-02-2012
(106718 — 106713)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

106718
Adama

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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Adama Dieng

**DECISION ON DEFENCE MOTION REQUESTING A COOPERATION ORDER
DIRECTED AT THE REPUBLIC OF AUSTRIA**

Office of the Prosecutor

Mr. Wallace Kapaya
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Adama

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 Federal Republic of Austria”, filed confidentially on 16 January 2012 (the “Defence Motion”);

CONSIDERING the “Additional Submissions to the Defence Extremely Urgent Motion Requesting the Trial Chamber to Issue an Order Directed at the Federal Republic of Austria”, filed confidentially on 25 January 2012 (“the Defence Additional Submissions”);

NOTING that the Prosecution did not respond 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 17 October 2011, the Chamber granted the Defence motion to vary its witness list by adding DWAN-114.¹
2. On 26 October 2011, the Chamber adjourned the proceedings until 30 January 2012.²
3. On 2 January 2012, according to the Defence, it informed the Austrian authorities that DWAN-114 was expected to testify starting on 30 January 2012, and that his testimony would last about two days.³
4. On 13 January 2012, the Austrian Embassy in Nairobi, Kenya informed the Defence that “no permission for official travel has been granted to [DWAN-114] by his superiors”.⁴
5. On 16 January 2012, the Defence filed the Motion at issue in this Decision.

¹ T. 17 October 2011, pp. 9-12. The Chamber also allowed the addition of DWAN-53 and DWAN-134, and the dropping of DWAN-70, DWAN-81 and DWAN-151.

² T. 26 October 2011, p. 90.

³ Defence Motion, Annex A.

⁴ *Id.*, Annex B.



6. On 23 January 2012, the Registrar submitted that the cost involved in bringing German interpreters from Europe to Arusha for DWAN-114's testimony would be unreasonable, and suggested that the Defence should explore other possibilities.⁵

7. On 25 January 2012, the Defence filed a Motion asking the Chamber to authorize the video-link testimony of DWAN-114.⁶

8. Also on 25 January 2012, the Defence filed its Additional Submissions, which contained an alternative prayer for relief in the event that the Chamber authorizes DWAN-114 to testify via video-link.⁷

9. On 1 February 2012, the Chamber granted the Defence request to authorize the video-link testimony of DWAN-114 in Vienna, Austria.

SUBMISSIONS

Defence Motion

10. The Defence moves the Chamber to request the Republic of Austria's cooperation and to order the Austrian government to authorize the transfer of DWAN-114 to Arusha no later than 27 January 2012.⁸

11. The Defence states that it wishes for DWAN-114 to travel to Arusha in order to testify in this case, and that it hopes to meet with him before his testimony. His anticipated testimony is essential, and it is expected to rebut allegations in 10 paragraphs of the Indictment and to clarify numerous issues in dispute between the parties.⁹

12. The Defence submits that the correspondence with Austria does not indicate that either Austria or DWAN-114 have refused to cooperate. Instead, according to the Defence, it merely appears that an Order from the Tribunal is necessary for DWAN-114 to receive official permission to travel to Arusha.¹⁰

Defence Additional Submissions

13. The Defence seeks to amend the prayer for relief stated in its original Motion. As an alternative prayer for relief in the event that the Chamber authorizes DWAN-114 to testify via video-link, the Defence instead asks the Chamber to order the Austrian

⁵ Registrar's Submissions Regarding the Testimony of DWAN-114, 23 January 2012, para. 7.

⁶ See Extremely Urgent Motion to Authorize Witness DWAN-114 to Testify Via Video Link, 25 January 2012, p. 1 (stamped at 2.27 p.m.).

⁷ See Defence Additional Submissions, p. 1 (stamped at 5.19 p.m.), para. 11.

⁸ Defence Motion, paras. 31-32.

⁹ *Id.*, paras. 8, 17-24, 30-32.

¹⁰ *Id.*, paras. 7, 25-30.

government to authorize DWAN-114's transfer to the video-link location in Vienna, Austria.¹¹

DELIBERATIONS

Preliminary Matters

14. The Chamber recalls that, on numerous previous occasions, it has warned the Parties against the filing of multiple submissions.¹² But given the present procedural posture of the case, the Chamber accepts the further submissions by the Defence, in the interests of justice.

15. In its further submissions, the Defence requests an alternative ground of relief in the event that the Chamber authorizes the *vid eo*-link testimony of Defence Witness DWAN-114.¹³ Because the Chamber has granted such authorization, the Chamber will only address this ground of relief, in which the Defence seeks an order to the Austrian government to authorize the transfer of DWAN-114 to the video-link location in Vienna.

State Cooperation

16. 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.¹⁴

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

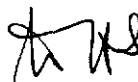
- (i) Specifically identify, to the extent possible, the evidence sought;
- (ii) Articulate the evidence's relevance to the trial; and

¹¹ Defence Additional Submissions, para. 11.

¹² Decision on Defence Motion for Inspection of Materials in the Prosecution's Custody (TC), 29 August 2011, para. 27; Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 11 April 2011, para. 18; Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009 (TC), 15 October 2010, para. 20; Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 15.

¹³ See Defence Additional Submissions, para. 11.

¹⁴ 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 on Defence Motion Requesting an Order Directed at the Togolese Republic (TC), 23 November 2010 ("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



(iii) Show that its efforts to obtain the evidence have been unsuccessful.¹⁵

18. The Chamber considers that the Defence has identified, in as much detail as possible, the evidence it seeks. Specifically, it seeks DWAN-114's testimony, and an authorization that will allow him to travel to the video-link location in Vienna.¹⁶

19. As for the second prong, the Chamber considers that the Defence has established the relevance of DWAN-114's testimony, which is anticipated to address 10 paragraphs of the Indictment and various issues of contention between the Parties.¹⁷ Because his testimony will be heard via video-link in Vienna, the Chamber also considers that it is important that DWAN-114 be authorized to travel there.

20. In its Motion, the Defence provides a *Note Verbale* from the Austrian Embassy that appears to indicate that an order from the Chamber may be required to secure DWAN-114's testimony in Arusha.¹⁸ The Chamber observes, however, that the Defence submissions are unclear as to whether an order is also required for DWAN-114 to travel to the video-link location in Vienna.

21. In light of the exceptional urgency of this request, and given the present stage of the proceedings where the Defence case is about to close, the Chamber considers that the interests of justice require it to issue an order to the Republic of Austria seeking its cooperation in this matter, should this be required.

¹⁵ 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 Bicamumpaka 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.

¹⁶ Defence Additional Submissions, para. 11.

¹⁷ Defence Motion, paras. 17-24. The Chamber has also taken into account the Oral Decision of 1 February 2012, granting authorization for Defence Witness DWAN-114 to testify via video link. The transcripts of that Oral Decision are not yet available for citation.

¹⁸ Defence Motion, Annex B.

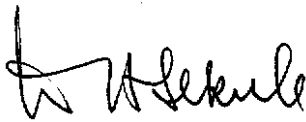
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion as it relates to the alternative prayer for relief;

RESPECTFULLY REQUESTS the Republic of Austria to provide any relevant assistance in authorizing Defence Witness DWAN-114 to travel to the video-link location in Vienna in order to testify; and

DIRECTS the Registry to transmit this Decision to the relevant authorities of the Republic of Austria.

Arusha, 1 February 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]