



ICTR-99-54-T  
14-05-2012  
(110107 - 110102)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

110107  
Musingy

OR: ENG

**TRIAL CHAMBER II**

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

Registrar: Mr. Adama Dieng

Date: 14 May 2012

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UNITED STATES  
JUDICIAL BRANCH  
RECORDS & COMMUNICATIONS

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR AN ORDER  
TO THE PROSECUTION TO PROVIDE EXPLANATIONS AND REFERENCES  
FOR EACH LOCATION OF THE SITE VISIT**

**Office of the Prosecutor**

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

**Defence Counsel**

Ms. Mylène Dimitri  
Mr. Claver Sindayigaya  
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 “Extremely Urgent Defence Motion Requesting the Trial Chamber to Order the Prosecution to Provide Explanations of the Specific Purpose of Each Location and Precise References for the Site Visit”, filed on 19 April 2012 (the “Defence Motion”);

**CONSIDERING:**

- (a) The “Prosecution Response to Defence Motion Requesting the Trial Chamber to Order the Prosecution to Provide Explanations of the Specific Purpose of Each Location and Precise References for the Site Visit”, filed confidentially on 23 April 2012 (the “Prosecution Response”); and
- (b) The “Defence Reply to Prosecutor’s Response to Defence Extremely Urgent Motion Requesting the Trial Chamber to Order the Prosecution to Provide Explanations of the Specific Purpose of Each Location and Precise References for the Site Visit”, filed on 25 April 2012 (the “Defence Reply”);

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

**NOW DECIDES** the Defence Motion pursuant to Rules 5, 54 and 73 of the Rules.

## INTRODUCTION

1. On 21 and 24 February 2012, the Chamber received submissions from the Parties that requested a site visit to the Republic of Rwanda.<sup>1</sup>
2. On 15 March 2012, the Chamber considered “that [it] may benefit from further submissions from the Parties” concerning the proposed site visit, and ordered the Parties to file further submissions “containing a brief explanation of the specific purpose for any visit to each suggested location, with precise references to the trial record”.<sup>2</sup>
3. On 16 March 2012, the Prosecution filed its further submissions. On 19 March 2012, the Prosecution filed a corrigendum, and the Defence filed its further submissions.<sup>3</sup>

<sup>1</sup> Prosecution Motion for a View of the *Locus In Quo*, 21 February 2012, p. 5; Dr. Ngirabatware’s Strictly Confidential Defence Submissions on Site Visit in Rwanda, 24 February 2012, para. 24.

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

<sup>3</sup> Confidential Additional Submissions for View of Locus In Quo, 16 March 2012; Corrigendum: Confidential Additional Submissions for View of Locus in Quo, 19 March 2012; Dr. Ngirabatware’s Strictly Confidential Defence Further Submissions on Site Visit in Rwanda, 19 March 2012.



4. On 3 April 2012, the Chamber rendered its Decision on Site Visit to the Republic of Rwanda. The Chamber noted that the Prosecution did not explain the specific purpose for each proposed location or provide precise references to the trial record, and warned the Prosecution pursuant to Rule 46 (A). The Chamber also granted the request for a site visit, and scheduled it for 21 through 25 May 2012.<sup>4</sup>

## SUBMISSIONS OF THE PARTIES

### *Defence Motion*

5. The Defence asks the Chamber to order the Prosecution to explain the specific purpose for each site visit location, with precise reference to the trial record, five days after the Chamber's Decision but in any event ten days before 21 May 2012.<sup>5</sup>

6. The Defence submits that without such an order, it will be unfairly disadvantaged because the Prosecution has the Defence's complete submissions about the proposed sites, while the Defence does not possess information about the Prosecution's position. Without such information, the Defence contends that it cannot prepare for the site visit. This is prejudicial, according to the Defence, because the Parties will be allowed to make observations of a factual nature, and the Defence cannot make well-informed observations without knowing why the Prosecution wants to visit each site.<sup>6</sup>

7. The Defence further takes the position that clear and accurate submissions are necessary for the site visit to run smoothly.<sup>7</sup>

8. Finally, the Defence submits that it should know the Prosecution's intention regarding the sites so that the Defence can prepare to make submissions after the site visit in supplementary closing briefs or in oral arguments.<sup>8</sup>

### *Prosecution Response*

9. The Prosecution submits that the Defence brought its Motion under the wrong Rule, and consequently the Motion should be dismissed pursuant to Rule 5 for procedural irregularity.<sup>9</sup>

10. The Prosecution also asks that the Motion be denied. The principle of equality of arms guarantees procedural equality, and both Parties have enjoyed equal opportunity to suggest locations for the site visit. The site visit does not entail argumentation by the

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<sup>4</sup> Decision on Site Visit to the Republic of Rwanda (TC), 3 April 2012 ("Decision of 3 April 2012"), paras. 19-21, p. 8.

<sup>5</sup> Defence Motion, paras. 9, 28-29, 30-31.

<sup>6</sup> *Id.*, paras. 16-23, 27.

<sup>7</sup> *Id.*, para. 24.

<sup>8</sup> *Id.*, paras. 20, 25-27.

<sup>9</sup> Prosecution Response, paras. 4-5.

Parties, and the Chamber has already addressed the issue of the Prosecution's submissions.<sup>10</sup>

### ***Defence Reply***

11. The Defence responds that Rule 5 does not apply, because the Prosecution fails to substantiate the requirement of material prejudice.<sup>11</sup> The Defence further maintains that, even if the Prosecution's argument were to be accepted, the Defence Motion should not be dismissed solely on the basis of procedural grounds.<sup>12</sup>

12. Moreover, the Defence contends that the point of the Defence Motion is to avoid being put at a disadvantage *vis-à-vis* the Prosecution with respect to preparations for the site visit, a concept which, according to the Defence, remains unaddressed by the Prosecution.<sup>13</sup>

13. Finally, the Defence submits that the Prosecution Response contains no confidential information, and that the Chamber should therefore request the Registry to lift its confidentiality.<sup>14</sup>

## **DELIBERATIONS**

### ***Preliminary Matter***

14. As a preliminary matter, the Chamber notes that the Prosecution filed its Response confidentially, although it does not contain confidential information. Filing such submissions publicly, when appropriate, helps to guarantee the transparency of these proceedings.<sup>15</sup> Accordingly, the Chamber directs the Registry to lift the confidentiality of the Prosecution Response.

### ***Rule 5***

15. Rule 5 (A) states that “[w]here an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party”.

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<sup>10</sup> *Id.*, paras. 7-21.

<sup>11</sup> Defence Reply, para. 4.

<sup>12</sup> *Id.*, para. 5.

<sup>13</sup> *Id.*, paras. 6-7.

<sup>14</sup> *Id.*, paras. 1, 8.

<sup>15</sup> See Decision on Prosecution Motion for Testimony via Video-Link of Prosecution Rebuttal Witnesses II, V, VI and VII (TC), 5 March 2012, para. 20; Decision on Defence Motion for Admission of Documentary Evidence (TC), 25 November 2010, para. 10, citing *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-T, Decision on Defence Motion to Strike Portions of the Prosecution Closing Brief (TC), 30 September 2010, para. 3.

16. Although the Prosecution refers to this Rule in objecting to the Defence Motion, the Prosecution does not appear to allege that it has been materially prejudiced by any non-compliance with the Rules.<sup>16</sup> The Chamber will therefore address the substance of the Defence Motion.

### *Substance of Defence Motion*

17. In the Chamber's view, the Defence misconceives the purpose of the submissions on the site visit. While the Defence appears to contend that the submissions were made to provide notice to the other Party, the Chamber recalls that the submissions were made to assist it in determining the sites to be visited.<sup>17</sup> The Chamber further reiterates that the purpose of a site visit is to assist the Chamber in the assessment of the evidence adduced at trial.<sup>18</sup>

18. The Defence contends that without receiving additional submissions by the Prosecution, it will be unable to prepare for the Prosecution's observations during the site visit. According to the Defence, it will be prejudiced and this will violate the principle of equality of arms.<sup>19</sup>

19. The Chamber notes that, during the site visit, the Parties will be allowed to make observations for the record, but that they should be of a limited and strictly factual nature, if any, without commenting on events that are alleged to have occurred there. Furthermore, following the site visit, an official report will be prepared and submitted to the Chamber and the Parties.<sup>20</sup> The Parties may use this report in any additional submissions on the site visit and during Closing Arguments. Thus, the Defence Motion is without merit.

<sup>16</sup> See, for example, Prosecution Response, paras. 4-5.

<sup>17</sup> Order of 15 March 2012, p. 2 ("CONSIDERING ... that the Chamber may benefit from further submissions from the Parties ...").

<sup>18</sup> Decision of 3 April 2012, para. 24.

<sup>19</sup> Defence Motion, paras. 18-19, 22.

<sup>20</sup> Decision of 3 April 2012, para. 35.

**FOR THE ABOVE REASONS, THE CHAMBER**

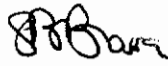
**DENIES** the Defence Motion; and

**DIRECTS** the Registry to lift the confidentiality of the Prosecution Response.

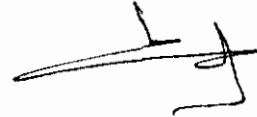
Arusha, 14 May 2012



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]

