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**International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda**

OR: ENG

**TRIAL CHAMBER II**

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

ICTR-99-54-T  
03-04-2012  
(109793-109785)

Registrar: Mr. Adama Dieng

Date: 3 April 2012

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

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**DECISION ON SITE VISIT TO THE REPUBLIC OF RWANDA**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. Patrick Gabaake  
Mr. Rashid Rashid  
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**Defence Counsel**

Ms. Mylène Dimitri  
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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 “Prosecution Motion for a View of the *Locus In Quo*”, filed on 21 February 2012 (the “Prosecution Motion”);

**CONSIDERING:**

- (a) “Dr. Ndirabatware’s Strictly Confidential Defence Submissions on Site Visit in Rwanda”, filed confidentially on 24 February 2012 (the “Defence Submissions”);
- (b) The Prosecution’s “Confidential Additional Submissions for View of Locus in Quo”, filed confidentially on 16 March 2012 (the “Prosecution Further Submissions”);
- (c) The Prosecution’s “Corrigendum: Confidential Additional Submissions for View of Locus in Quo”, filed confidentially on 19 March 2012 (the “Prosecution Further Submissions Corrigendum”); and
- (d) “Dr. Ndirabatware’s Strictly Confidential Defence Further Submissions on Site Visit in Rwanda”, filed confidentially on 19 March 2012 (the “Defence Further Submissions”);

**CONSIDERING** also the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

**NOW DECIDES** the Prosecution Motion pursuant to Rules 4 and 46 of the Rules.

### INTRODUCTION

1. On 23 March 2010, the Chamber denied the Prosecution Motion for a site visit in the Republic of Rwanda, stating that it was not an optimal time to determine whether a site visit is necessary and desirable.<sup>1</sup>
2. On 10 February 2012, the Chamber invited the Parties to make written submissions as to whether the visit in Rwanda should be conducted.<sup>2</sup>
3. On 15 March 2012, the Chamber ordered the Parties to file further submissions “containing a brief explanation of the specific purpose for any visit to each suggested

<sup>1</sup> Decision on Prosecution Motion for a Site Visit (TC), 23 March 2010, para. 9.

<sup>2</sup> T. 10 February 2012, p. 9. See also T. 22 February 2012, pp. 34-36.

109791

location, with precise references to the trial record”, and to also indicate the two persons from their teams who would attend a site visit, if granted.<sup>3</sup>

## SUBMISSIONS OF THE PARTIES

### *Prosecution Motion*

4. The Prosecution requests the Chamber to conduct a site visit in the Republic of Rwanda before the filing of Closing Briefs. The Prosecution specifies 31 places that the Chamber may deem appropriate for a fair determination of the case. Visiting these sites would only require six days total, inclusive of two days for return travel between Arusha and Rwanda.<sup>4</sup>

5. The Prosecution submits that a site visit is necessary due to the inability of some Prosecution witnesses to estimate distances. Moreover, since many disputed issues relate to the physical aspects of sites, a site visit will provide the Chamber with a first-hand view of the locations and assist in the Chamber’s evaluation of evidence.<sup>5</sup>

6. The Prosecution also mentions that a Prosecution investigator such as André Delvaux, who testified as a witness in this case, “may be required to participate in the site visit in order to assist the Trial Chamber in identifying the relevant sites”.<sup>6</sup>

### *Defence Submissions*

7. The Defence asks the Chamber to conduct a site visit at the conclusion of the evidentiary phase but before the filing Closing Briefs, and for the visit to include 37 specific sites. The Defence also requests that the Chamber deny any involvement in the site visit of any Prosecution investigator or witness, and to direct the Registry to make all necessary arrangements for the proposed site visit.<sup>7</sup>

8. According to the Defence, the Accused “does not wish to personally participate”, and therefore “the scope of the visit should be restricted to ensure that his right to be present is not excessively jeopardized”.<sup>8</sup>

9. Further, the Defence opposes the Prosecution’s suggestion that any Prosecution Investigator, including André Delvaux, guides the Chamber and the Parties during the visit. The Defence submits that doing so would prevent the site visit from being neutral and unbiased, and would thereby violate the Accused’s rights.<sup>9</sup>

<sup>3</sup> Order to Parties for Further Submissions (TC), 15 March 2012, p. 2.

<sup>4</sup> Prosecution Motion, paras. 1, 10, 12, 15, p. 5, Annex A. The Chamber recalls that, on 23 February 2012, the Annex to the Prosecution Motion was reclassified as strictly confidential.

<sup>5</sup> *Id.*, paras. 3-4, 6, 8, 11. See also *id.*, paras. 7, 9.

<sup>6</sup> *Id.*, para. 10.

<sup>7</sup> Defence Submissions, paras. 12, 24, Annex I.

<sup>8</sup> *Id.*, para. 11.

<sup>9</sup> *Id.*, para. 14. See also *id.*, para. 13.

109790

10. As for the practical modalities of the site visit, the Defence submits that these should be put in place by the Registry. The Defence suggests that a representative from both Parties and from the Registry undertake a preliminary and informal site visit, to identify the relevant sites. It also asks for a thorough assessment of any security risk and for preventive measures to be taken during the visit to protect the identities of witnesses.<sup>10</sup>

11. The Defence also requests that audio and video recordings be made during the visit, that a detailed record be produced, and that the Parties be allowed to make factual observations for the record.<sup>11</sup>

#### ***Prosecution Further Submissions***

12. The Prosecution makes submissions concerning 28 proposed sites, all of which are said to be located in Nyamyumba commune.<sup>12</sup>

13. The Prosecution submits that every proposed site was the subject of witness testimony that “dealt extensively with descriptions ... and explanations of distance[s] between various places ... in relation to the [sites]”.<sup>13</sup> For some of these sites, the Prosecution further contends that a visit “will assist in giving the Trial Chamber a realistic perception of the witness testimony”.<sup>14</sup>

14. In support of these submissions, for 24 of its 28 proposed sites, the Prosecution provides a list that identifies the Prosecution witnesses who referred to each location and the dates of transcripts. For the other 4 proposed sites, the Prosecution submits that they are “self explanatory”.<sup>15</sup>

15. The Prosecution identifies the Trial Attorney and Assistant Trial Attorney as its tentative representatives during the site visit.<sup>16</sup>

#### ***Defence Further Submissions***

16. The Defence makes submissions in relation to its 37 proposed sites. For each of these submissions, the Defence identifies either “[s]ome Witnesses (Prosecution and Defence) whose testimony is related to the site” or various Indictment paragraphs, as well as date and page citations to the transcript for every witness. The Defence also supplies,

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<sup>10</sup> *Id.*, para. 17.

<sup>11</sup> *Id.*, paras. 18-19.

<sup>12</sup> Prosecution Further Submissions, paras. 5-40; Prosecution Further Submissions Corrigendum, paras. 2-3.

<sup>13</sup> Prosecution Further Submissions, paras. 8 (discussing the sites in “Category A”), 24 (“Category B”), 35 (“Category C”).

<sup>14</sup> *Id.*, paras. 24 (addressing the sites in “Category B”); 35 (“Category C”).

<sup>15</sup> *Id.*, paras. 6, 9-23, 25-29, 30 (claiming that the sites in paragraphs 31-34 are “self explanatory”), 36-40.

<sup>16</sup> Prosecution Further Submissions Corrigendum, para. 4.

109789

for each proposed site, a “[b]rief explanation of specific purpose” varying between 1 and 6 paragraphs in length.<sup>17</sup>

17. Finally, the Defence submits that any rebuttal or rejoinder evidence should not affect the date for the site visit, which could take place at any time convenient to the Chamber. The Defence states that its Lead Counsel and Legal Assistant will attend the site visit. Depending on the date of the site visit, however, the Defence Co-Counsel will replace Lead Counsel.<sup>18</sup>

## DELIBERATIONS

### *Preliminary Matters*

18. The Chamber notes that although the Prosecution originally proposed 31 sites, the Prosecution Further Submissions only pertain to 28 sites.<sup>19</sup> The Chamber therefore considers that the Prosecution no longer seeks to visit the three sites that were omitted from its Further Submissions.

19. More importantly, however, the Chamber recalls that it explicitly ordered the Parties to explain briefly “the specific purpose for any visit to each suggested location”.<sup>20</sup> The Chamber notes with regret that the Prosecution did not follow this order when filing its Further Submissions. Instead of explaining the specific purpose for each proposed location, the Prosecution merely provides generalized arguments that extend to all of its suggested sites. This is unhelpful to the Chamber.

20. The Chamber also ordered the Parties to substantiate their explanations “with precise references to the trial record”.<sup>21</sup> The Prosecution, however, has opted not to follow this order. Instead, the Prosecution identifies only witnesses and transcripts dates that largely regurgitate the dates on which each witness testified.<sup>22</sup> This is unacceptable, and the Chamber reminds the Prosecution that “[a] violation of a court order *as such* constitutes an interference with the Tribunal’s administration of justice” which can fall within the ambit of Rule 77 (A) for contempt of the Tribunal.<sup>23</sup>

<sup>17</sup> Defence Further Submissions, Annex A, p. 1. See also *id.*, Annex A, pp. 1-17, nn. 3-138 (concerning the 37 proposed sites).

<sup>18</sup> *Id.*, paras. 9, 11.

<sup>19</sup> Compare Prosecution Motion, Annex A, no. 5, 7, 15, and Prosecution Further Submissions.

<sup>20</sup> Order to Parties for Further Submissions (TC), 15 March 2012, p. 2.

<sup>21</sup> *Id.*

<sup>22</sup> The Chamber notes that the Prosecution cites to every day of testimony for Prosecution Witnesses André Delvaux, ANAD, ANAE, ANAF, ANAG, ANAJ, ANAK, ANAL, ANAM, ANAO, ANAS, ANAT in support of many proposed locations. See Prosecution Further Submissions, paras. 9-13, 25-28, 36-40.

<sup>23</sup> *In the Case Against Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement (AC), 19 May 2010, para. 20. See also Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (TC), 26 August 2011, para. 54.

21. Finally, the Chamber recalls that this is at least the third time that the Prosecution has omitted citations to sources.<sup>24</sup> In this regard, the Chamber has already stated that it “expects that the Prosecution will provide appropriate citations to support the assertions and arguments made in its written pleadings”.<sup>25</sup> The Chamber considers that the Prosecution’s failure to provide precise citations, including to the exact dates and pages of relevant transcripts, regardless of whether it is specifically ordered to do so, is contrary to the interests of justice. The Chamber warns the Prosecution that further omissions in this regard could attract sanction pursuant to Rule 46 (A) for misconduct of counsel.

### *Site Visit*

22. Rule 4 of the Rules provides that “[a] Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President and in the interests of justice.” This Rule has consistently been interpreted to permit a Chamber to conduct a site visit.<sup>26</sup> Indeed, the Appeals Chamber has confirmed that “[t]he Trial Chamber has the primary discretion to decide whether or not a site visit is necessary or relevant in the assessment of evidence”.<sup>27</sup>

23. In determining whether a site visit will be instrumental in the discovery of the truth and determination of the matters before the Chamber, the Chamber examines if some of the disputed issues at trial relate to the physical attributes of various sites relevant to the case. A site visit can assist the Chamber in its assessment of issues of visibility, layout of buildings, distances between locations and correlative proximity of places. Thus, a first-hand familiarization with the relevant locations can assist in the fair and expeditious determination of the case. Furthermore, the ease of logistical planning, the anticipated costs of the visits to the Tribunal, and the number of days required for a proper site visit are to be considered by the Chamber. Detailed records of the proceedings should be kept.<sup>28</sup>

24. While the Parties are allowed to make submissions as to which locations merit inclusion in a site visit itinerary, the ultimate consideration as to whether and where to

<sup>24</sup> See Decision on Prosecution Motion to Compel the Defence to Reduce the Number of Defence Witnesses, Disclose the Order of Appearance of Defence Witnesses, and Disclose Defence Witness Statements (TC), 9 March 2011 (“Decision of 9 March 2011”), para. 17; Prosecutor’s Extremely Urgent Motion to Postpone the Date Set for Commencement of Defence Case, 10 November 2010.

<sup>25</sup> Decision of 9 March 2011, para. 17.

<sup>26</sup> See, for example, *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Site Visit (TC), 10 May 2011 (“*Nzabonimana* Decision”), para. 9, p. 5; *The Prosecutor v. Gregoire Ndahimana*, Case No. ICTR-2001-68-T, Scheduling Order for Site Visit to Rwanda, Filing of Closing Briefs and Hearing of Closing Arguments (TC), 28 April 2011, para. 11; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor’s Motion for Site Visits in the Republic of Rwanda (TC), 26 February 2009 (“*Nyiramasuhuko et al.* Decision”), para. 18.

<sup>27</sup> *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-A, Judgement (AC), 28 September 2011, para. 76. See also *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007, para. 16; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement (AC), 30 November 2006, para. 50.

<sup>28</sup> *Nyiramasuhuko et al.* Decision, para. 20. See also *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement (AC), 2 February 2009, para. 50.

conduct a site visit are the Chamber's own impressions as to which locations, if any, could substantially assist it in the assessment of the evidence adduced at trial.<sup>29</sup>

25. In this case, both Parties submit that a site visit would be beneficial.<sup>30</sup> The Defence further states that "the Accused does not wish to personally participate" in any site visit.<sup>31</sup>

26. The Chamber considers that some of the disputed issues at trial concern physical attributes of various sites in former Kigali-Ville and Gisenyi prefectures, including the distances between various locations, issues involving line-of-sight and the suitability of certain locations for activities alleged to have occurred there. Having given due weight to the various considerations outlined above, the Chamber finds that a site visit is appropriate. Accordingly, the Chamber grants the request of the Parties insofar as they seek a site visit.

27. Having reviewed the submissions of the Parties closely, the Chamber notes that the Parties appear to propose a visit to a number of identical or sufficiently similar sites.<sup>32</sup> The Chamber considers that it would be appropriate to visit these sites, and they have been included in the Confidential Annex to this Decision.

28. The Prosecution and the Defence have also separately suggested additional sites to visit. In the Chamber's view, the evidence adduced and issues presented in this case make it appropriate to visit some of these sites.<sup>33</sup> Other proposed sites, however, do not warrant such a visit,<sup>34</sup> as the Chamber considers that the trial record is sufficient to permit the Chamber to make any relevant determinations concerning these sites.

29. The Chamber notes that some of these sites are residences of protected witnesses or their family members.<sup>35</sup> Because a visit to these locations could possibly compromise the identities of protected witnesses, the Chamber considers that the vehicles should not stop at these locations, but instead the Registry should inform the Chamber and the Parties when passing these sites.

30. Finally, notwithstanding the fact that the Parties have not suggested viewing them, the Chamber considers that it would also be appropriate to view one additional site in former Kigali-Ville prefecture and one in former Gitarama prefecture, as well as two specific routes between the former Kigali-Ville and Gisenyi prefectures. The Chamber

<sup>29</sup> *Nzabonimana Decision*, para. 10

<sup>30</sup> See, for example, Prosecution Motion, para. 4; Defence Submissions, para. 7.

<sup>31</sup> Defence Submissions, para. 11.

<sup>32</sup> See Prosecution Motion, Annex A, no. 1-4, 6, 9-10, 13, 16-20, 22-23, 27; Defence Submissions, Annex I, no. 1, 3-11, 13, 18, 24-25. See also Confidential Annex, no. 12, 17-19, 21-22, 25, 27-28, 30-31, 33, 37, 42, 48. The Chamber expresses no view as to whether any of the proposed sites—for example "Kabiza roadblock" and "Kabiza"—are actually the same or have ever existed.

<sup>33</sup> See Prosecution Motion, Annex A, no. 8, 11-12, 21, 24, 28-31; Defence Submissions, Annex I, no. 2, 12, 14-17, 19-22, 26-37. See also Confidential Annex, no. 1-2, 4-7, 11-15, 20, 22-24, 26, 29-30, 32, 34-36, 38-47, 49-52.

<sup>34</sup> See Prosecution Motion, Annex A, no. 14, 25-26; Defence Submissions, Annex I, no. 23.

<sup>35</sup> See Confidential Annex, no. 2, 13, 26, 29, 31, 33, 40-41, 44, 49.

considers that viewing these sites and routes may assist in assessing the Accused's alibi. The Chamber also considers it appropriate to view a boundary line between two secteurs in the former Gisenyi prefecture. The Chamber has therefore included these locations in the Confidential Annex of sites to be visited.<sup>36</sup>

31. The Chamber notes the Defence's submission that the site visit should take place at any time convenient to the Chamber, and that the site visit will not impact the rebuttal phase of the case or any possible rejoinder. In this regard, the Chamber recalls that the Prosecution rebuttal evidence concerns Ngirabatware's alleged presence outside of Rwanda.<sup>37</sup> The Chamber hereby schedules the site visit for 21 through 25 May 2012, inclusive of one day travel to Rwanda and one day return to Arusha.

32. As for the modalities of the site visit, the Chamber considers that the Registry should arrange all aspects of the site visit, including whatever preliminary preparations it deems best. In the Chamber's view, it would also be appropriate for the Registry to guide the site visit participants to the specific locations listed in the Confidential Annex to this Decision. Finally, as both Parties have indicated the two members of their team who would attend the site visit,<sup>38</sup> the Chamber does not consider it necessary to address the propriety or otherwise of having a Prosecution investigator also attend.

33. The Chamber directs that the Registry will announce the location and keep a detailed official record, including video and audio recordings, where the Chamber deems it appropriate to do so. The Registry is to submit the official record to the Chamber and the Parties no later than seven days after the conclusion of the site visit.

34. During the site visit, the Parties may make observations for the record of a strictly factual nature, without giving any commentary regarding evidence or events that are alleged to have occurred at a site. Submissions of an argumentative or legal nature shall not be allowed.

35. Further details regarding the precise itinerary for the site visit, if necessary, shall be communicated to the Parties by either the Chamber or the Registry.

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Prosecution Motion and the Defence Submissions to the extent that they seek a site visit;

**SCHEDULES** the site visit for 21 through 25 May 2012, inclusive of one day travel to Rwanda and one day return to Arusha;

**DIRECTS** the Registry to make all necessary arrangements to visit the sites identified in the Confidential Annex—not necessarily in the order they are listed—and to liaise as

<sup>36</sup> See Confidential Annex, no. 3, 8-10, 16.

<sup>37</sup> See generally Decision on Prosecution Motion for Leave to Present Rebuttal Evidence (TC), 14 November 2011.

<sup>38</sup> See Prosecution Further Submissions Corrigendum, para. 4; Defence Further Submissions, para. 9.

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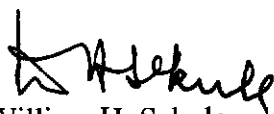
necessary with the Parties and the Chamber to facilitate the implementation of this Decision; and

**ORDERS** that, at each site visited, the following procedure will be adopted:

- a. A Registry representative will guide the site visit participants to the specific locations to be visited as detailed in the site visit itinerary;
- b. The Registry representative will announce the location at each site;
- c. The Registry representative will keep a detailed official record, where the Chamber deems it appropriate to do so;
- d. The official record will be submitted to the Chamber and Parties and admitted into the trial record as a Chamber's exhibit no later than seven days after the completion of the site visit; and
- e. The Parties may make observations for the record of a strictly factual nature, without giving any commentary regarding evidence or events that are alleged to have occurred at a site. Submissions of an argumentative or legal nature, shall not be allowed; and

**WARNS** the Prosecution that further omissions of precise citations could attract sanction pursuant to Rule 46 (A) for misconduct of counsel.

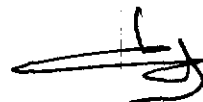
Arusha, 3 April 2012



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]

