

ICTR-96-4-T  
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CRIMINAL REGISTRY  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1998 MAR -4 A 9 48

CHAMBER I - CHAMBRE I

OR : ENG

Before: Judge Laity Kama, Presiding Judge  
Judge Lennart Aspegren  
Judge Navanethem Pillay

Registry: Mr. Lars Plum  
Mr. John M. Kiyeyeu

Decision of: 17 February 1998

**THE PROSECUTOR  
VERSUS  
JEAN-PAUL AKAYESU**

Case No. ICTR-96-4-T

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**DECISION ON THE DEFENCE MOTION REQUESTING  
AN INSPECTION OF THE SITE AND  
THE CONDUCT OF A FORENSIC ANALYSIS**

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The Office of the Prosecutor:

Mr. Pierre-Richard Prosper  
Mr. James Stewart

Counsel for the Accused:

Mr. Nicolas Tiangaye  
Mr. Patrice Monthé

Taba.Exhumation/Def.Motion/Legal/Eng.

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“THE TRIBUNAL”),**

SITTING as Trial Chamber I, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING the motion received from the Defence Counsel on 29 December 1997, requesting, firstly, an inspection of the site in order to prove the existence of one or several mass graves, and, where necessary, to determine the content of such graves, and, secondly, an order from the Tribunal for the carrying out of a forensic analysis of three cadavers;

CONSIDERING the response of the Prosecutor to the above mentioned motion, filed on 4 February 1998;

HAVING HEARD the Defence and the Prosecutor at the audience held on 13 February 1998;

TAKING NOTE of Articles 17 and 20 of the Statute of the Tribunal (the “Statute”), and Rules 73 and 89 of the Rules of Procedure and Evidence of the Tribunal (the “Rules”);

**AFTER HAVING DELIBERATED,**

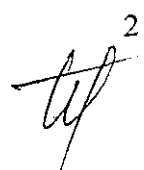
**A. On the request for an inspection of the site**

1. The Defence Counsel in his motion filed on 29 December 1997 requests an inspection of the site so as to establish proof of the existence of one or more mass graves at the Taba ‘bureau communal’ between 19 April and end of July 1994. If such graves were to be located, the Defence Counsel further requests that the content of these be determined.

2. The Defence asserts in the said motion that the inspection of the site is of urgent necessity and is based on the inconsistencies of the testimonies of the prosecution witnesses heard during trial. Thereupon, the Defence Counsel submitted that three prosecution witnesses, namely witnesses “A”, “J” and “H”, affirmed, either in previous statements made to representatives of the Office of the Prosecutor, or during testimony before the Chamber, that there had indeed been mass graves in the vicinity of the Taba ‘bureau communal’. However, other prosecution witnesses, such as witness “K”, fail to mention the mass graves that allegedly existed at the Taba ‘bureau communal’. It is argued by the Defence Counsel that these inconsistencies call into question the credibility of these witnesses; hence the urgent need for the site inspection.

3. In support of its request for the on-site investigation, the Defence refers to Article 17 (2) of the Statute which states, *inter alia*, that the Prosecutor has the power to “conduct on-site investigations”. According to the Defence, the Prosecutor, who has the burden of proof, did not order such an investigation. Consequently, the Defence believes it is now obliged to make up for this culpable failure.

4. Furthermore, the Defence Counsel submitted that an on-site inspection, if carried out with all the parties present, would provide evidence to substantiate or not (as the case may be) the

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physical and psychological acts allegedly perpetrated at the site. It is submitted by the Defence that, in accordance with Rule 89 of the Rules, and in view of national rules of evidence emanating from Canada and France, the Tribunal is empowered to order an on-site inspection at any time during the proceedings, before judgement.

5. The Prosecutor, in her response filed on 4 February 1998, does not oppose a visit to the site by the Trial Chamber. However, she submits that, though such a visit could be informative and may assist the Trial Chamber in the final analysis of the evidence, it is not essential for a just determination of the case.

6. Rule 89(B) of the Rules specifies that a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Moreover, Rule 89(C) states that a Chamber may admit any relevant evidence that it deems to have probative value. Considering the aforementioned, the Tribunal is of the opinion that it is empowered to order inspections of the site where necessary.

7. However, the Tribunal notes the Prosecutor's assertion that, contrary to the submissions of the Defence, the on-site investigations of Taba Commune were carried out. In the response filed by the Prosecutor, reference is made to the investigations headed by Mr. Halvard Tömte which occurred between late 1995 and the middle of 1996. These investigations, it is stipulated in the response, consisted of witness interviews and visits to the location where the alleged acts took place. Furthermore, evidence before this Chamber is to the effect that many of the corpses buried in the original mass grave sites have been exhumed for reburial; hence the impracticality of carrying out further inspections and exhumations of the said sites.

8. Considering all of the above, and in view of the advanced stage of the trial, the Tribunal finds that an on-site inspection of the Taba 'bureau communal', though informative, would not be instrumental in the discovery of the truth and determination of the matter before it. Consequently, the Tribunal will not grant the request of the Defence Counsel for an on-site inspection by the Tribunal of the Taba 'bureau communal'.

#### **B. On the request for a forensic analysis of three cadavers**

9. The Defence Counsel further requests in his motion of 29 December 1997, that the Tribunal order a forensic analysis of the three cadavers of the brothers of Ephrem Karangwa so as to confirm that their deaths did in actual fact occur circa 19 April 1994 in Musambira Commune. Should these be confirmed, the Defence also requests that an exhumation be carried out by an expert of international repute so as to determine the conditions of death, including the circumstances under which they occurred, the date thereof, the burial site and the identities of the deceased.

10. In the said motion and during the audience held on 13 February 1998, the Defence Counsel asserted that the exhumation and forensic analysis was a necessary step in the trial of the accused. The Defence Counsel submitted that the Prosecutor was merely relying on written statements and oral testimonies of witnesses to establish the alleged killings of the said three

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individuals. He opined that these testimonies and statements, which were often contradictory, had to be treated with circumspection and that, on their own, were insufficient to prove the deaths of the said brothers. The Defence stated that only a forensic analysis would establish the pertinent facts thereof.

11. The Prosecutor, in her response of 4 February 1998 and during the audience, opposed the request of the Defence on the grounds of it being erroneous. She contended that, based on the testimonies given by the witnesses in court, there are no inconsistencies as to the cause of death, the identity of those killed or as to when they were allegedly killed. Further, she believed that, considering the advanced stage of the proceedings, and the length of time the Defence has had in its possession the information relied upon in the motion, the request for exhumation is not timely. In conclusion, the Prosecutor submitted that it is for the Trial Chamber to assess the credibility of the witness testimonies when weighing up the evidence before it.

12. The Tribunal takes note of Rule 89(C) of the Rules which provides that a Chamber may request verification of the authenticity of evidence obtained out of court. To that effect, if deemed necessary, the Tribunal could order an exhumation and forensic analysis so as to prove or disprove a contentious piece of evidence, as requested by the Defence in its motion.

13. However, considering the ancientness of the acts which allegedly occurred four years ago, and in light of the fact that a number of the purported mass graves, including, without a doubt, those supposedly in the vicinity of the Taba 'bureau communal,' have been the subject of previous exhumations and reburials, the Tribunal finds that a new forensic analysis would not be appropriate nor, in any case, instrumental in the discovery of the truth. Rather, the Tribunal feels that the arguments raised by the Defence Counsel in support of his motion are pertinent mainly to evaluating the credibility of certain witness testimonies and not to showing the necessity for an exhumation and forensic analysis, as requested. Consequently, the Tribunal is of the opinion that the request of the Defence be dismissed.

Taba.Exhumation/Def.Motion/Legal/Eng.

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**FOR ALL THE ABOVE REASONS,**


**THE TRIBUNAL**

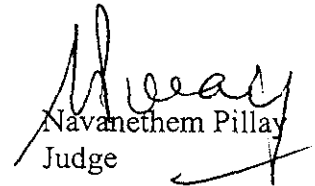
**DISMISSES** the Defence Counsel request for an on-site inspection of the Taba 'bureau communal';

**DISMISSES** the Defence Counsel request for an exhumation and forensic analysis of three cadavers.

Decision rendered on 17 February 1998,  
Signed in Arusha on 3 March 1998.

  
Laity Kama  
Presiding Judge

  
Lennart Aspegren  
Judge

  
Navanethem Pillay  
Judge

(Seal of the Tribunal)



