

2070 - 1

ICTR-99-54-T

13 - 02 - 2012

(106810 - 106807)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

106810
MURINA

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 13 February 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

2012 FEB 13 P 12:48
UNICTR
JUDICIAL RECORDS / ARCHIVES
RECEIVED

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

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Rashid Rashid
Mr. Iskandar Ismail
Mr. Michael Kalisa
Ms. Faria Rekkas

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Mr. Gregg Shankman

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 Nigeria”, filed confidentially, with *ex parte* annexes, on 23 January 2012 (the “Defence Motion”);

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 23 January 2012, the Defence filed the present Motion.
2. On 24 and 25 January 2012, according to the Defence, it met with Defence Witness DWAN-112, who agreed to testify as a Defence witness.¹
3. On 26 January 2012, the Defence moved the Chamber to request the Togolese Republic’s cooperation and to order the Togolese government to authorize DWAN-112 to travel to Arusha to testify.²
4. On 1 February 2012, the Chamber granted the Defence Motion of 26 January 2012, and respectfully requested the Togolese Republic to authorize, if required, DWAN-112 to travel to Arusha in time for his testimony.³
5. It is currently anticipated that DWAN-112 will testify during the current trial session.

SUBMISSIONS

6. The Defence seeks a cooperation order from the Chamber requesting the Federal Republic of Nigeria to allow one of its citizens to meet with the Defence and to testify as

¹ See Decision on Defence Motion Requesting a Cooperation Order Directed at the Togolese Republic (TC), 1 February 2012 (“Decision of 1 February 2012”), para. 2. See also Defence Extremely Urgent Motion Requesting the Trial Chamber to Issue an Order Directed at the Republic of Togo, 26 January 2012 (“Defence Motion of 26 January 2012”), para. 2.

² See Defence Motion of 26 January 2012, paras. 20, 25-27. See also Decision of 1 February 2012, para. 3.

³ Decision of 1 February 2012, p. 4.

a Defence witness in Arusha. The Defence submits that its request fulfils the three requirements for a cooperation order set forth by the Tribunal's jurisprudence.⁴

7. According to the Defence, it "needs to meet with [the Nigerian citizen] before being in a position to determine whether it will call him as a Defence witness, in possible replacement of Defence witness DWAN-112".⁵ The Defence further submits that his testimony is relevant to the trial, as he would be expected to rebut allegations contained in 10 paragraphs of the Indictment. Moreover, his testimony would also be expected to rebut some allegations that, according to the Defence, were not pleaded in the Indictment.⁶

8. Finally, the Defence submits that its numerous and diligent efforts to obtain the evidence sought have proved unsuccessful. After trading a series of *Notes Verbales* with the Nigerian government, the Defence sent its Legal Assistant to Nigeria in order to meet with the Nigerian citizen on 13 and 14 December 2011. Unfortunately, according to the Defence, it was not permitted to hold an official meeting with him. The Defence states that it sent another *Note Verbale* on 21 December 2011, requesting the Nigerian government to authorize a meeting, and that the Nigerian authorities have yet to address it.⁷

DELIBERATIONS

9. 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.⁸

10. 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

⁴ Defence Motion, paras. 1, 20-21, 27, 43-44.

⁵ *Id.*, para. 38.

⁶ *Id.*, paras. 22-26.

⁷ *Id.*, paras. 2-18, 28-29, 32. See also *id.*, paras. 30-31, Annexes 1-13.

⁸ 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.⁹

11. The Chamber notes that the Nigerian citizen has never been on the list of potential Defence witnesses. It appears that the Defence seeks to meet with the Nigerian citizen in order to determine whether he could be a “possible replacement of Defence witness DWAN-112”.¹⁰

12. In this regard, the Chamber recalls that the Defence filed the present Motion before it met with DWAN-112, before DWAN-112 agreed to testify for the Defence, and before the Chamber issued a cooperation order in order to secure DWAN-112’s testimony. As a result, DWAN-112 is now anticipated to testify during the current trial session, and thus no possible replacement is at issue.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 13 February 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

⁹ 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, 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, Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute (TC), 31 October 2005, para. 2.

¹⁰ See Defence Motion, para. 38.