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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, Presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 25 April 2010

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THE PROSECUTOR
v.
DOMINQUE NTAWUKULILYAYO

Case No. ICTR-05-82

**DECISION ON EXTREMELY URGENT DEFENCE MOTION FOR THE TRIAL
CHAMBER TO REISSUE NEW MODALITIES FOR THE
SITE VISIT TO RWANDA**

Rules 4 and 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Charles Adeogun-Phillips
Thembile Segoete

Counsel for the Defence:
Maroufa Diabira
Dorothee Le Fraper du Hellen

[Signature]

INTRODUCTION

1. On 27 January 2010, the Chamber informed the Parties that it was considering holding a *proprio motu* site visit.¹ On 2 February 2010, the Parties were notified that they should file any submissions relating to the site visit by 19 February 2010.² Both the Prosecution and Defence filed submissions in accordance with the deadline set by the Chamber.³ On 9 March 2010, the Chamber issued an order scheduling the site visit for 25 to 29 April 2010.⁴

2. On 20 April 2010, the Defence filed written submissions which proposed, among other things, draft rules of procedure and conduct for the site visit, and enquired as to whether the location of one of the sites had been determined by the Registry.⁵ On the same date, the Chamber informed the Parties that modalities for the site visit would be circulated by the Registry, and confirmed that the site visit would be conducted in accordance with the confidential itinerary annexed to the Site Visit Order.⁶ That same date, the Registry circulated the site visit modalities in accordance with the Chamber's instructions.⁷

3. On 23 April 2010, the Defence filed a motion requesting that the Chamber issue new modalities and provide information with respect to how one of the sites was located.⁸ The time limit for the Prosecution to file its response has not yet expired. However, the Chamber considers it unnecessary to wait for the Prosecution response before rendering its Decision on the Defence Motion.

DISCUSSION

4. The Defence submits that the site visit modalities were issued without prior consultation with the Parties and without considering its proposed draft rules of procedure and conduct. It observes that the modalities are different to those recently issued by another Trial Chamber and points to a draft Practice Directive on Site Visits.⁹

5. It also expresses concerns regarding point I (c) of the site visit modalities, which provides that the Registry representative will read aloud written submissions made by the Parties in relation to the sites. According to the Defence, its written submissions filed on 18

¹ Email correspondence dated 27 January 2010 from the Chamber to Prosecution and Defence Counsel. Further to the Chamber's request, the Defence notified the Chamber on 25 January 2010 that it did not intend to apply for a site visit and that its position was one of neutrality. The Prosecution did not indicate whether it intended to apply for a site visit.

² Email correspondence dated 2 February 2010 from the Chamber to Prosecution and Defence Counsel.

³ The Prosecution's Submissions on the Site Visit, 19 February 2010 and *Propositions de la Défense Relatives aux lieux que la Chambre pourrait estimer utile de visiter pour la compréhension de la preuve dans le Cadre d'un déplacement sur les lieux décide proprio motu*, 18 February 2010.

⁴ Scheduling Order for Site Visit to Rwanda and Hearing of Closing Arguments and Confidential Annex, 9 March 2010 ("Site Visit Order").

⁵ Email correspondence dated 20 April 2010 from Defence Legal Assistant to the Chamber; Extremely Urgent Submissions with respect to Site Visit in Rwanda, 20 April 2010.

⁶ Email correspondence from the Chamber dated 20 April 2010 to Prosecution and Defence Counsel.

⁷ Site Visit Modalities, 20 April 2010.

⁸ Extremely Urgent Defence Motion for the Trial Chamber to Reissue New Modalities for the Site Visit to Rwanda, 23 April 2010 ("Defence Motion").

⁹ Defence Motion, paras. 5-6.



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February 2010 were no more than “propositions”, including very brief and broad reasons why the Chamber may wish to visit particular sites. The Defence is concerned that the Chamber will not hear further oral representations or allow audio, video or photographic recordings at the sites. It submits that these restrictions impair its ability to represent the interests of the Accused and preclude the Parties from commenting in the event a Judge inadvertently misconstrues a particular observation.¹⁰ It further submits that point 1 (d) of the site visit modalities provides no guidance on what will be included in the “detailed” official note to be prepared by the Registry representative, or whether it may be challenged.¹¹

6. The Defence also requests information on the methodology used in locating the house of Prosecution Witness BAC and refers to an “obvious risk that the information possessed by the Registrar regarding the location of the house has been contaminated” by the witness herself, or by someone connected to the witness who shares her interest in the Chamber finding her evidence to be credible.¹²

7. The Chamber is not obliged to consult the Parties prior to determining the modalities for a site visit. Nor is it bound by the procedure followed by other Trial Chambers, or by any draft practice directions which have yet to be adopted and are subject to amendment. In determining the site visit modalities, the Chamber has at all times been mindful of its obligation to respect the rights of the accused, as well as the need to maintain a detailed record of the site visit.¹³ It does not consider, nor has the Defence pointed to any binding obligation, that contemporaneous observations by the Parties, audio, video or photographic recordings of the visit are necessary to ensure these principles.

8. Moreover, prior to issuing its order for the *proprio motu* site visit, the Chamber invited the Parties to file written submissions setting out which locations they considered would be instrumental in understanding the evidence, together with their reasons. That the Defence now feels its prior submissions were not fully reasoned does not justify reopening the matter. In any event, the Chamber will be accompanied by the Parties during the visit. Should they wish to draw the Chamber’s attention to certain observations made during it, or dispute any matters arising from the official notes taken by the Registry representative, they may, following the site visit, file written submissions as already indicated by the Chamber.¹⁴

9. Finally, the Defence provides no basis for asserting that the information possessed by the Registry regarding the location of Prosecution Witness BAC’s house has been contaminated. The witness testified to its location under oath and it was identified by the UN Security office in Kigali in conjunction with the Witnesses and Victims Support Section.¹⁵ Accordingly, the Chamber has no reason to doubt the veracity of this location, nor is it

¹⁰ Defence Motion, paras. 9-18.

¹¹ Defence Motion, para. 12.

¹² Defence Motion, paras. 19-20.

¹³ See Articles 19 and 20 of the Tribunal’s Statute with respect to the Trial Chamber’s obligation to ensure a fair trial and respect the rights of the accused. With respect to the requirement to maintain a detailed record of the site visit, see *Protais Zigiranyirazo v. The Prosecutor*, ICTR-01-73-A, Decision on Zigiranyirazo’s Motion for Admission of Additional Evidence, 16 September 2009, para. 21 citing *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgment, 2 February 2009, para. 50.

¹⁴ Email correspondence dated 27 January 2010 to Prosecution and Defence Counsel.

¹⁵ Witness BAC testified to its location and confirmed that she still lives there. See *Ntawukulilyayo*, T. 11 May 2009, pp. 47-48, 62.



necessary to disclose the specific communications about how it was located for the purposes
of the site visit.

FOR THESE REASONS, the Chamber

DENIES the Defence Motion.

Arusha, 25 April 2010



Khali la Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]

